

INNOMATZ MEDICAL (PRIVATE) LIMITED TRADING AS CBD SPECIALIST
HOSPITAL & MATERNITY

versus

OWEN MAKUMBE TRADING AS MADHADHA LIQUOR STORE

and

THE CHAIRMAN LIQUOR LICENSING BOARD

and

CITY OF HARARE

and

THE OFFICER -IN- CHARGE LICENSING INSPECTORATE ZIMBABWE REPUBLIC
POLICE

HIGH COURT OF ZIMBABWE

KATIYO J

HARARE, 16 November 2023, 27 November 2023 & 25 January 2024

Urgent Chamber Application

Mr *T E Gumbo*, for the applicant

M. *F Mubangwa*, for the 1st respondent

Mr *C Chibidi*, for the 2nd respondent

Mr *A Moyo*, for the 3rd respondent

KATIYO J: The applicant approached this Honourable court on an urgent basis seeking the following relief; it is ordered that,

- i) First respondents bar and restaurant operating at number 71 Central Avenue, Harare be and is hereby declared an unlawful nuisance infringing on applicant's rights.
- ii) that the first respondents license to operate a bar and restaurant operating at number 71 central avenue issued without following due process be and is hereby declared null and void.
- iii) That the second and third respondent be and are hereby directed to revoke the issued license upon the issuance of this order, and lastly.
- iv) that the first respondent to bear the costs of suit.

Brief Background

The applicant's complaint is that it has been operating a hospital since 2015 at no.69 Central Avenue, Harare which houses a neonatal unit a dialysis unit and theatre, which operations require quiet, peaceful and serene environments to maintain a professionally licensed service, however the first respondent started operating a bar at no.71 Central Avenue sometime in August or September of 2023 right next to the applicant's hospital in a manner which now disrupts the applicants provision of professional medical services to it's patients. In particular, the first respondent runs its operations into the night and sometimes up to 03:00 a.m and in so doing applicant has to contend with, loud music, excessive lighting, drunk patrons, which circumstances are now making it impossible for the applicant to maintain it's status as a professional medical service provider. The first respondent however insists that it is operating legally as it was issued with the relevant operating license by the relevant authority being the second Respondent in this case and wants to continue carrying on its operations at no.71 Central Avenue, Harare.

In Limine

The first respondent raised the issues of Urgency, and that the Declaratory Relief being sought is not competent. The issues were deliberated whereupon the Judge dismissed the two points *in limine*. The first Respondent's lawyer conceded and stated that for practical purposes the issue is urgent by virtue of its nature although he had opposed its urgency initially. The court found that on the issue of the declaratur, if the matter goes on merit and if those averments are proved to be correct then certainly the declaratur will stand. Having conceded to the urgency of the matter we will proceed to the merits.

Declaratory Order

As far as the declaratory order in an application of this nature is concerned the court is guided by **Section 14 of the High Court Act [Chapter 7:06]**.

“High Court may determine future or contingent rights, The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination”

In the case of *RK Footware Manufactures Pvt Ltd v Boka Book Sales 1986 (2) ZRL 209* SANDURA JP as he was then held and commented as follows:

“The court has to identify two considerations that the court has to look at when determining whether or not to issue a declaratory order. He stated that the court had to consider whether the applicant was an interested person in an existing future of contingent right of obligation and secondly whether the case was a proper one for the court to exercise its discretion.”

The first respondent and the applicant submitted that attempts were made before approaching the court to try and coexist peacefully however they were futile, with each party claiming that they have a legitimate right to be carrying out their activities undisturbed by either party on their respective premises. The applicant's patients, are normally vulnerable members of the society and in need of delicate care, so the introduction of the neighbouring beerhall which is being operated by the first respondent, comes with a plethora of problems that the applicant now has to deal with, hence the present application for a declaratory order. The question is whether the applicant's rights are being infringed by the first respondent's operations?

It is a fact that the excessive noise and the extended operating hours operated by the first respondent are severely affecting the applicant's pre-natal and neo natal units which on account of the delicate nature of pregnancies and newly born babies, some whom will be literally in intensive care on account of premature births and manageable illnesses which accompany newly born babies, require a quiet and peaceful environment for recovery and labour operations.

Also, we cannot ignore the fact that the applicant's dialysis unit has also been severely affected as patients usually suffer from fatigue and general tiredness which sees them sleeping through the, dialysis procedure, such dialysis procedures are done throughout the day and many into the late hours of the night and dialysis centres are very few in Harare hence high demand at the applicants' hospital. Patients have started to complain about the unmitigated nuisance they are being made to endure since the commencement of first respondents' operations with one having written to the Minister of health and child welfare.

The case is one that cannot be left unattended as such a magnitude of disregard to the rights of vulnerable members of society cannot be ignored but their rights ought to be safeguarded. It is therefore a proper case for the Court to adjudicate so as to put a stop to such a disorderly situation. The proximity of the beerhall to the hospital coupled with the beerhall's day to day activities which proceed into the night, has become a nuisance and the Court holds that indeed the first respondent is infringing the applicant's rights. The Court elects to readily

exercise its discretion in determining the application before it but not without considering the implication of the issuance of an operating license to the 1st Respondent permitting it to carry out its operations on the said premises and the rights flowing from such issuance.

Lawfulness of the Issuance of the first Respondent's License

The first respondent is not to be faulted for receiving the license, he probably assumed all formalities were carried out and proceeded to act on that presumption. The lawfulness of the issuance should be examined, a reading of the applicants founding affidavit states that patients have been forced to be moved away from the bar to relatively more quiet sections of the hospital. The situation is compounded by the fact that surrounding circumstances suggest that due process was not followed as the applicant and surrounding neighbours were not consulted to give their consent to the change of use of the property to a bar as required by law, this therefore points to an illegality which the honourable court must quickly address to protect the rights of the applicant who has a prior license in the area, carrying on medical services from a hospital. The applicant sought to resolve this matter by engaging all the respondents in this matter, the first respondent has adopted a more brazen approach through impunity which cannot be allowed to continue any longer for the applicant to retain a stature as a professional medical services provider.

On the other hand, the first respondent opposed the matter arguing that the first respondent was duly licensed in terms of the law so his operations are above board and cannot be faulted, all he did was receive his license and then carried out its operations in terms of that license. The urgency of this matter has been dismissed on the point *in limine* but he still maintains that his client still needs to be given a chance and this matter should come with an interim relief pending return date where parties will make representations, however this court looking at this application in toto is of the view that the issuance of such licenses leaves a lot to be desired as a hospital of that nature cannot coexist with a beerhall or beer outlet. Knowing the behaviour of consumers of alcohol in a serious morally upright society and in a normal society such license cannot be issued to such operations. If the beer outlet had existed first before the hospital still the authorities would have been found wanting if they had issued a license to the hospital where there is a beer outlet. The case of *Guga v Moyo & Other 2000 (2) ZLR 458 (SC)* illustrated the principle;

“The basic rule in double sales where transfer has not been passed to either party is that the first purchaser should succeed. The first in time is stronger in law. The second purchaser is left with a claim for damages against the seller, which is usually little

comfort, but that rule applies only in the absence of special circumstances affecting the balance of equalities.”

In this particular scenario it is the hospital which has been there since 2015 and has been operating peacefully without any disturbance, not until this beer outlet was sanctioned to operate with its neighbour. With that, it has been conceded that this matter is urgent for practical purposes by the first respondent’s counsel and I totally agree with him for that professional concession. It is so, in that the court in listening to the submissions and looking at the papers presented before it, it is quite clear that something is seriously amiss, whether or not this licence was issued as a result of due process being followed, still the end result of the issuance of the license is not the best result. How can an infant or a premature baby co-exist with a noisy neighbourhood with patrons relieving themselves, and beerhalls operating into the late hours? At that same time, patients really need to rest having gone through the agony of being treated and at that very same time the beerhall patrons will be making noise and at most will be excessively drunk. At times these same patrons engage in fist fights and making noise and suffer injuries, which injuries will call for them to seek assistance from the hospital which they actually demonise.

This court is therefore of the view that the license was not properly issued. A license for operating a beerhall cannot be situated next to a hospital of that magnitude. The court gives credit to the third Respondent for admitting to their error as the authority which administers by laws of the city for actually conceding that the license should indeed be revoked as it was issued in error. Due diligence was supposed to be carried out and consultations with neighbours were supposed to be done in accordance with **s 26(3) of the Regional, Town and Country Planning Act [Chapter 29:12]** which reads as follows;

“an application in terms of subsection (1)—(a) may, in terms of an operative master plan or local plan or an approved scheme, only be granted by the local planning authority—(i) after special consideration of the circumstances of the particular case; or (ii) in the case of such scheme, by special consent of the local planning authority, or (b) relates to development which does not conform to the development existing or normally permitted in the area; or (c) relates to development which could, in the opinion of the local planning authority, have an adverse effect or important impact on the locality or the area generally; or (d) relates to development which conflicts with any condition which is registered against the title deed of the property concerned and confers a right which may be enforced by the owner of another property, the local planning authority shall require the applicant, at his own expense, to give public notice of the application and to serve notice of the application on every owner of property adjacent to the land to which the application relates and such other owners as the local planning authority may direct and to submit proof that such notice has been given.”

As much as the first respondent gave public notice of the application by way of advertisement, the notice of the application was not served on the applicant furthermore the applicant says he missed the said advertisement. The Judge notices that whatever transpired during that period, the liquor board was determined to issue that license regardless of what was carried on there. If they had carried out their due diligence and were satisfied, on what basis can one recommend such a license to be issued? One begins to wonder, it is this conduct which is discouraged of people who are given positions of authority, they are supposed to act responsibly and uphold the morals of society, the best interests of society should always be protected. In this case I do not see that being the case, it is actually the opposite of what I am commenting on. As much as there is some opposition, the opposition is without merit, something which the counsel for the first respondent I am sure is aware of.

The second respondent which is the issuing authority says that they were yet to make full investigations regarding the complaints being raised, however they do not deny that what is happening there is what is happening there. Photographs of the place have actually been attached as annexures which show some patrons milling around and some vehicles are in the sanitary lane where the delivery lane of this hospital is located. So, can we allow such a chaotic environment to exist in an open democratic and organized society as ours? Certainly, that should not be allowed. Beer outlets should be placed where they do not disturb the operations of decent institutions such as hospitals and learning institutions where people are supposed to enjoy peaceful environments which allow them to undertake their duties and their studies.

It is worth noting that, the third respondent as an ultimate licensing authority submitted in its heads of argument that the first respondent is in breach of the restaurant special liquor license which was issued to him by the third respondent and it is consequently on this basis that, the third respondent elected not to oppose the relief sought by the applicant being the revocation of the respondent's license and also elected to abide by the Court's decision. I do not see why this court should not be inclined to grant this application.

Normally the Courts do not interfere with the exercise of statutory functions but only does so in exceptional circumstances when it is deemed to be in the interests of society. This is an exceptional case where the courts will interfere with the decisions of administrative authorities.

In *Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt)Ltd 1996(2) ZLR 15 (5)* it was stated that

“Government or quasi government Boards and municipal authorities are often in positions of great power and influence when it comes to issuing and denying licenses. The duty of the Court is not to dismiss the authority and take over its functions, but to ensure as far as humanly possible that it carries out its function fairly and transparently. If we are satisfied that it has done that we cannot interfere just because we do not approve of its conclusion. But at the other end of the scale, if the conclusion is hopelessly wrong, the Courts may say that it could only have been arrived at by reference to improper considerations or by failure to refer to proper considerations. In these cases we reason backwards from the effect to the cause. We say the result is so bizarre that the process by which it was reached must have been unfair or lacking in transparency.”

Further, the *Affretair* case Mc Nally JA states four circumstances that a court will substitute its own decision for that of an administrative functionary. They are

1. Where the end result is a foregone conclusion and it would be a waste of time to refer the matter back.
2. Where further delay could prejudice the applicant
3. Where the extent of bias or incompetence is such that it would be unfair to the applicant to force it to submit to the same jurisdiction.
4. Where the court is in as good a position as the administrative body to make a decision.

The Court thus finds that there was an irregularity in the issuance of the license and as such it is a misnomer, in that the result is so bizarre that the process by which it was reached must have been unfair or lacking in transparency. The end result of a beerhall co-existing with a hospital is definitely bizarre and any further delay in granting the applicant relief will prejudice it. I cannot overemphasize how it is undesirable for a fully operational beerhall to operate next to a hospital, of which our very existence is premised on such health facilities, it is inhumane. Liquor licenses are sprouting throughout towns with no ablution facilities, people are harassed as they go about their own business whilst others haphazardly relieve themselves and it is raising a nuisance. The Court frowns on the manner in which the license was issued and is inclined to agree with the applicant and third respondent’s assertion that it is improper co – existence. It is a foregone conclusion that the revocation of the first respondent’s license is the only resolution to the ongoing situation as the third respondent has conceded to such revocation having concluded that the first respondent is already in breach of the terms of the issued license

As a result of the aforementioned and having found this matter to be urgent it is a matter which does not need a return date, you cannot postpone notice or order to be done on other dates. This is an exceptional case where the relief being sought will be granted as amended.

In the result the court orders as follows;

1. The application for a declaratory order be and is hereby granted.
2. The first respondent's license to operate a bar at number 71 Central Avenue, Harare be and is hereby declared a nuisance infringing on applicant's rights.
3. The second and third respondents are hereby directed to revisit the first respondent's operating license immediately upon the issuance of this order.
4. There shall be no order as to costs.

Chinawa Law Chambers, applicant's legal practitioners
Mubangwa and Partners, first respondent's legal practitioners
Civil Division of The Attorney General, 2nd respondent's legal practitioners
Gambe Law Group, third respondent's legal practitioners