IL & B MARCOW CATERERS (PTY) LTD v GREATERMANS SA LTD AND ANOTHER; AROMA INN (PTY) LTD v HYPERMARKETS (PTY) LTD AND ANOTHER 1981 (4) SA 108 (C)

Citation	1981 (4) SA 108 (C)
Court	Cape Provincial Division
Judge	Friedman J and Fagan J
Heard	June 12, 1981
Judgment	June 25, 1981
Annotations	Link to Case Annotations

C

Flynote : Sleutelwoorde

Practice - Applications and motions - Urgent application - Abridgment of D times prescribed and acceleration of hearing - Good cause - What constitutes - Possible financial prejudice - Not entitled to preference - Public interest in outcome - Justified place on semi-urgent roll.

Headnote : Kopnota

The applicants sought permission for their applications to be heard as matters of urgency, and to review the decision of second respondent, the E Minister of Industries and Commerce and Consumer Affairs, to grant a grocers' wine licence to first respondents. Applicants afforded respondents not the 14 and 24 days respectively, required by Rule 53 of the Uniform Rules of Court for entering appearance and filing answering affidavits, but seven and 12 days respectively. As a consequence applicants were required in terms of Rules 27 and 6 (12) to show good F cause why the times should be abridged and why applicants could not be afforded substantial redress at a hearing in due course. The three major considerations which the Court, in exercising its judicial discretion to abridge the times prescribed and to accelerate the hearing, would normally consider sufficient and satisfactory grounds being shown were, namely the prejudice that applicants might suffer by having to wait for a hearing in G the ordinary course; the prejudice that other litigants might suffer if the applications were given preference; and the prejudice that respondents might suffer by the abridgment of the prescribed times and an early hearing. The main consideration advanced by applicants was the possibility that they might suffer losses of profits - the losses, if any, sounded in money.

Held, that the fact that a litigant with a claim sounding in money might suffer serious financial consequences by having to wait his turn for the hearing of his claim did not entitle him to preferential treatment.

H *Held*, further, that the loss that applicants might suffer by not being afforded an immediate hearing was not the kind of loss that justified the disruption of the roll and the resultant prejudice to other members of the litigating public.

Held, further, however, as the Cape Provincial Division operated a sem-iurgent roll for opposed matters which were not of extreme urgency, but which were nevertheless too urgent to await hearing in the ordinary course on the continuous roll, that, in view of the large scale of the operations of the new liquor outlets and the public interest in the outcome of the dispute, that the matters should be placed on the semi-urgent roll.

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Case Information

Applications for permission for certain applications to be heard as matters of urgency. The facts appear from the reasons for judgment.

A *L R Dison SC* (with him *J P van Niekerk*) for the applicant in the first application.

D B Knight SC (with him *J Immerman*) for the first respondent.

No appearance for the second respondent.

L R Dison SC (with him *D G Scott*) for the applicant in the second application.

R M Marais SC (with him *P B Hodes*) for the first respondent.

B No appearance for the second respondent.

[The Court refused the application and filed the following reasons for judgment on June 25.]

Judgment

C FAGAN J: These two applications were set down for hearing on Friday, 12 June 1981. In each was sought permission for the application to be heard as a matter of urgency and the review of the decision of second respondent to grant a grocers' wine licence to first respondent. Argument was addressed to the Court on whether applicants had made out cases of urgency. The following order was made in each matter, reasons to be D handed in later:

1. The application that the matter be heard as one of urgency is refused.
2. The matter is to be set down for hearing as one of semi-urgency and the Registrar is directed to deal with it accordingly.

E 3. The costs of today are to stand over for determination at the hearing.

These are the reasons.

To ensure the smooth operation of the Courts, a body of adjective law has evolved. Much of this law is contained in the Uniform Rules of Court. The Rules were made in terms of s 43 (2) *(a)*of the Supreme Court Act 59 F of 1959 and, as delegated legislation, are binding upon the Courts.

Rule 53 deals with reviews. It requires such proceedings to be brought by way of notice of motion directed, *inter alia*, to parties affected. Such parties are afforded 14 days from the receipt of the notice to deliver G notice of intention to defend and at least 24 days from such receipt to deliver answering affidavits. The provisions of Rule 6 as to set down of applications apply *mutatis mutandis* to review proceedings.

Rule 6 deals with applications. In terms of Rule 6 (5) *(f)* an applicant H upon delivering his replying affidavit may apply to the Registrar to allocate a date for the hearing of the application. In this Division the matter will then come on the roll of opposed matters and await its turn in regard to date of hearing. At the moment, so I am informed by the Registrar, such an applicant would have to wait about nine to 11 months before his matter is heard.

More rapid procedures are available to applicants both in review proceedings and in other applications. Rule 27 entitles the Court upon application on notice and good cause shown to make an order abridging

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any time prescribed by the Rules. The Court may also on good cause shown condone any non-compliance with the Rules. In regard to set down of A review proceedings, Rule 6 (12) is applicable. It provides, *inter alia*, that the Court may dispose of urgent applications at such time and place and in such manner and in accordance with such procedure as to it seems meet. The circumstances that an applicant avers render a matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course must, in terms of Rule 6 (12) *(b)*, be B set forth explicitly in the supporting affidavit. Should the matter be too urgent for affidavits to be prepared, the Court can condone non-compliance with Rule 6 (12) in terms of its powers under Rule 27. Matters of extreme urgency can thus be brought before the Court at any time, day or night.

C There are degrees of urgency. In an attempt to deal with this diversity, a semi-urgent roll is in terms of a Court Notice operated in this Division alongside the ordinary roll. Opposed matters which are not of extreme urgency but are nevertheless too urgent to await hearing in the ordinary course on the continuous roll, are placed on the semi-urgent roll.

D When an applicant believes his matter to be semi-urgent, he can apply, after notice to all other parties, through the Chamber Book for an appropriate order. If such application is opposed a Judge may direct that argument should be heard in order to determine whether the matter should be placed on the semi-urgent roll. Matters on this roll are heard more E expeditiously than opposed matters on the continuous roll. At present the waiting period is about two to eight weeks, depending upon whether a Court vacation intervenes.

When an applicant believes that his matter is one of urgency, he may himself decide what times to allow affected parties for entering appearance to defend and for delivering answering affidavits. He may F without consulting the other parties arrange a date for hearing. That is what applicants did in these applications. In both instances, respondents were afforded not the 14 and 24 days respectively, required by Rule 53 for entering appearance and filing answering affidavits, but seven and 12 days respectively. In both instances, applicants set the matters down for hearing on 12 June 1981 without consulting respondents.

G Applicants, by so doing, became obliged to persuade the Court that the matters were of such urgency that their non-compliance with the Rules should be condoned and that the matters should be heard forthwith. H Respondents had no option; they were compelled by applicants to adhere to the time periods chosen by applicants and to appear in Court on the day selected by applicants. Then only, save if respondents had anticipated the hearing and made an earlier application to Court, could respondents object to the procedure followed by applicants. See *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) where at 782A - E this course and its implications are discussed by RUMPFF J A as he then was.

In terms of Rules 27 and 6 (12), applicants thus had to show good cause why the times should be abridged and why applicants could not

be afforded substantial redress at a hearing in due course. The case for urgency had to be made out in the supporting affidavits. For discussions of this requirement, see *Luna Meubel Vervaardigers (Edms) Bpk v Makin and* A *Another* 1977 (4) SA 135 (W) at 137F; *Sikwe v SA Mutual Fire & General Insurance Co Ltd* 1977 (3) SA 438 (W) at 440H; *Eniram (Pty) Ltd v New Woodholme Hotel (Pty) Ltd* 1967 (2) SA 491 (E) at 493C - D, G; *Mangala v Mangala* 1967 (2) SA 415 (E) at 415H - 416A.

In the Marcow Caterers matter, the grounds for urgency alleged in the B supporting affidavits are essentially as follows: Applicant carries on business as hotelier at the Oxford Hotel in Durbanville. The hotel business requires to be subsidised by its highly profitable off-sales department. In this department called Marcows Bottle Store are employed a manager and five assistants and delivery men. Applicant represents also the Hotel, Bottle Store, Restaurant Association - Cape, an association of C 350 liquor licensees in the Cape Province.

First respondent conducts a supermarket under the name of Checkers about 500 metres from applicant's bottle store. Checkers is a self-service store selling groceries and a variety of general goods. It forms part of D a shopping complex which consists of a large number of speciality shops and a restaurant.

On 23 October 1980 first respondent made application to second respondent for a grocers' wine licence for Checkers. In January 1981 the liquor board considered the application and applicant's objections thereto. One of the grounds of objection argued was that a grocers' wine licence could not be granted to first respondent

since a butchery was carried on in E Checkers by someone other than first respondent and the provisions of s 35 (2) read with s 35 (1) *(d)* of the Liquor Act 87 of 1977 as amended precluded the granting of a licence in those circumstances. The chairman of the liquor board ruled that this ground of objection was without merit. The liquor board made its recommendations to the second respondent who F granted the licence on 14 April 1981 and on 1 May 1981 informed applicant accordingly. Applicant seeks to review the decision of second respondent on the ground that he was precluded from granting the licence to first respondent for the abovementioned reason.

G Applicant alleges that, as soon as Checkers start selling wine in terms of the licence, applicant will suffer irreparable loss because of the business Checkers will take away from it. Almost every customer of applicant's bottle store, so it is alleged, buys groceries at Checkers.

First respondent in its answering affidavits sets out reasons why it H denies that applicant is entitled to have the decision of second respondent reviewed. It furthermore denies that the matter is one of urgency and sets out its reasons at length. It points out that first respondent is restricted to selling table wines whilst applicant sells all types of liquor. Applicant also supplies services which first respondent will not provide, *inter alia*, specialist advice, credit facilities, personalised service, deliveries, free ice, glasses and party facilities, literature in liquor and related matters. Applicant is a member of the Marcow Brothers Hotel Group in which a liquor distributor, the Rembrandt Group Ltd, has a

50 per cent interest. This is a very powerful liquor distribution group. Applicant will thus be able to compete vigorously with first respondent. A It is also averred that first respondent's experience in relation to liquor outlets throughout the Republic has been that a grocers' wine licence in a Checkers supermarket draws business to the area and results in bottle stores near the supermarket doing very well because of the more specialised services and varied products they offer. First respondent accordingly submits that applicant has shown no real prejudice or even a B likelihood of prejudice to itself as a result of the granting of the licence.

Second respondent filed no affidavits and abided by the decision of the Court.

Applicant in reply to the averments of first respondent conceded that most C consumers have their own favourite bottle stores where they will continue to buy their beer and spirits, but alleged that they were likely to buy their table wines at the supermarket because the wines will be cheaper there and more readily available to customers when making their other purchases.

In the Aroma Inn matter, the reasons for urgency alleged in the founding affidavits are in the main as follows:

D Applicant carries on business as an hotel at Brackenfell. The hotel has off-sales privileges which are carried on in a speciality shop in the Pick 'n Pay Hypermarket in Brackenfell. Applicant also represents the Hotel, Bottle Store, Restaurant Association - Cape.

First respondent conducts a hypermarket under the name of Pick

E 'n Pay in Brackenfell. It is a very large supermarket consisting of a self-service store selling groceries and a variety of general goods.

Allegations like those in the Marcow Caterers matter are then made concerning the granting to first respondent of a grocers' wine licence, also on 14 April 1981. Much the same is averred about the prejudice to F applicant should Pick 'n Pay commence sales of table wine.

First respondent in its answering affidavits, after dealing with the allegation and denying that the licence was granted to it contrary to the provisions of the Liquor Act, sets out reasons broadly similar to those of first respondent in the Marcow Caterers matter why the matter is not one of urgency.

G Second respondent abided by the decision of the Court.

Applicant in a replying affidavit alleges that first respondent has commenced selling table wine at the hypermarket and is doing so at 20 per cent to 25 per cent less than the prices charged by applicant and other H licensees. Applicant and other licensees cannot accommodate such a price reduction without disastrous financial consequences to their business.

It is clear from the requirements set out in Rules 27 and 6 (12) that the Court's power to abridge the times prescribed and to accelerate the hearing of the matters should be exercised with judicial discretion and upon sufficient and satisfactory grounds being shown by the applicants. The major considerations normally and in these two applications are three in number, viz the prejudice that applicants might suffer by having to wait for a hearing in the ordinary course; the prejudice

that other litigants might suffer if the applications were given preference; and the prejudice that respondents might suffer by the abridgment of the prescribed times and an early hearing.

A It was submitted that the two applicants as well as members of the Hotel, Bottle Store, Restaurant Association - Cape would suffer great harm if the matters were not dealt with promptly. The large price reductions that the first respondents would introduce would, it was contended, completely ruin the ordinary retail market and affect the livelihood of applicants and members of the association.

B These submissions were effectively countered by arguments advanced on behalf of first respondents. The Court was not satisfied that the matters were so urgent as to merit immediate attention. It reasoned as follows:

The averments made by applicants in regard to the detrimental effect that C the new liquor outlets would have on their businesses, appeared to be too pessimistic. In this regard due consideration was given to the statements on affidavit concerning the experience of first respondents in opening and operating similar outlets in other parts of the Republic.

D Assuming that applicants were entitled to represent the Hotel, Bottle Store, Restaurant Association - Cape, which appears doubtful, there was, in the absence of any indication where in the Cape Province the 350 members conducted their liquor businesses, no basis upon which any or appreciable prejudice to members could be claimed. The opening of new outlets selling table wine in Durbanville and Brackenfell could for example E hardly affect the business of a bottle store in an area of the Cape Province such as Kimberley.

Other litigants waiting for their matters to be heard would be prejudiced if priority were afforded to these applications as they would have to wait longer. And what distinguishes these two applications from other matters? Applications for review such as these occur commonly and are not given F priority. The prejudice that applicants are complaining about is the possibility that they may suffer losses of profits - the losses, if any, sound in money. Assuming that such losses are irrecoverable, that still does not distinguish these matters from many others awaiting their turn on the ordinary roll. Take for example all the cases wherein general damages G are claimed in delict including actions instituted under the Compulsory Motor Vehicle Insurance Act 56 of 1972. Interest is not claimable on the amount awarded and litigants suffer financially by delay in the adjudication of their matters. Moreover, the fact that a litigant with a claim sounding in money may suffer serious financial consequences by H having to wait his turn for the hearing of his claim does not entitle him to preferential treatment. On the other hand, where a person's personal safety or liberty is involved or where a young child is likely to suffer physical or psychological harm, the Court will be far more amenable to dispensing with the requirements of the Rules and disposing of the matter with such expedition as the situation warrants. The reason for this

differential treatment is that the Courts are there to serve the public and this service is likely to be seriously disrupted if considerations such as those

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advanced by the applicants in these two matters were allowed to dictate the priority they should receive on the roll. It is, in the nature of A things, impossible for all matters to be dealt with as soon as they are ripe for hearing. Considerations of fairness require litigants to wait their turn for the hearing of their matters. To interpose at the top of the queue a matter which does not warrant such treatment automatically results in an additional delay in the hearing of others awaiting their turn, which is both prejudicial and unfair to them. The loss that B applicants might suffer by not being afforded an immediate hearing is not the kind of loss that justifies the disruption of the roll and the resultant prejudice to other members of the litigating public.

Finally there is the question of prejudice to respondents. First respondents were required to prepare their answering affidavits and obtain C the services of counsel for the hearing in great haste. It was also pointed out that, by reason of applicants' abridgment of the prescribed times, counsel for first respondents have had to prepare and hand in heads of argument before applicants' replying affidavits were available.

Whilst the Court was of the view that the applications did not merit D immediate attention, it nonetheless felt that there was a sufficient degree of urgency present to warrant the matters being placed on the semi-urgent roll. The large scale of the operations of the new liquor outlets and the public interest in the outcome of the dispute weighed with the Court in this regard.

As regards costs, the Court exercised its discretion in favour E of the applicants by its order that the costs of the hearing on 12 June 1981 are to stand over for decision at the resumed hearing. The Court was persuaded to do so by the submission of counsel for applicants that applicants' cases rest on what he termed a simple point, that it was not F unreasonable for applicants to consider that respondents had no real answer to their claims and that applicants believed that the matters could be speedily disposed of. Not having considered the merits of the applications, the Court regarded it as advisable to let the question of costs stand over for decision by the Court who will deal with the merits.

G FRIEDMAN J concurred.

Applicants' Attorneys: *C & A Friedlander*. Respondents' Attorneys: *Sonnenberg, Hoffmann & Galombik*.

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