

MARIUS BLOM ING.

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TEL: (012) 004-0244

ORIGINAL

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 46771/17

In the matter between:

NCW RESTAURANTS AND RESIDENCES (PTY) LTD

APPLICANT

and

THE GAUTENG PROVINCIAL LIQUOR BOARD

FIRST RESPONDENT

MELVILLE RESIDENTS ASSOCIATION

SECOND RERSPONDENT



NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE that the abovementioned Applicant intends applying to the abovementioned Honourable Court on **Tuesday 25 July 2017** at **10 o'clock** in the morning or as soon thereafter as Counsel for the Applicant can be heard, for the following relief:

1. That the non-compliance with the rules of the Honourable Court in respect of dies, form and service be condoned in terms of Rule 6(12) and that this matter be heard as an urgent application;

2. An order directing the First Respondent within 30 (thirty) calendar days to finalise the consideration of the pending application of the Applicant and in writing to inform the Applicant of its decision, stating full reasons should the application be declined;
3. An order authorising the Applicant, NCW Restaurants and Residences (Pty) Ltd, to trade in liquor in its business to be known as NCW Restaurant, situated at Erf 879, 46 Main Road, bounded by 10th and 11th Avenue, Melville, Region B, Johannesburg as if the Restaurant Liquor Licence it applied for under reference number GLB7000008218 has been granted and issued until the consideration of the said application has been finalised and, if approved, the licence has been issued;
4. An order directing the First Respondent along with the Second Respondents, should the latter oppose this application, be ordered to bear the costs of this application.
5. Further and/or alternative relief.

KINDLY TAKE NOTICE as follows:

1. The Applicants will rely on the affidavit of **NICOLAAS CASPARUS WILLEMSE** for purposes of this application;
2. The Applicants choose the address of their attorneys of record for purposes of Court Rule 6(5)(b);

3. Should you intend to oppose the relief sought you must by not later than **11 o'clock WEDNESDAY 12 JULY 2017** notify the Applicant of your intention to do so, also complying with Court Rule 6(5)(d);

4. You must also file your opposing affidavit, should you wish to do so, by **11 o'clock on MONDAY 17 JULY 2017**;

The Applicant will then file its replying affidavit and prepare the court file of the Honourable Court in accordance with the Practice Rules of the Honourable Court to be heard on the day and at the time referred to above.

THUS DONE AND SIGNED AT PRETORIA ON THE 7TH DAY OF JULY 2017.

(Sgd) M BLOM.....

**ATTORNEY FOR APPLICANT
MARIUS BLOM INCORPORATED**

409B LEA STREET
WATERKLOOF GLEN
PRETORIA
0010

TEL: (012) 004 0244

FAX: 0864078431

REF: M BLOM/nv/THE1/0001

TO: THE REGISTRAR OF THE COURT
MADIBA STREET
PRETORIA

**AND TO: THE STATE ATTORNEY
ATTORNEY FOR THE FIRST RESPONDENT
GROUND FLOOR
SALU BUILDING
316 THABO SEHUME STREET
PRETORIA**



Copy hereof received by: _____

Date: _____ Time: _____

AND TO: MELVILLE RESIDENTS ASSOCIATION
SECOND RESPONDENT
126A 4TH AVENUE
MELVILLE
2092

Copy hereof received by: _____

Date: _____ Time: _____

MARIUS BLOM INC

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FIRST RESPONDENT

MELVILLE RESIDENTS ASSOCIATION

SECOND RESPONDENT

FOUNDING AFFIDAVIT

I, the undersigned,

NICOLAAS CASPARUS WILLEMSE

make oath as follows:

1.

DEPONENT AND APPLICANT:

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- 1.1 I am an adult male, and the sole Director of **NCW Restaurants and Residences (PTY) Ltd** with registered address situated at Erf 879, 46 Main Road, bounded by 10th and 11th Avenue, Melville, Region B, Johannesburg.
- 1.2 The facts contained in this affidavit fall within my own personal knowledge and are true and correct;
- 1.3 I am duly authorised to depose to this affidavit as I am the sole director of the Applicant and a copy of the resolution authorising me to do so is annexed hereto as **ANNEXURE "A"**;
- 1.4 The Applicant is **NCW Restaurants and Residences (PTY) Ltd**, a private South African Company, duly registered and incorporated as such and to trade as NCW Restaurant, situated at Erf 879, 46 Main Road, bounded by 10th and 11th Avenue, Melville, Region B, Johannesburg.

2.

RESPONDENTS:

- 2.1 The First Respondent is the Gauteng Provincial Liquor Board, instituted and constituted as such in terms of the Provisions of the Gauteng Liquor Act, 2 of 2003, to which I will herein after refer as "the Act" with offices on the 3rd Floor of a building known as 124 Main Street, situated at 124 Main Street, Johannesburg and with local offices at 2nd Floor of a building known as 124 Main Street, situated at 124 Main Street, Johannesburg;

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2.2 The Second Respondent is the Melville Residents Association, a voluntary association of which the legal capacity and constituting constitution is unknown to the applicant with address situated at 126a 4th Avenue, Melville, Johannesburg;

3.

JURISDICTION:

The First Respondent exercises its functions and duties in the Province of Gauteng which is within the area of jurisdiction of the Honourable Court. The second Respondent and its constituting members are all resident in or close to Melville, Johannesburg.

4.

RELIEF SOUGHT:

The Applicant approaches the Honourable Court in terms of the Provisions of Section 6(2)(g) of the Promotion of Administrative Justice Act, 3 of 2000-PAJA-for a mandamus order and interim relief in terms of Section 8 of the said Act, as will be more fully explained below.

5.

BACKGROUND:

5.1 The Applicant applied for a Restaurant Liquor Licence in respect of a business to be known as NCW Restaurant situated at Erf 879, 46 Main Road, bounded by 10th and 11th Avenue, Melville, Region B, Johannesburg;

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- 5.2 The application was properly drawn and lodged with the First Respondent on the 4th of November 2016 and I attach hereto as **ANNEXURE "B"** a copy of the lodgement checklist of the First Respondent;
- 5.3 I attach hereto a brief explanation by Mr. Marius Blom, an attorney specialising in the field of liquor licensing, which explains the process of applying for a new liquor licence in Gauteng and I confirm that I concur with the content of the said document. It is annexed hereto as **ANNEXURE "C"**;
- 5.4 During November 2016, the Second Respondents and some of its constituting members lodged objections to the granting of the licence applied for by the Applicant. I attach hereto as **ANNEXURE "D"** a copy of the said objection. An objection to a liquor licence application has to be made in the prescribed manner in accordance with section 25 of the Act. Section 25 reads as follows:

25 Objections

- (1) Any person may lodge an objection to the granting of a licence in terms of this Act, in the prescribed manner, with the local committee and the applicant within twenty-one (21) days from date of lodgement of the application with the secretary of the local committee referred to in section 23.*

[Subsec (1) substituted by sec 4 of Act 9 of 2003 wef 16 January 2004.]

- (2) The objection shall fully state the reasons thereof and contain the full names of the person or institution objecting, together with the full address and contact details and be accompanied by any supporting documentation.*

- 5.5 A number of the members of the Second Respondent also filed objections in their personal capacities the content of which is basically the same as ANNEXURE "D". All those objections did not comply with the requirements of section 25 quoted above in particular as no addresses were given and accordingly I cannot
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site them herein for the serving of copies of this Application. I submit that service of this application on the Second Respondent constitutes proper service on its constituting members.

5.6 Through my consultant I received an email from the local committee of the First Respondent on 1 March 2017 requesting me to attend a meeting at the offices of the First Respondent. I attended said meeting on 13 April 2017 but none of the objectors were present at the meeting. Accordingly it was postponed.

5.7 I received a further notice from my consultant for the Applicant to attend a newly scheduled meeting on the 14th of June 2017. Which the Applicant and attorney Blom, acting as its legal representative attended. The objectors were also represented and raised a technical issue regarding the zoning of the premises. For the Applicant Mr Blom submitted that based on a number of decisions of the Honourable Court, zoning is not a requirement to be dealt with by the Local Committee of the First Respondent, or for that matter by the First Respondent itself as it is the competency of the Local Authority who in any case provided a letter confirming the use of the premises for a restaurant. The representatives of the Second Respondent made vague allegations that the said letter is questionable and that they needed a postponement to verify the veracity of the said letter.

5.8 The Local Committee resolved to have the matter referred to the First Respondent for further consideration both in respect of the point raised re zoning, as well as the merits of the matter.

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- 5.9 As at this point in time, and notwithstanding the fact that a period of eight months has expired, no decision has been forthcoming in respect of the application.

6.

SUBMISSIONS:

- 6.1 I humbly submit that the application should have been processed within three to four months and accordingly that a decision should have been taken at this point in time and thus that the First Respondent, be it through its local office or at its main office, is unnecessarily delaying the taking of a decision as is contemplated in Section 6(2)(g) of PAJA;
- 6.2 I further submit that the application as lodged with the First Respondent on 4 November 2016 was fully compliant with the provisions of the Act and that the purpose for which the meeting was called on 13 April 2017, being to give the objectors an opportunity to state their objections before the First Respondent, was properly held but none of the objectors attended said meeting. Subsequently the Local Committee did make a recommendation to the First Respondent leaving it for the First Respondent to make a final decision.
- 6.3 Even though the application as lodged with the First Respondent was fully compliant in terms of the Act and the fact that I once again attended the relevant meeting on 14 June 2017 as requested by the First Respondent, I have not received any further feedback from the First Respondent in this matter;

TM




6.4 It is further submitted that the Applicant is in possession of all relevant documents and certificates for operating the relevant business such as the relevant approval by the Department of Development Planning, business licence, a city of Johannesburg Fire and Safety Compliance, Certificate of Acceptability for Food Premises, even though most of these documents are not pre-requisites for an application to be lodged with the First Respondent or for the issuing of a licence by the First Respondent;

6.4 Under the circumstances the Applicant has no other choice but to approach the Honourable Court for assistance in protecting its rights in terms of Sections 22 and 33 of the Constitution of the Republic of South Africa, Act 108 of 1996, by way of a prayer for a mandamus order against the Respondent and, more importantly, interim relief in the form of an order authorising the Applicant to trade in liquor as if the licence has been processed, granted and finalised, until the process is in fact finalised.

7.

INTERIM RELIEF:

7.1 I respectfully submit that the Honourable Court has the power to grant an Applicant before it interim relief, *in casu* an interim order authorising an Applicant to trade in liquor as if the licence it applied for, has been finalised and issued, until it is in fact so finalised and issued;

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- 7.2 I believe that the first requirement is a *lis pendens* before the Honourable Court or another decision maker and respectfully submit that this application as well as the pending application before the First Respondent, constitutes such a *lis pendens*;
- 7.3 Secondly the Applicant for interim relief must be suffering prejudice. The Applicant is in fact suffering prejudice in that its business – a fine dining restaurant and bar – is of a nature where a liquor licence is a *sine qua non* for its successful functioning. The Applicant applied timeously for a licence and is being prejudiced by the refusal and/or delay on the part of the Respondent to finalise and grant the licence;
- 7.4 The Applicant for interim relief must also have a clear right or at least a *prima facie* right. I respectfully submit that it is a constitutional right of the Applicant to do business and to make a living. In terms of Section 33 of the Constitution of the Republic of South Africa, Act 108 of 1996 the Applicant is also entitled to fair administrative action, which clearly is lacking;
- 7.5 An Applicant for interim relief must not have another way of off-setting the prejudice suffered. Except maybe for a claim for damages against the Respondents, the Applicant does not have any such avenue of relief available. A claim for damages will be very difficult to quantify and/or prove and even if it is successful, be *contra bonis mores* as it will not be the Respondents that will make good the prejudice suffered but the tax payer;
- 7.6 I accordingly submit, with respect, that the Applicant is entitled to request interim relief from the Honourable Court.

A handwritten signature, possibly reading 'G. M.', is written in the bottom right corner of the page. To the right of the signature, the letters 'TM' are handwritten.

8.

URGENCY:

- 8.1 The Applicants has completed its newly established business and is ready to trade though it is in practical terms basically impossible to run the business properly without having a liquor licence or authority to sell liquor in the business as it is a fine dining restaurant. The rights of the Applicant in terms of Section 22 of the Constitution (supra) are accordingly being frustrated, if not violated. With the Honourable Court as custodian of the constitution, and for the sake of the constitution and the stature of the Honourable Court, it is submitted that the Honourable Court should urgently assist under such circumstances;
- 8.2 The Applicant has invested R6,500,000.00 in establishing its business and employs 8 (eight) full time staff. The monthly salaries of the staff members amounts to R84,000.00 per month. The Applicant suffers a loss of R380,000.00 per month as a result of the delay by the First Respondent in finalising the licence.
- 8.3 In addition to what was said in paragraph 7 about a claim for damages, I also wish to submit that the likelihood of the Applicant surviving the ordeal of carrying the losses for two to three years before a claim for damages can come before the Honourable Court, might in the end be of academic value as the Applicant will simply not survive that long carrying such losses;

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- 8.4 If this application is brought as a normal motion application, I am advised that it will most likely only be heard in the second half of next year, if all parties strictly adhere to the time limits prescribed. This will simply obviate the very necessity of this application;
- 8.5 The business will be a fine dining restaurant requiring properly trained and experienced staff. The Applicant scheduled its planning according to the outlines given in Annexure "B" and this included sourcing and appointing the necessary qualified staff who is currently on the applicants payroll and who will have to be discharged and appointments revisited should this matter not be heard as an urgent application.
- 8.6 I respectfully submit that the matter is urgent and pray that it might please the Honourable Court to condone the non-compliance with the provisions of Rule 6 and in terms of Rule 6(12) to hear this matter as an urgent application.

9.

COSTS:

I respectfully request the Honourable Court that the First Respondent along with the Second Respondents, should the latter oppose this application, be ordered to bear the costs of this application.


10.

A handwritten signature, possibly reading 'S. S.', followed by the initials 'TM'.

PRAYER:

On behalf of the Applicant I then pray for the following relief:

- 10.1 That the non-compliance with the rules of the Honourable Court in respect of dies, form and service be condoned in terms of Rule 6(12) and that this matter be heard as an urgent application;
- 10.2 An order directing the First Respondent within 30 (thirty) calendar days to finalise the consideration of the pending application of the Applicant and in writing to inform the Applicant of its decision, stating full reasons should the application be declined;
- 10.3 An order authorising the Applicant, NCW Restaurants and Residences (Pty) Ltd, to trade in liquor in its business to be known as NCW Restaurant, situated at Erf 879, 46 Main Road, bounded by 10th and 11th Avenue, Melville, Region B, Johannesburg as if the Restaurant Liquor Licence it applied for under reference number GLB7000008218 has been granted and issued until the consideration of the said application has been finalised and, if approved, the licence has been issued;
- 10.4 An order directing the First Respondent along with the Second Respondents, should the latter oppose this application, be ordered to bear the costs of this application.
- 10.5 Further and/or alternative relief.

A handwritten signature, possibly reading 'K. M.', is written in dark ink. To the right of the signature are the initials 'IM'.

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DEPONENT

Thus signed and sworn to before me at PRETORIA on this the 6th day of
July 2017 by the deponent who declares the contents of this
affidavit to be true and correct and who uttered the words, "so help me God", and who
has declared that he knows and understands the contents of this declaration that he
considers the oath to be binding on his conscience and that he has no objection against
taking the oath.

 6/7/2017
NOT NO. 8/14/3 PRETORIA (2008/0708)
COMMISSIONER OF OATHS
TRUST MASHAWI
POSTNET MENLYN
SHOP 33 WATERGLEN CENTRE
GARSFONTEIN ROAD
WATERKLOOF GLEN
COMMISSIONER OF OATHS