IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION - GRAHAMSTOWN

Case No: 1278/14
Date Heard: 15/08/14
Date delivered: 13/11/14
REPORTABLE

In the matter between:

SHOPRITE CHECKERS (PTY) LTD **APPLICANT**

And

MEC FOR ECONOMIC DEVELOPMENT, ENVIRONMENTAL AFFAIRS AND TOURISM: EASTERN CAPE **1ST RESPONDENT**

GOVERNMENT OF THE EASTERN CAPE PROVINCE **2ND RESPONDENT**

EASTERN CAPE LIQOUR BOARD **3RD RESPONDENT**

JUDGMENT

SMITH J:

1) The applicant brought urgent proceedings for an order declaring sections 71(2) and 71(5) of the Eastern Cape Liquor Act, 10 of 2003, ("the Act") unconstitutional and invalid to the extent that they provide for the lapsing of grocer's wine licences after a period of 10 years after the commencement of the Act. The applicant is the holder of 28 grocer's wine licences, granted to it by the Liquor Board in respect of approved supermarkets throughout the Eastern Cape Province, between 19 January 1989 and 16 January 2003, in terms of section 22(1) (b), read with section 20(b) (iv) of the Liquor Act 27 of 1989, ("the 1989 Liquor Act").

2) In addition, the applicant also seeks:

(a) condonation for its non-compliance with section 64 of the Act. That section provides that the Eastern Cape Liquor Board must be allowed not less than one month after service of documents within which to deliver notice of intention to defend, unless the court authorises a shorter period. In this matter the Board was given just short of three weeks to file opposing papers;

(b) an order directing that the following words in the second column of the Schedule associated with grocer's wine licences are severable and fall to be excised: "*for a period of ten years after which such registration must lapse, provided that the holder of such registration may at any stage after expiry of a period of five years after the date of commencement of this Act, apply for registration to sell all kinds of liquor on separate premises*";

(c) an order that section 71(5) of the Act is severable from the rest of section 71, and falls to be excised in its entirety; and

(d) an interim order allowing it to continue selling wine at the approved grocery stores, pending confirmation of this Court's decision by the Constitutional Court.

3) The MEC for Economic Development: Environmental Affairs and Tourism of the Eastern Cape; the Government of the Eastern Cape Province and the Eastern Cape Liquor Board, have been cited as the first, second and third respondents, respectively.

4) In the Act a right to sell liquor is referred to as a "registration". I accordingly use that term interchangeably with the term "liquor licence".

Points *in limine*

5) Before I deal with the substantive issues relating to the constitutionality of the impugned provisions, I must first consider several points *in limine* which have been raised by the respondents. In this regard the respondents contend that:

(a) the application should be dismissed for lack of urgency. Any urgency that there might have been was self-created;

(b) the applicant has failed to join the Minister of Trade and Industry, who has a direct and substantial interest in the outcome of the proceedings;

(c) the applicant has failed to comply with section 64 of the Act, which requires that the Liquor Board must be allowed at least one month to deliver notice to defend in judicial proceedings against it;

(d) the applicant failed to provide the notice to the Registrar as required in terms of Uniform Court Rule 16A;

(e) the relief sought by the applicant in terms of prayer 4 of its notice of motion is not competent because it requires the Court to step into the shoes of the Legislature and itself create another category of liquor licences not provided for in the Act; and

(f) the relief sought in prayer 5 of the applicant's notice of motion is similarly ineffectual as it requires the Court to legalise unlawful activity.

Urgency

6) Mr *Ford SC,* who appeared for the respondents, argued that the matter should be dismissed for lack of urgency. He submitted that the applicant had been aware of the consequences of the impugned legislation since the date on which it became operational, namely 14 May 2004, but only took legal action to protect its interests more than nine years later. Such urgency as there might have been was thus, in any event, self-created.

7) The application was launched on 7 April 2014, and set down for hearing on 2 May 2014. It was brought on a semi-urgent basis, and truncated time periods were stipulated in the notice of motion, requiring the respondents to file their notice to oppose and answering affidavits, if any, by 17 April 2014. The papers were served by way of e-mail on 7 April 2014, and were formally served on the respondents on 8 April 2014.

8) The matter was adjourned on 2 May 2014, and the respondents were granted until 31 May 2014 to file supplementary answering affidavits. The applicant was ordered to pay the wasted costs occasioned by the postponement.

9) Effectively then, any prejudice which the respondents may have suffered as a consequence of the truncated time periods had been satisfactorily redressed when they were allowed reasonable opportunity to file supplementary answering affidavits, and the applicant tendered its wasted costs.

10) There can be little doubt that the matter was indeed urgent as the applicant's right to sell wine from its grocer's stores would have come to an automatic and permanent end on 14 May 2014. As Mr *Smuts SC,* who appeared for the applicant, has correctly argued, a retrospective order of constitutionality would have been cold comfort for the applicant, as it would not have served to compensate it for financial losses consequent upon the closure of its table wine sections.

11) In the event, the consideration of legality weighs heavily with me in this regard. In my view it would be undesirable to non-suit an applicant, who seeks to enforce its constitutional rights, on the basis of inconsequential procedural and technical difficulties, such as a perceived lack of urgency, in particular where the respondent had been allowed reasonable opportunity to file opposing papers. This point *in limine* can, in my view, therefore not be upheld.

Non-joinder

12) In this regard the respondents contend that the National Minister of Trade and Industry is a necessary party to these proceedings, and that he must be joined before the matter can be considered. In my view there is no merit in this contention. It is not clear to me in what manner it is contended that the Minister will be affected by any pronouncements made in this matter. The declaration of unconstitutionality sought by the applicant will not impact on the Minister's regulatory functions in terms of the national legislation. The regulation of retail sale of liquor is a provincial competence, and falls squarely within the exclusive provincial powers conferred by Schedule 5 of the Constitution. (*Ex parte: President of the Republic of South Africa: In re constitutionality of the Liquor Bill* 2000 (1)

SA 732 (CC). In the result I am of the view that the Minister has no direct and substantial interest in the subject matter of this case. This point must accordingly also fail.

Failure to comply with section 64 of the Act

13) Section 64 of the Act provides that the Liquor Board must be allowed at least one month after service of the documents instituting legal proceedings, to deliver notice to defend in judicial proceedings against it, "*unless the court concerned has in a particular case authorised a shorter period".* The applicant has applied for an order condoning its failure to comply with this section. The respondents' complaint in this regard is that the applicant failed to obtain judicial sanction for the shorter time periods stipulated in its notice of motion prior to launching the application. This contention is in my view untenable. It is inconceivable that the legislature could have intended that the Court only has a discretion to allow a shorter period for the filing of the notice to defend before the institution of legal proceedings. Such a construction of the section would mean that it would be virtually impossible to launch urgent proceedings against the Board. The section is clearly intended to ensure that the Board is allowed sufficient time to file opposing papers or pleadings, while reserving the discretion of a Court to sanction shorter time periods in deserving cases.

14) In my view the applicant has shown good cause for the relief it seeks in this regard. In any event, as Mr *Smuts* has correctly argued, the order of 2 May 2014 has rendered this point academic as the Liquor Board has in fact been given reasonable time to file further affidavits.

Failure to comply with Uniform Court Rule 16A

15) The applicant has sought condonation for its failure to comply strictly with the provisions of Uniform Court Rule 16A. In terms of this Rule the applicant was required to provide notice to the Registrar, at the time of filing the application papers, of the constitutional issues raised by it.

16) Though the applicant initially failed to submit the notice, it has subsequently remedied this oversight. The Rule 16A notice was thereafter duly posted on the Registrar's notice board on 29 April 2014, where it remained for the prescribed period of 20 days. No third party has given notice of intention to intervene as *amicus curiae.*

17) While the respondents initially opposed the condonation sought in this regard, Mr *Ford* has understandably not persisted with his opposition during oral argument. In my view there has been substantial compliance with the Rule, and the applicant has, in any event, shown good cause why its initial failure to comply should be condoned. In the result the non-compliance with Rule 16A is condoned.

The relief sought in prayers 4 and 5 of the notice of motion

18) The respondents' contention in respect of the relief sought in prayer 4 is that the excision of the impugned wording will have the practical effect of creating another category of registration in addition to those provided for in section 20 of the Act. The Court is thus required to step into the shoes of the legislature, an act which would offend against the principle of separation of powers. In my view this point can also not be upheld. The relief sought in paragraph 4 is consequential upon the granting of the main relief, namely a declaration of constitutional

invalidity. It would be anomalous to grant the main relief and nonetheless leave the offending wording in the Schedule unaffected.

19) Mr *Smuts* correctly argued that the striking down of the impugned sections and excision of the impugned wording in the Schedule would serve only to remove the *"guillotine effect"* thereof. These provisions are accordingly severable from the rest of the Act.

20) The objection against the relief sought in paragraph 5 is that it will effectively legalise unlawful activity, namely the sale of liquor from a supermarket without a registration authorising it. This point is also untenable as the interim relief sought in paragraph 5 is clearly competent in terms of section 172(2)(b) of the Constitution.

History of the legislation

21) In terms of section 32 of the 1989 Liquor Act, licences were issued to persons mentioned therein, and in respect of premises which had been approved by the Liquor Board. Grocer's wine licences were issued in terms of section 20(b)(iv) of the 1989 Liquor Act, and section 87 thereof provided that the holder of a grocers' wine licence "*shall at all times carry on the business of a general dealer (which shall include dealing in groceries and food stuffs) and may carry on or pursue any other business"*. These licenses were granted for an indefinite period.

22) The holder of a grocer's wine licence was, in addition prohibited from: selling liquor other than table wine (wine containing no more than 14% alcohol per volume); selling wines in receptacles with capacity of

more than 5 litres; and selling wine within certain proscribed hours on Saturdays and Sundays, Good Fridays and Christmas Days. (See sections 88-90 of the 1989 Liquor Act)

23) Although grocer's wine licences were, in terms of section 15(1)(b)(i), granted for an indefinite period, the Liquor Board could suspend or withdraw a licence in respect of which a report relating to the failure of the holder to discharge an obligation attaching to the licence, or a complaint or objection to the licence, have been submitted to its chairperson by a designated police officer. In addition, the relevant MEC could suspend or withdraw a licence or the right or privilege attaching thereto, upon the advice of the Liquor Board.

24) Section 107 of the 1989 Liquor Act provided that licences lapsed: when abandoned in writing by the holder; where the holder fails to pay the applicable licence fees by the prescribed date; when withdrawn in terms of section 15(1)(b)(i); when set aside by a competent court; and on a date when it is replaced by a licence granted under section 32A. It is common cause that the applicant's grocer's wine licences were never withdrawn, neither have they lapsed in accordance with the abovementioned provisions.

25) During 1997 the National Assembly commenced the legislative process for the enactment of a new national statute to replace the 1989 Liquor Act. That process resulted in a National Liquor Bill which the Constitutional Court subsequently found to be unconstitutional, as representing an inadmissible intrusion into the exclusive provincial

legislative power to regulate retail liquor licencing. (*ex parte President of the Republic of South Africa: In re: Constitutionality of the Liquor Bill* (supra).

26) The National Bill was thereafter revised to ensure compliance with the Constitutional Court judgment and the resultant statute, namely the Liquor Act, 59 of 2003, was consequently limited to the setting of national norms and standards, and the regulation of the manufacture and wholesale distribution of liquor.

27) Several of the provincial legislatures have since enacted their own provincial statutes to regulate retail sale of liquor in their respective provinces. The Eastern Cape Act was enacted on 11 December 2003. The objects of the Act are: *"to make provision for the registration of retail sales and micro-manufacturing of liquor in the Province, to encourage and support the liquor industry and reduce the socio-economic and other costs of excessive alcohol consumption…".* (section 2)

28) The Act does, however, not provide for separate licences in respect of different types of liquor, as was the case in the 1989 Liquor Act. Holders of liquor licences are thus not entitled to sell anything other than liquor in the licenced premises. Thus the Liquor Board may not allow a registration in terms of which other goods, such as food stuffs, may be sold on the same premises, unless the Premier has determined otherwise.

29) Licences granted in terms of the 1989 Liquor Act, however, continued to be valid in terms of the transitional provisions contained in

the Act. Thus in terms of section 71(2) the exemptions, licences or approvals referred to in the Schedule to the Act were deemed to be registrations in the categories mentioned therein. Grocer's wine licences, issued in terms of section 20(b)(iv) of the 1989 Liquor Act, are mentioned in the Schedule, but only to the extent that they would automatically lapse after a period of ten years. Thus the holder of a grocer's wine licence, deemed to be registered to sell wine by virtue of the conversion contemplated in section 71(2), was, in terms of section 71(5), entitled to sell wine at the licenced premises, "*for a period of 10 years after the commencement of this Act: Provided that the holder of such registration may, at any stage, after expiry of a period of five years from the date of the commencement of this Act, apply for registration to sell all kinds of liquor in separate premises as described*". The legal effect of the transitional provisions is thus that a grocer's wine licence, issued in terms of the 1989 Liquor Act, remained valid until 14 May 2014, after which it would automatically lapse. Holders of such licences could, after the expiry of five years from 14 May 2004, apply for registration to sell all kinds of liquor on separate premises.

The applicant's contentions

30) The applicant contends that the unavoidable consequence of the aforesaid transitional provisions is that the well-established and widely-practiced concept of grocery retailers selling table wine was no longer allowed in the Eastern Cape, with effect from 14 May 2014. The applicant will thus be compelled to close the table wine sections in each of its 28 affected grocery stores.

31) It avers that its business model for stand-alone liquor outlets requires that they be proximate to its grocery stores, in order to draw the requisite customer base. There are not enough suitable premises available for such liquor stores, and the closure of its wine sections will therefore not result in the opening of the same number of stand-alone liquor stores. It also contends, by virtue of a table compiled by its Project Officer for Liquor Stores, that the sale of wine in its liquor stores are 40% of the sales figures for wine in the proximate grocery stores. The loss of revenue from the sale of wine at its grocery stores can therefore not be made up by opening separate liquor stores, even if the requisite premises had been available. The closure of its table wine sections at its grocery stores will result in the loss of some R40 million sales per annum. The resultant loss in VAT revenue for the state would be some R2 million per annum.

32) It contends, in addition, that the closure of its wine sections will impact negatively on its business strategy of attracting customers in the higher income brackets. These customers are attracted by a wide range of local and imported wines, which can be conveniently purchased at competitive prices, as part of their grocery shopping excursions.

33) The closure of its wine sections will also impact negatively on its marketing strategy, which includes the encouragement of food and wine pairings, advertised in print and online electronic media. Customers, on the other hand, will have a more limited choice of table wines, as liquor stores generally do not offer the same variety and range of table wines as the licenced grocery stores, being limited by their smaller sizes. In addition, the closures will also result in job losses. The jobs of wine

assistants, who focus solely on the sale of wine, will become redundant. The closures will also impact negatively on the already struggling wine industry.

34) The applicant points to the fact that the impugned provisions of the Act closely resemble those of sections 89(1)(a) and 8 (and the relevant portions of the Schedule) of the National Bill. It thus suggests that it appears that the Eastern Cape Provincial Legislature simply copied those provisions without giving due consideration to the reasons for the approach adopted by the National Legislature. It contends that the intention of the National Legislature was to avoid the situation where holders of manufacturing and distribution licences could also hold retail licences. There is nothing in the policy paper, which accompanied the first draft of the National Bill, to suggest that there was any aspect of grocer's wine licences which was in any way perceived to be harmful, or presenting particular risks to the proper regulation of the retail liquor industry. In this regard it points to the fact that of the five other provinces which enacted provincial liquor legislation, none had provided for the automatic lapsing of grocer's wine licences. Those provincial statutes all provide either for the conversion of grocer's wine licences into registrations in terms of the Provincial Acts, or their conversion into grocer's wine licences under the new provincial act.

35) The applicant furthermore contends that the impugned provisions amount to an unjustifiable deprivation of its rights in terms of section 25(1) of the Constitution. That section provides that "No *one may be*

deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".

36) It contends finally that grocer's wine licences constitute property as contemplated by that section, and that the impugned provisions give rise to an arbitrary deprivation of that property. The effect of the legislation is that its rights to sell table wines at its grocery stores had terminated on 14 May 2014, resulting in a total and permanent deprivation of those rights.

The respondents' contentions

37) The respondents contend that the transitional provisions of the Act did not have the effect of extending the validity of the licenses granted under the 1989 Liquor Act, but rather to deem those licences to be one or the other new categories of registrations provided for in the Act. One of the objects of the Acts was to reduce the 18 categories of registrations, provided for in the 1989 Liquor Act, to only five. Thus grocer's wine licences granted under the 1989 Liquor Act were, with effect from 14 May 2004, converted into registrations in terms of section 20(a) of the Act, which provide for the sale of liquor for consumption off the premises where the liquor is being sold. Two conditions attached to the registration: first, that only wine may be sold; and second, the registration would lapse after 10 years.

38) They accordingly claim that the impugned sections do not provide for the lapsing of grocer's wine licences after a period of 10 years from the commencement of the Act, as contended for by the applicant, but rather for the termination of such licences on 14 May 2004, and substitution therefor of registrations under the Act. They assert that the applicant's

case is that it is the grocer's wine licence under the 1989 Liquor Act which constitutes property (and not the deemed registration under the current Act), and that it had been deprived of that property on 14 May 2014. The relief sought by the applicant in this regard is accordingly untenable.

39) The respondents contend furthermore that, to the extent that the Court may find that the impugned provisions amount to a deprivation of the applicant's property, they have, in any event, provided sufficient reasons for the deprivation. Such deprivation as there might have been was accordingly not arbitrary in the sense contemplated in terms of section 25 of the Constitution.

Questions to be considered

40) In *First National Bank of SA Limited t/a Wesbank v Commissioner, South African Revenue Services and Another; First National Bank of SA t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), at paragraph 46, the Constitutional Court held that the following questions arise in a case where the constitutionality of deprivation of property, not based on expropriation, is challenged :

(a) Does that which is taken away amount to property for the purposes of section 25?

(b) If so, has there been a deprivation of such property?

(c) If there is, is such deprivation consistent with the provisions of section 25(1)?

(d) If not, is such deprivation justified under section 36 of the Constitution?

I consider these questions below with extensive reference to foreign and local case law and academic writings. As will appear from the discussion which follows, though there has not been any authoritative pronouncements on these questions insofar as liquor licences are concerned, our Courts have: (a) consistently recognised the inherent commercial value of liquor licences; (b) acknowledged the increasing importance of rights acquired by way of "governmental largesse" in modern-day society; and (c) construed the terms "property" and "arbitrary" expansively for the purposes of the protection afforded by section 25.

Is a liquor licence property as contemplated by section 25 of the Constitution?

41) Mr *Ford* submitted that any rights flowing from the granting of a liquor licence under the 1989 Liquor Act cannot constitute property for the purposes of section 25, for the following reasons:

(a) a liquor licence is a permission given by a competent authority to a person to do something which would otherwise be unlawful. The permission encompasses also, not only the grant or refusal of the permission, but also the power to impose conditions pertinent to that permission. *(Ex parte v President of the Republic of South Africa: In re: Constitutionality of the Liquor Bill (supra) at para 56).* Thus the form of the permission is always contingent on changing norms and policies;

(b) liquor licences are not freely transferable. While they can notionally be sold, the Liquor Board, under the 1989 Liquor Act, had a complete discretion whether or not to grant a transfer;

(c) the applicant's reliance on its subjective interest in the licence is misplaced and irrelevant in the determination of the character of the right. In this regard he relied on the following dictum in *First National Bank of SA Limited* (supra):*"Neither the subjective interest of the owner in the thing owned, nor the economic value of the right of ownership having regard to the other terms of the agreement can determine the characterisation of the right"* (paragraph 56);

(d) in interpreting the property clause the court must have due regard to the tension between individual rights and the state's extensive socio-economic obligations. Such an approach will tilt the scales in favour of a conclusion that a liquor licence does not constitute property for the purposes of section 25 of the Constitution;

(e) a distinction must be drawn between the right and the object of the right. In dealing with incorporeal rights it is the object of the right which is the protected property. In this regard the applicant has failed to demonstrate that it has a right to the performance of something by the state which would be the object of the right, and would accordingly constitute property. The applicant thus had no absolute right to be granted the licence.

42) I deal with Mr *Ford's* submissions in the course of the discussion which follows below. Suffice it to say at the outset that the approach suggested by Mr *Ford* finds no support in foreign or local case law and academic literature. In fact it goes against the grain of those authorities, which, in my view, appear to favour a more expansive construction of the term "property" for the purpose of constitutional protection.

43) It is by now settled law that the protection afforded to property in terms of section 25 of the Constitution extends to incorporeal personal rights. (*Law Society of South Africa v Minister of Transport 2011 (1) SA 400 (CC) at paragraph 83; National Credit Regulator v Opperman and Others 2013 (2) SA 1 (CC); Agri SA v Minster for Minerals and Energy 2013 (4) SA 1 (CC).*

44) The legal concept of property, for the purpose of constitutional protection, however, remains frustratingly difficult to define. In *First National Bank of SA Ltd (supra)* at paragraph 51, Ackermann J cautioned that it is "*practically impossible to furnish – and judicially unwise to attempt – a comprehensive definition of property for the purposes of section 25".*

45) The following attempt at a definition by Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* [1965] 2 All ER 472, at 494, is perhaps a useful starting point: *"Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability".*

46) I intend to demonstrate below, with reference to various local and foreign cases, that liquor licences indeed meet all these requirements.

47) While it may be so that the term “property” appears to elude precise definition for the purposes of the constitutional protection afforded by section 25, I do not think that it would be difficult to recognise it when one encounters it in a particular case. It seems only logical to me that a licence granted by the state to a person (or corporation, for that matter) to trade in a certain commodity - which endures for as long as the recipient conducts itself in accordance with the conditions attaching thereto, and which entitles the recipient to invest substantial sums on the understanding that the relevant administrative functionary is by law precluded from arbitrarily revoking the licence - must be worthy of the protection accorded by section 25 of the Constitution.

48) If, however, this logical postulation is not sufficiently compelling to sway the discourse, then there is, in my view, in any event ample authority in support of the assertion that our Courts have adopted an expansive approach to the interpretation of the term “property” in section 25. In *Transkei Public Servants Association v Government of the Republic of South Africa and Others 1995 (9) BCLR 1235 (Tk),* Pickering J, in interpreting the equivalent provision of section 25 in the Interim Constitution, and after surveying various authorities and academic writings, remarked *obiter,* at 1246D to 1247A, that “*the meaning of ‘property’ in section 28 of the Constitution may well be sufficiently wide to encompass a State housing subsidy”.* (See also: *National Credit Regulator v Opperman* (supra), at paragraph 63)

49) It is significant furthermore that even before the advent of our constitutional dispensation; our Courts have recognised the inherent commercial value of liquor licences. As early as 1912 the then Appellate Division (per De Villiers J.P.) stated that a liquor licence is "a *privilege granted to a particular person to sell liquor at a particular place; and though it cannot be exercised save in connection with the premises to which it relates, yet it may be separately dealt with, and has a value of its own*". The learned judge also held that the licence substantially increases the value of the premises in respect of which it had been granted. (*Receiver of Revenue Cape v Cavanagh* 1912 AD 459 at 463)

50) Similarly in *Slims (Pty) Ltd and Another v Norris NO* 1989 All SA 33 (A), in the minority judgment, Corbett JA, after having examined several authorities, concluded that a liquor licence does have commercial value. The learned judge quoted, with approval, (at 52) the following *dictum* by Van Zyl J in *Solomon v Registrar of Deeds 1944 CPD 319 at 325*

> "… a liquor licence is not merely a privilege but is a right of a potential commercial value which may sometimes be very considerable, and a right which is alienable and can be sold. It is, however, not every sale thereof which can be given effect to because when a licence has been sold, transfer thereof to the purchaser will have to be obtained from the Licensing Board; and if the Board does not approve of the purchaser or if the purchaser does not possess one of the essentials required by law, such as e.g. the right to occupy the premises to which the license relates, transfer of the licence will not be obtained and the sale will fall through. Although, however, there are these limitations to the giving effect to a sale of a liquor licence, the right to sell is there and it can sometimes be a very valuable right".

He then also stated that:

> "… a person other than the licencee may by contract acquire a *jus in personam* against the licencee requiring the licencee to do all in his power to have the licence transferred to such person or his nominee. In addition to the case of a "sale" of a licence mentioned above, there is the situation created by the leasing of licenced premises and the business conducted thereon." (at 52-53)

51) In *Hewlett v Minister of Finance and Another* [1982] All SA 436 (ZS), the Zimbabwe Supreme Court was called upon to consider an assertion that the right to receive compensation under the Victims of Terrorism (Compensation) Act is "property" within the meaning of section 16 of the Zimbabwean Constitution, which, *inter alia*, prohibits the compulsory acquisition of property without compensation. Fieldsend CJ quoted, with approval, dicta in several cases to the effect that property is not a term of art, but*" a common English word, which must be taken in an ordinary sense",* and that it is a comprehensive term encompassing "*every possible interest which the party can have*". (at 440-441) The learned judge then concluded at 450 that: "[*g]overnment could be made virtually impossible if every deprivation of property required compensation. A liquor licence, for example, is a valuable asset and may be regarded as property. If legislation were to provide for the compulsory transfer of such a licence to another without compensation it would almost certainly be unconstitutional".*

52) While there yet has to be an authoritative pronouncement regarding the question whether a liquor licence constitutes property for the purposes of section 25, there has been a persuasive trend, both internationally and locally, to recognise certain rights acquired by way of "governmental largesse" as worthy of constitutional protection. In a seminal article, entitled "*The New Property*", published in the United States of America, ((1964) 73 Yale LJ 57-89) by Charles A Reich, the learned author propounds the increasing importance of governmental "largesse" in modern-day society. He explains that:

> "One of the most important developments in the United Stated during the past decade has been the emergence of government as a revenue and

> power, and pours forth wealth: money, benefits, services, contracts, franchises, and licenses. Government has always had this function. But while in early times it was minor, today's distribution of largess is on a vast, imperial scale. The valuables dispensed by government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth – forms which are held as private property. Social insurance substitutes for savings; a government contract replaces the businessman's customers and good will. The wealth of more and more American's depends upon a relationship to government. Increasingly, Americans live on government largess – allocated by government on its own terms, and held by recipients subject to conditions which express 'the public interest'." (at 57)

53) The trend of this discourse was subsequently also supported by various South African authors. (See: *The Right to private property in a new political dispensation in South Africa:* Professor Carol Lewis: 1992 (8) SAJHR 389; Van Der Walt: *Property Rights, Land Rights and Environmental Rights*: Van Wyk et al, 455 at 465). In Van Der Walt's *Constitutional Property Law*, 2005, at 100, the learned author, also propounds the view that:

> "Licences, permits and quotas are usually created by state grants and awards and therefore subject to state powers of cancellation, amendment and regulation, and they are often not regarded as property. However, in the world of commerce these interests can acquire great value, especially when they give access to valuable services, trading or manufacturing opportunities and when they can be sold and transferred. Because of their origin in administrative awards, there is some resistance to the notion that commercial interests in licences, permits and quotas could be protected as property, but some of these interests have enjoyed limited constitutional protection in foreign case law. The tendency is to regard licences, permits and quotas as constitutional property only if they have commercial value and once they have been vested and acquired according to the relevant (statutory or regulatory) requirements."

54) And in *National Credit Regulator v Opperman* (supra), at paragraph 63, Van der Westhuizen J, recognizing these developments in other constitutional jurisdictions, said that:

> "In the circumstances of this case the recognition of the right to restitution of money paid, based on unjustified enrichment, as property under s 25(1) is logical and realistic. It would be in accordance with developments in other jurisdictions where personal rights have been recognised as constitutional property. Intangible property has become important in modern day society and property should not be narrowly interpreted as to diminish the worth of the protection given by S.25"

55) Similarly in *Tre Traktorer AB Case* [1989] ECHR Series A Vol 159, the European Court of Human Rights held that a licence to serve alcoholic beverages is an economic interest which constitutes "*a possession"* for the purposes of Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedom. That Article provides that:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of International Law."

56) Significantly in that case the Swedish government also asserted that: since there was no right in Swedish law to obtain or retain a liquor licence, the competent authorities enjoy wide discretion in respect thereof; the licence is non-transferrable; and the issue of revocation of licences being primarily part of the implementation of the Swedish policy concerning alcoholic beverages, the licence could therefore not be considered to confer any right justiciable before civil or administrative courts. In rejecting this argument the Court held, at paragraph 40 that:

> "… the applicant could maintain, on arguable grounds, that under Swedish law it was entitled to continue to run its restaurant business under the licence unless it contravened the conditions laid down therein or gave rise to any of the statutory grounds for revocation (section 64 of the Act)".

57) The Court held furthermore, at paragraph 43, in dealing with an assertion that the impact of the revocation of the licence on the applicant's business had been "*indirect or tenuous*", that *"persons and companies concerned carry on a private commercial activity, which has the object of earning profits and is based on a contractual relationship between the licence-holder and the customers…"*

58) It is thus clear that both foreign and local authorities, as well as academic writings, favour the approach that licences, permits and quotas issued by administrative functionaries, and which in the hands of licencees have acquired commercial value, must be considered as property for the purposes of constitutional protection.

59) And in my view it matters not that: the person who applies for a licence to the relevant administrative functionary may not have a right to be granted the licence; the licence may be suspended or withdrawn under certain circumstances; and that transfer thereof may be subject to administrative approval. These considerations are not sufficient to disqualify the right from protection under section 25. Substantially the same conditions attach to the granting of other permits such as, for example, gambling licences or licences for cellular networks. In all these cases the recipients of licences acquire personal incorporeal rights which endure for as long as they conduct themselves within the stipulated conditions attaching to the licence. Where the approval of the licencing authority is required for the sale or transfer of the licence, such approval cannot be refused arbitrarily. Holders of permits are thus entitled to invest substantial funds in the exploitation of the right on the understanding that the law will afford protection against arbitrary deprivation thereof.

60) The commercial value which these rights acquire in the hands of the recipients can be determined objectively and is not, as was argued by Mr *Ford*, a mere subjective interest in the licence.

61) Although an applicant has no right to be granted a licence, once granted it brings into existence an enforceable personal incorporeal right

which entitles the recipient to trade in accordance with the conditions attaching thereto. For as long as recipients conduct themselves in accordance with those stipulated conditions, our law protects them against any arbitrary deprivation of the right by the issuing authority. The nature of the right is therefore not nearly as precarious as was contended for by Mr *Ford.* In addition, these rights are also transferable, albeit subject to approval by the licencing authority.

62) There can thus be little doubt that: a right to sell liquor under the Act (or for that matter under the 1989 Liquor Act) is clearly definable and identifiable by persons other than the holder; has commercial value; is capable of being transferred; and is sufficiently permanent, in the sense that the holder is, in terms of Administrative Law, protected against arbitrary revocation thereof by the issuing authority. I am accordingly of the view that the grocer's wine licences issued to the applicant under the 1989 Liquor Act constitute property for the purposes of section of 25(1) of the Constitution.

Has there been a deprivation of property within the meaning of section 25?

63) The applicant contends that the deprivation of its property lies in the fact that the licences were to endure indefinitely, subject only to suspension or withdrawal under certain circumscribed and exceptional circumstances. The effect of the impugned provisions was to terminate them permanently with effect from 14 May 2014, resulting in the applicant having to close all its Eastern Cape grocer's wine sections. It asserts, in addition, that this termination did not come about as a result of a decision

by an administrative functionary, but operated automatically. It was thus not possible for it to challenge the termination in terms of the Promotion of Administrative Justice Act, 3 of 2000.

64) The respondents, on the other hand, contend that the applicant had not been deprived of anything because the licence was no more than "*a bare permission to sell liquo*r", and that, in any event, it was open to the applicant to apply for a more expansive registration, allowing it to sell all kinds of liquor. They also asserted that any such contended deprivation could, in the event, not have been in respect of the licences issued under the 1989 Liquor Act, but rather those deemed registrations referred to in section 71(2) of the Act. The relief sought by the applicant in this regard is thus misplaced.

65) The Constitutional Court has adopted an expansive approach to the interpretation of the term "deprivation" in section 25(1). In the *First National Bank (supra),* at paragraph 57, Ackerman J held that:

> "In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned."

66) And in *Agri SA v Minister for Minerals and Energy* (supra), at paragraph 48, Moseneke ACJ held that:

> "Deprivation within the context of section 25 includes extinguishing a right previously enjoyed and expropriation is a subset thereof. Whereas deprivation always takes place when property or rights therein are either taken away or significantly interfered with."

67) Similarly in *Mkontwana v Nelson Mandela Metropolitan Municipality and Another 2005 (1) SA 530 (CC)* at paragraph 32, Yacoob J concluded that:

> "Whether there has been a deprivation depends on the extent of the interference with or the limitation of use, enjoyment or exploitation. It is not necessary in this case to determine precisely what constitutes deprivation. No more need to be said than that at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation."

68) In my view Mr *Smuts* correctly submitted that the grocer's wine licences granted to the applicant were more than bare permissions to sell liquor, but rather commercially valuable rights to sell table wine in specified supermarkets. Those rights had been terminated by virtue of the enactment of the impugned provisions.

69) Furthermore, the mere fact that the applicant could apply for a licence to sell all kinds of liquor does not mean that it was entitled as of right to such registration. The applicant would have been in the same position as any other first time applicant. Its application would have been subjected to the usual scrutiny and adjudication by the relevant authorities, and it was by no means certain that the registrations would be approved. In any event, such new registrations would not have entitled the applicant to continue selling wine at its grocery stores. The replacement licences would only have entitled it to sell all kinds of liquor from separate premises. The applicant's rights to sell wine at its supermarkets would therefore not have been revived, with the resultant negative impact on its business strategies which I have mentioned earlier.

70) I am also of the view that there is no merit in the contention that it had in fact been the deemed registrations in terms of the Act that terminated on 14 May 2014, and not the original licences granted in terms of the 1989 Liquor Act. The transitional provisions in the Act were clearly

intended to preserve the entitlement of the holders of grocer's wine licences to continue selling table wines from approved grocery stores for a period of 10 years. This was a dispensation that was alien to the categories of registrations created by the Act. In effect therefore, it was the original rights, granted under the 1989 Liquor Act that terminated on 14 May 2014.

71) I am accordingly satisfied that the effect of the impugned legislation was to permanently deprive the applicant of its right to sell table wines at the approved stores in accordance with its business model. The interference with this right was substantial, to the extent that it eroded the essential content thereof. The consequences of the impugned provisions therefore go beyond the normal restrictions on the use and enjoyment of property in an open and democratic society.

72) In the result I am of the view that the applicant has indeed been deprived of its property by virtue of the enactment of the impugned provisions of the Act.

Was the deprivation arbitrary?

73) In *First National Bank (supra)* Ackermann J concluded, at paragraph 65, that the term "arbitrary", as used in section 25(1), is not limited to "*non-rational deprivations, in the sense of there being no rational connection between means and ends",* and that it is *"more demanding than an enquiry into mere rationality".* It is nevertheless "a *narrower and less intrusive concept than that of the proportionality evaluation required by the limitation provisions of s 36".*

74) The learned judge then concluded that a deprivation is arbitrary when the impugned law *"does not provide sufficient reason for the particular deprivation in question or is procedurally unfair".* The sufficiency of the reasons proffered for the deprivation must be assessed in the light of the following considerations:

(a) the relationship between the extent of the deprivation, the stated objectives of the legislation, and the means employed to achieve those objectives, must be considered. The deprivation will be arbitrary when there are other less invasive, workable and efficient means to achieve the objectives;
(b) the Court must also consider the relationship between the purpose of the impugned legislation, on the one hand, and the nature of the property, as well as the extent of the deprivation, on the other;
(c) regard must also be had to the relationship between the purpose for the deprivation and the person whose property is affected;
(d) where the property in question is land or corporeal movables, or embrace all aspects of ownership, more compelling reasons would generally be required to justify the deprivation then in cases where the affected right is less extensive, or only some incidents of ownership have been partially affected.

(*First National Bank* (supra) at paragraph 100).

75) I agree with Mr *Smuts'* submission that in most cases there would be no discernable or significant difference between the test for "*sufficient reason"* to justify deprivation of property and that required for a justifiable limitation of a right in terms of section 36(1). The extent to which these enquiries would invariably overlap was more aptly demonstrated by the

approach adopted by the Constitutional Court in *National Credit Regulator Opperman* (supra) when considering whether sufficient reason had been established for the deprivation of a credit provider's right to claim restitution based on unjust enrichment of monies paid to a customer in terms of an unlawful agreement by section 89(5)(c) of the National Credit Act, 34 of 2005. Van der Westhuizen J concluded, at paragraph 75, that:

> "Many of the factors employed under the arbitrariness test to determine sufficiency of reasons yield the same conclusion when considering whether a limitation is reasonable and justifiable under s 36"

76) In considering whether or not the deprivation in that case was arbitrary within the meaning of section 25, and having had regard to the extent of the deprivation and the stated objectives of the impugned section, the learned judge concluded as follows, at paragraph 71:

> "In this case the means chosen are disproportionate to the purpose, as is further demonstrated by the less restrictive means analysed below under the justification enquiry."

77) Mr *Smuts* has correctly submitted that the deprivation of the applicant's property in this case had been extensive and total. The applicant had, until 14 May 2014, a right to sell wine at its grocery stores throughout the province. That right was completely extinguished by the impugned legislation with effect from the aforesaid date. The respondents were thus required to provide sufficient and compelling reasons for the deprivation.

78) What then were the reasons proffered by the respondents to justify the deprivation?

79) The respondents contend that the policy considerations which underpinned the National Bill required simplification of the processes

relating to applications for liquor licences and the enforcement of regulatory provisions. This has resulted, *inter alia,* in a substantial reduction in the number of registration categories.

80) They also claim that there were concerns about the ability of licencees to exercise proper control over the sale of liquor in the context of a supermarket, as opposed to separate premises where only liquor is sold. In addition, they maintain that the open display of liquor in supermarkets frequented by young people is undesirable, and that it would be difficult for staff to monitor compliance with regulatory provisions in circumstances where food stuffs and other items are sold from the same premises.

81) Mr *Ford* has submitted that the respondents were constrained to balance the adverse social implications of sale of liquor and commercial considerations by reducing the number of registration categories from 18 to five. He submitted, in addition, that the consequence of maintaining the sale of liquor from grocery stores as a separate category of registration, would increase the administrative burden of enforcement and control, and the logical solution was thus to enable existing holders of grocer’s wine licences to convert them into licences to sell all types of liquor on separate and specialised premises.

82) He argued furthermore that the deprivation was not extensive because holders of grocer’s wine licences could still apply for registration, which would have enabled them to sell all types of liquor, albeit from different premises. The applicant thus had an opportunity to convert its licences into even more expansive rights, or so he argued.

83) It is difficult to conceive of how the deprivation of existing grocer's wine licences could have served to simplify the processes in respect of new applications. Mr *Smuts* correctly argued that the purported need for simplification of applications for new licences cannot justify the deprivation of pre-existing rights in respect of which no such applications would have been required.

84) Regarding the assertion that the sale of liquor on the same premises as food stuffs and other items makes it difficult to enforce regulatory provisions; the respondents have failed to provide details of exactly what those difficulties would be, and how they have impacted on regulation during the transitional period of 10 years.

85) It appears in any event that, according to the respondents, the purported regulatory difficulties would only arise if all kinds of liquor are sold at supermarkets. The supplementary affidavit of the second respondent states the following in this regard:

> "Concerns were raised during the public processes with the practical and potential social economic consequences of this. As it read, the draft bill would allow kinds of liquor to be sold from a supermarket. This would effectively impose the limitation applicable to the employment of persons on registered persons on the onus of all supermarkets and grocery stores with registration for the retail sale of liquor. In addition, the prohibitions on the sale of liquor to persons under the age of 18 years and to a person under the influence of alcohol or a drug having a narcotic effect would also apply. Considerable concerns were expressed as to the ability of the responsible registered person to exercise proper control in the context of a large supermarket with a number of till points and with staff focused on the activities of a supermarket rather than the obligations of liquor retailer. Of concern also was the open display liquor for sale on supermarket shelves to young people frequenting and purchasing at supermarkets."

86) In addition, as is apparent from the above excerpt, there is no indication on the papers of any scientific or empirical basis for these broad-sweeping averments. The deponent merely repeats concerns which had been expressed by unidentified persons. Such nebulous assertions

can hardly constitute compelling and sufficient reason for the total deprivation of property. They seem at best to be flimsy and speculative. It is furthermore significant that, of all the provinces that have enacted their own provincial liquor acts, the Eastern Cape is the only one where the sale of table wine in grocery stores has been prohibited. This rather begs the question as to whether the provincial lawmaker did in fact consider whether there was a compelling social need for the impugned provisions, or as was contended by the applicant, they had merely slavishly followed the wording of the National Bill. The lamentable paucity of the reasons proffered by the respondents in their attempt to justify the deprivation rather inclines one to the latter conclusion.

87) I am accordingly of the view that the only reason proffered by the respondents, namely the need to simplify administrative processes in respect of applications and enforcement of regulatory provisions, is insufficient to justify the extent of the deprivation. The deprivation of the applicant's property is accordingly arbitrary within the meaning of section 25 of the Constitution.

Section 36 enquiry

88) In the light of my findings above, the enquiry contemplated by section 36(1) of the Constitution has no practical effect. Mr *Smuts* has correctly submitted that the test of arbitrariness contemplated in section 25 is even more stringent than that envisaged in section 36(1). It is difficult to conceive how deprivation, which had been found to be arbitrary, can nevertheless, also be reasonable and justifiable in an open and democratic society. The respondents have in any event not put up any

facts, other than those proffered to gainsay the assertion that the deprivation was arbitrary, which could possibly further impact on an enquiry in terms of section 36(1). I am accordingly also of the view that the impugned provisions cannot constitute a reasonable and justifiable limitation of the applicant's section 25(1) right.

Interim relief

89) There then only remains for me to consider whether the applicant has made out a case for the interim relief which it seeks pending confirmation of this Court's decision by the Constitutional Court. I have already dealt with the respondents' technical objections to the order, and for the reasons which I have mentioned earlier, I am satisfied that this Court is indeed empowered to make such an order in terms of section 172(2)(b) of the Constitution.

90) In deciding whether it is appropriate to grant interim relief pending the decision by the Constitutional Court, I must consider: whether there are there reasonable prospects that the statute will be found unconstitutional; if there is a real prospect of irreparable harm to the applicants or others; and taking into account the public interest, where the balance of convenience lies.

(Constitutional Law of South Africa: Moolman et al: Second Edition, Volume 1 at 9-172)

91) The effect of the interim order will be to allow the applicant to continue with the sale of table wines from its approved supermarket premises. It follows logically from my findings above that the applicant has established a clear right, and that its right had been infringed. The

respondents have not put up any facts to suggest that the continuation of the sale of wine from supermarkets will be inordinately difficult to regulate, or that it may cause other social problems or harm. In fact, the sale of table wine from grocery stores have endured for a period of 10 years after the enactment of the impugned provisions, and no evidence has been presented to suggest that the regulation thereof has been more problematic than that of other types of registrations. The balance of convenience thus firmly favours the applicant.

92) I am satisfied, for the reasons which I have stated above, that there are reasonable prospects that the Constitutional Court will find the impugned provisions unconstitutional. The prospects of irreparable harm to the applicant are self-evident. It will not be able to recoup the substantial financial losses it will no doubt suffer by way of civil action, and there being no other effective remedy available to the applicant, I am indeed persuaded that all the legal prerequisites for an interim interdict have been established.

93) Insofar as the question of costs is concerned, both counsel were in agreement that it should follow the result.

Order

94) In the result I make an order in the following terms:

(a) The applicant's non-compliance with section 64 of the Eastern Cape Liquor Act, 10 of 2003 ("the Act") is condoned:

(b) Sections 71(2) and (5) of the Act, read with the relevant parts of the Schedule to the Act, are declared to be inconsistent with the Constitution, and invalid to the extent that they provide for the lapsing of grocer's wine licences after a period of 10 years after the commencement of the Act;

(c) The following words in the Second Schedule to the Act, associated with the grocer's wine licences, are declared to be severable and are hereby excised: *"for a period of ten years after which such registration must lapse, provided that the holder of such registration may at any stage after expiry of a period of five years after the date of the commencement of this Act, apply for registration to sell all kinds of liquor on separate premises as prescribed";*

(d) Section 71(5) of the Act is declared to be severable from the rest of section 71, and is hereby excised;

(e) The orders in paragraphs (a), (b), (c) and (d) above are referred for confirmation to the Constitutional Court;

(f) Pending confirmation by the Constitutional Court:

(i) The applicant may continue to sell wine, as defined in section 1 of the Liquor Products Act 1989, in

accordance with its licences which it had in place as at the date of the notice of motion; and

(ii) The third respondent is interdicted from taking any steps against the applicant in terms of the Act in response to the applicant selling wine in accordance with the said licences.

(g) The respondents are ordered to pay the costs of this application, including costs occasioned by the employ of two counsel, jointly and severally, the one paying the other to be absolved.

Smith J: Judge of the High Court

Appearances

For the Plaintiff: Adv. Smuts SC

Instructed by: Wheeldon Rushmere & Cole
119 High Street
Grahamstown

For the Defendant: Adv. Ford SC

Instructed by: Nkuhlu, Khondo Inc.
Number 4, First Floor
Carlton Centre
106 High Street
Grahamstown