CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 20/02

ANDREW LIONEL PHILLIPS	First Applicant
VIVA AFRIKA INVESTMENTS CC	Second Applicant
versus	
THE DIRECTOR OF PUBLIC PROSECUTIONS (WITWATERSRAND LOCAL DIVISION)	First Respondent
THE MINISTER OF TRADE AND INDUSTRY	Second Respondent
THE MINISTER OF SAFETY AND SECURITY	Third Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR FINANCE AND ECONOMIC AFFAIRS IN THE PROVINCIAL GOVERNMENT OF GAUTENG	Fourth Respondent
THEODOR WILHELM VAN DEN HEEVER N.O	Fifth Respondent
PHILLIP WARDEL MOORREES REYNOLDS N.O	Sixth Respondent
SWINGING TRADING TWISTER C.C	Seventh Respondent

Heard on : 29 August 2002

Decided on : 11 March 2003

JUDGMENT

YACOOB J:

Introduction

[1] Selling liquor in South Africa is subject to the Liquor Act 27 of 1989 (the Act). The Act states its purpose as being "[t]o provide for control over the sale of liquor; and for matters connected therewith." It seeks to exercise that control by a licensing system. Liquor may only be sold by holders of liquor licences[1] which determine the "rights and privileges" as well as the "obligations and liabilities" of their holders.[2] Licence holders are therefore bound by their licence conditions and by the provisions of the Act applicable to them. The Act distinguishes between–

(a) on-consumption licences that authorise the sale of liquor to be drunk only at the place at which it is sold,[3] and

(b) off-consumption licences in terms of which the liquor is sold for consumption elsewhere.

[2] The Act defines the kinds of on- and off- consumption licences[4] that may be issued.[5] It defines the obligations of licence holders in considerable detail and sets out the conditions applicable to the various categories of on- and off- consumption licences.[6] The Act seeks also to govern, influence or determine the circumstances and behaviour at places licensed to sell liquor for consumption. This is done by placing a

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[1] Section 154(a) of the Act.

[2] Section 21 of the Act.

[3] The definition of on-consumption licence in Section 2 and Section 20(a).

[4] Section 20(a) and (b) of the Act respectively.

[5] Section 32 of the Act.

[6] Chapters 7 and 8 of the Act respectively.

statutory duty on the on-consumption licence holder not to allow certain conduct on the licensed premises[7] on pain of criminal sanction.[8] One of these provisions, section 160(d), is under attack in this case. The subsection makes it an offence for an on-consumption licence holder to allow a person (i) to perform an offensive, indecent or obscene act or (ii) who is not clothed or not properly clothed to perform or to appear on licensed premises where entertainment is presented or to which the public has access.

[3] Section 160 provides:

> "160 Offences by holders of on-consumption licences
>
> The holder of an on-consumption licence who-
>
> (a) allows drunkenness or licentious conduct on the licensed premises;
>
> (b) sells or supplies liquor to a person who is in a state of intoxication;
>
> (c) allows the licensed premises to be used as a brothel or to be frequented by persons who are regarded as prostitutes;
>
> (d) allows any person-
>
> (i) to perform an offensive, indecent or obscene act; or
>
> (ii) who is not clothed or not properly clothed, to perform or to appear,
>
> on a part of the licensed premises where entertainment of any nature is presented or to which the public has access; or
>
> (e) . . .
>
> shall be guilty of an offence".

[4] Mr Phillips, the first applicant, owns all the shares in the second applicant, the holder of a licence that permits liquor to be sold and consumed on certain premises in

[7] Section 160 of the Act.

[8] Section 163 of the Act.

Midrand. He was charged with the offence of contravening section 160(d) of the Act probably arising from striptease dancing on the premises. Fearing prosecution, the applicants sought an order in the Witwatersrand High Court declaring the section constitutionally invalid.

[5] The Director of Public Prosecutions for the Witwatersrand Local Division, the National Minister of Trade and Industry, the National Minister of Safety and Security and the Provincial MEC for Finance and Economic Affairs for the province of Gauteng were all quite properly joined in the proceedings. That they had a material interest in the outcome is beyond doubt but although they gave notice of intention to oppose, they withdrew on the date of hearing. The reasons for this are not apparent. Consequently, the application before the High Court was not opposed.

[6] The High Court decided the case[9] on the basis of section 16 of the Constitution and ordered:

> "(1) Subject to the confirmation of the Constitutional Court, Sections 160(d)(i) and (ii) of the Liquor Act, 27 of 1989, are declared unconstitutional with immediate effect.
>
> (2) The first and fourth respondents are ordered jointly and severally to pay the costs of this application. Such costs are to be taxed on the opposed scale."

The order has been referred to this Court for confirmation in terms of section 172(2) of the Constitution.[10]

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[9] *Phillips Andrew Lionel and Another v The Director of Public Prosecutions and Others* (WLD) Case No 02/6168, 14 June 2002, unreported.

[7] The applicants supported the High Court judgment and attacked section 160(d) on two additional grounds. It was contended that the section-

(a) infringes the rule of law because it is vague and does not convey the prohibited conduct clearly enough to any licence holder; and

(b) infringes section 12 of the Constitution because it has the effect of depriving people of freedom without just cause.

[8] Section 172(2) confirmation proceedings are not routine for it does not follow that High Court findings of constitutional invalidity will be confirmed as a matter of course. This Court is empowered to confirm the High Court order of constitutional invalidity only if it is satisfied that the provision is inconsistent with the Constitution. If not, there is no alternative but to decline to confirm the order. It follows that a finding of constitutional invalidity by a High Court does not relieve this Court of the duty to evaluate the provision of the provincial Act or Act of Parliament in the light of the Constitution. A thorough investigation of the constitutional status of a legislative provision is obligatory in confirmation proceedings. This is so even if the proceedings are not opposed, or even if there is an outright concession that the section under attack is invalid. As the judgments in this case show, the issues in this case are not straightforward. Issues that come before this Court seldom are.

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[10] Section 172(2)(a) provides:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[9] Acting on the directions of the Chief Justice, the Registrar of this Court wrote to the National Director of Public Prosecutions (the National Directorate), the Minister of Trade and Industry and the Minister of Safety and Security to enquire whether any of them intended to oppose confirmation. The letter reads in part:

> "It appears from the judgment that the application for the declaration of invalidity was not opposed either by the Director of Public Prosecutions, or the Government. The order has been referred to the Constitutional Court for confirmation in terms of section 172(2) of the Constitution. Before giving directions in this matter, the Chief Justice has asked me to establish whether or not the National Director of Public Prosecutions, or the government intends to oppose the confirmation of the order. The Chief Justice contemplates setting the matter down during the latter part of August 2002, and will be glad, therefore, if you would respond to this letter as soon as possible."

[10] In its reply, the National Directorate stated that it had decided not to oppose confirmation. The Department of Safety and Security said that the matter had been referred to the National Commissioner of the South African Police Service, but there was no further communication from that department. The letter to the Minister of Trade and Industry remains unanswered. In the result, we had no argument or assistance from any party other than the applicants.

[11] This is unsatisfactory. Under the separation of powers that is fundamental to our Constitution it is the duty of the executive to implement laws made by the legislature. If the constitutionality of a law is challenged, courts and not the executive must decide whether the law is valid. If the executive considers that despite its constitutional duty to do so, it cannot enforce the law because there is no valid defence

to the constitutional challenge, it should inform the court of its reasons for that decision.

[12] A declaration that legislation is inconsistent with the Constitution and invalid cannot be made by consent. A declaration in these terms is a substantial intrusion into the domain of the legislature and, as has been mentioned, should only be made by a court after careful consideration of all relevant issues. Courts are entitled to the assistance of the executive when they have to consider these cases. This assistance is relevant not only to the decision of a court, but also to the basis upon which the decision is made and the way the judgment is expressed. It is regrettable that no assistance was given to the courts that have been required to decide the applicants' challenge.

The freedom of expression challenge

[13] Section 16 of the Constitution provides:

> "Freedom of expression
>
> 16. (1) Everyone has the right to freedom of expression, which includes-
>
> (a) freedom of the press and other media;
>
> (b) freedom to receive or impart information or ideas;
>
> (c) freedom of artistic creativity; and
>
> (d) academic freedom and freedom of scientific research.
>
> (2) The right in subsection (1) does not extend to-
>
> (a) propaganda for war;
>
> (b) incitement of imminent violence; or
>
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. "

Subsection (2) is not relevant to the present enquiry.

[14] I consider first whether section 160(d) limits the freedom of expression guaranteed by section 16(1) of the Constitution. The people to whom and the circumstances in which subsection (d) applies must be determined by interpreting it in the context of section 160 as a whole. The section is concerned with conduct on licensed premises and seeks to control it by criminalising acts or omissions by the licensee in relation to conduct by others on the premises. Subsection (a) is aimed at preventing all drunken conduct by any person on licensed premises. Its particular focus is the conduct of patrons. Unlike subsection (d), this subsection does not concern itself with appearances or performances of any kind. Subsection (b) is likewise directed at patrons and seeks to ensure that they do not drink too much. Subsection (c) targets prostitution.

[15] The offence defined by subsection (d) penalises the licence holder for allowing on the premises entertainment that involves the performance of offensive, indecent or obscene acts and any performance or appearance by a person who is improperly clothed or not clothed at all. The prohibition applies to all entertainment of every description provided only that the conduct covered by the subsection is part of it. It covers dramatic performances including plays and concerts irrespective of whether they represent serious works of art or the communication of thoughts and ideas essential for positive social development. Section 160(d) therefore limits the freedom of artistic creativity and the freedom to receive and impart information and ideas protected by section 16(1)(b) and (c) of the Constitution. Even though the performers

and audiences themselves are not guilty of any offence in terms of the subsection, the inevitable consequence of its enforcement is to restrict the performance of all entertainment within this broad category and to impact negatively on performers and potential audiences alike.

[16] The limitation of freedom of expression as defined in section 16 of our Constitution is apparent. There is therefore no need to strain to discover the outer reaches of the freedom of expression protection afforded by section 16 of our Constitution nor to express any view on the High Court's reasons for the conclusion that section 160(d) is inconsistent with section 16. The justification enquiry must accordingly be engaged.

Justification

[17] Before doing so however, it is necessary to address an aspect of the High Court judgment that has relevance for the way in which constitutional protection of freedom of expression is understood and perceived. Referring no doubt to section 16 of the Constitution, the judge in the High Court concluded that:

> "It is clear, however, that under the new constitutional dispensation in this country, expressive activity is prima facie protected no matter how repulsive, degrading, offensive or unacceptable society, or the majority of society, might consider it to be."[11]

This sentence might convey an incorrect understanding of the extent of the protection afforded by the constitutional scheme. The right to freedom of expression (as is the

[11] Above n9 at para 14.

case with all rights in the Bill of Rights) is not and should not be regarded as absolute. The section 16(1) right may be limited by a law of general application that complies with section 36 of the Constitution.[12] In other words, the Constitution expressly allows the limitation of expression that is "repulsive, degrading, offensive or unacceptable" to the extent that the limitation is justifiable in "an open and democratic society based on human dignity, equality and freedom".

[18] The High Court disposed of the justification analysis on the basis that the state had made no effort to justify the limitation and that it was not the function of the court to determine a basis upon which the section may be justified. The judge added that "[t]he necessity for the limitation of freedom of expression in sections 160(d)(i) and (ii) of the Act is anything but obvious."[13] The approach in the High Court seems to have been based on the assumption that any limitation of a right is prima facie without justification and that the state is obliged to set out fully the basis upon which the limitation is said to be justified. If the state does not do this, so this reasoning implies, a finding that a right has been limited is automatically transformed into and, except where the justification is obvious, becomes a conclusion that the right has been unjustifiably infringed.

[12] Section 36, to the extent relevant, provides:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, . . ."

[13] Above n9 at para 18.

[19] The nature of the burden attracted by the state is appropriately described by Somyalo AJ as follows:

> "It is also no longer doubted that, once a limitation has been found to exist, the burden of justification under section 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of the section. The weighing up exercise is ultimately concerned with the proportional assessment of competing interests but, to the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the court. It is for this reason that the government functionary responsible for legislation that is being challenged on constitutional grounds must be cited as a party. If the government wishes to defend the particular enactment, it then has the opportunity — indeed an obligation — to do so. The obligation includes not only the submission of legal argument but placing before court the requisite factual material and policy considerations. Therefore, although the burden of justification under section 36 is no ordinary onus, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment."[14]

[20] The burden placed upon the state is no ordinary onus. The state should place before a court evidence and argument on which it intends to rely in support of justification. Although absence of this evidence and argument does not necessarily result in invalidity of the challenged provision, it may tip the scales against the state, but in appropriate cases only. It follows that the absence of evidence and argument from the state does not exempt the court from the obligation to conduct the justification analysis and to apply what was described by Somyalo AJ as "the primary criteria enumerated in section 36 of the Constitution".[15]

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[14] *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* 2001 (4) SA 491 (CC) ; 2001 (8) BCLR 765 (CC) at para 19.

[15] Above n14 at para 24.

[21] These criteria are:

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

Often there will be no need for evidence at all in relation to the limitations analysis. Sometimes, however, evidence will be necessary. That will depend on the right and limitation in question.

[22] The justification exercise involves an assessment of proportionality. As O'Regan J and Cameron AJ wrote:[16]

> "The approach to limitation is, therefore, to determine the proportionality between the extent of the limitation of the right considering the nature and importance of the infringed right, on the one hand, and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means available to achieve that purpose."

The High Court did not examine whether the section satisfied the requirements of proportionality mandated by section 36. This judgment must embark on that exercise.

[16] *S v Manamela And Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 66.

Proportionality Analysis

[23] The right to freedom of expression is integral to democracy, to human development and to human life itself. It must be all the more zealously guarded because the infringement of this right was used as an instrument in an effort to achieve the degree of thought control conducive to preserve apartheid and to impose a value system fashioned by a minority on all South Africans. As Langa DCJ said in the *Islamic Unity* case-

> "[26] This Court has held that -
>
> > ' . . . freedom of expression is one of a 'web of mutually supporting rights' in the Constitution. It is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19), and the right to assembly (s 17) . . . The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial.'
>
> As to its relevance to a democratic state, the Court has pointed out that freedom of expression -
>
> > ' . . . lies at the heart of a democracy. It is valuable for many reasons, including its instrumental functions as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters . . . .' [footnotes omitted.]
>
> and in *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* the following was said -
>
> > 'Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational

> norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression — the free and open exchange of ideas — is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed.'

[27] Notwithstanding the fact that the right to freedom of expression and speech has always been recognised in the South African common law, we have recently emerged from a severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments. The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa. Those restrictions would be incompatible with South Africa's present commitment to a society based on a 'constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours'. As pointed out by Kriegler J in *Mamabolo* -

> '. . . freedom to speak one's mind is now an inherent quality of the type of society contemplated by the Constitution as a whole and is specifically promoted by the freedoms of conscience, expression, assembly, association and political participation protected by sections 15 to 19 of the Bill of Rights.'"[17] [footnotes omitted]

But the right to freedom of expression has many facets and can be exercised in a myriad different ways. Some of these facets may be less important than others to the growth of a democracy and to human development. The extent to which freedom of expression is limited by section 160(d) and the specific facet or manifestation of the right that is limited are of particular relevance in this case.

[17] *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) at paras 26 and 27.

[24] The High Court held that the purpose and effect of the section is "obviously to limit freedom of expression". That is no doubt its effect but this must be seen in the context of the primary purpose of the Act which is to provide for control over the sale of liquor and for matters connected therewith. The state has an interest in the control of liquor consumption. In this context, the purpose of section 160 of the Act in particular might be to determine, influence and control circumstances or behaviour at places where liquor can legally be bought and consumed. Liquor notoriously has a negative effect on the behaviour, feelings and thought patterns of consumers. It is known to give rise to lapses in judgment, false courage, lack of discernment, lack of discipline and a measure of vulnerability. The state's interest in minimising the harm that might result from these negative consequences is apparent. There could be no complaint about the prohibition if the extent of the limitation is consonant with the overall purpose of reducing, as far as possible, the negative consequences of liquor being consumed in a public place. But the section impacts far beyond that required by any legitimate purpose.

[25] Section 160(d) binds all on-consumption licence holders. On-consumption licences include[18]:

> "(i) hotel liquor licences;
> (ii) restaurant liquor licences;
> (iii) wine-house licences;
> (vi) theatre liquor licences;
> (v) club liquor licences"

[18] Section 2 read with section 20(a) of the Act.

[26] Each of these licence holders is obliged to conduct some business on the licensed premises other than the sale of liquor. What is more, the sale of liquor at each of these enterprises may legitimately be described as secondary or ancillary to the primary business that the licence holder is obliged to conduct. Thus, for example, the holder of a:

(a) hotel liquor licence is obliged to maintain a bona fide hotel at which accommodation and meals are regularly served to guests;[19]

(b) theatre liquor licence is obliged at all times to maintain on the licensed premises a bona fide theatre at which dramatic performances, plays, concerts or films are regularly presented or shown to the public.[20]

[27] The section applies to all establishments described in the Act where liquor may legitimately be sold for consumption including all hotels, restaurants, theatres, clubs and sports grounds. It must be borne in mind that in the case of a theatre licence, an auditorium does not fall outside licensed premises. Section 62(1) of the Act expressly requires a theatre liquor licence holder to maintain a bona fide theatre "on the licensed premises". The application of the section is not restricted to bars or public houses at which the primary activity concerns itself with the sale of liquor for consumption. Had there been a neatly tailored provision applicable only to this category of licensed premises, the position might well have been different.

[19] Section 53(1) of the Act.

[20] Section 62(1) of the Act.

[28] That the section applies to theatres is of particular concern. A theatre liquor licence holder is obliged to maintain a bona fide theatre at which dramatic performances, concerts or plays are presented. The core business of a theatre is to realise protected freedom of expression by presenting artistic creations that communicate thoughts and ideas. There seems to be no basis to distinguish, as the Act purports to do, between theatres that sell liquor for consumption and those that do not. This is particularly so if it is borne in mind that theatres are in effect restricted to selling liquor only to those to whom access has been granted to attend a particular presentation[21] and then only for a period that starts half an hour before the show begins and cannot go beyond half an hour after it ends.[22] Indeed, the provision controls the kind of entertainment that may be provided at licensed theatres instead of controlling behaviour or conduct at these establishments. The provision is far too wide and also misdirected.

[29] No ground for this limitation of free expression has been suggested, nor does one present itself to me. The limitation is unjustifiable. There is accordingly an unjustifiable infringement of the right to freedom of expression. The state was not represented and we have had no argument on whether the section can be tailored to meet a legitimate state interest and, if this can be done, whether it is appropriate to craft an order to this effect. Nor can I think of any tailoring exercise that would

[21] Section 62(2) of the Act.

[22] Section 63(1) of the Act.

produce an appropriate order. This Court must therefore confirm that section 160(d) is constitutionally invalid.

[30] It is not necessary to consider any other attack launched by the applicants. In particular, nothing need be said about the contention that the nature of the conduct prohibited by the section[23] either defies definition altogether and is accordingly vague or is overbroad. The contention raises sensitive, important, complex and contentious issues which must be left for determination at some more appropriate future time.

[31] Finally, it is necessary to consider a just and equitable order appropriate to section 160(d) being invalid.[24] It is just and equitable that the declaration should not apply to a conviction for a contravention of section 160(d) in relation to which the time for noting an appeal has expired, or where condonation for late filing of a notice of appeal has been refused.

[32] It is appropriate that the first four respondents be ordered to pay the costs of the application in this Court, jointly and severally.

Order

[33] There will be an order in the following terms –

[23] Offensive, obscene or indecent acts or appearance or performance while improperly clothed or not clothed at all.

[24] Section 172(1) of the Constitution.

(1) Paragraph (1) of the order made by Cloete J in the Witwatersrand High Court is set aside and replaced by the following order:

(a) Section 160(d) of the Liquor Act 27 of 1989 is unconstitutional and of no force or effect.

(b) This declaration does not apply to a conviction for a contravention of section 160(d) in relation to which the time for noting an appeal has expired, or where condonation for late filing of a notice of appeal has been refused.

(2) The first, second, third and fourth respondents are ordered to pay the applicants' costs in these confirmation proceedings jointly and severally.

Chaskalson CJ, Langa DCJ, Goldstone J, Kriegler J, Mokgoro J, Ngcobo J, O'Regan J and Sachs J concur in the judgment of Yacoob J.

MADALA J:

Introduction

[34] This matter comes to us as an application for the confirmation of an order of the Witwatersrand High Court under section 172(2) of the Constitution. That court declared certain provisions of the Liquor Act[1] (the Act) to be inconsistent with the Constitution and accordingly invalid**.**

[1] Act 27 of 1989.

[35] I have had the benefit of reading other judgments in this case prepared by Yacoob J as well as the concurring judgments of Sachs J and Ngcobo J. I do not agree with the conclusion which they reach with regard to section 160, the impugned section. I am however in full agreement with Yacoob J on his analysis of the nature of confirmation proceedings and that they should not be taken lightly by the parties, least of all the executive whose contribution will often be of inestimable value in helping the Court to arrive at a proper decision and in couching the order to be made. It must always be remembered that in confirmation proceedings the issue is the constitutional validity of a parliamentary or provincial statute or conduct of the President. It will often have wide and far-reaching repercussions for the whole country and the conduct of those who will be affected by the decision of the Court.

[36] The application before the High Court was not opposed. In this Court we have had no assistance from any party save the applicants. The case arises out of the performance of striptease dancing on licensed premises of the applicants. The impugned legislation is found by the majority to be overbroad in that it not only outlaws serving alcohol where there is nude dancing, the central purpose of which is to titillate, but also encompasses in its wide scope nudity that could be part of a theatrical production which has objectives beyond those of erotic stimulation.

[37] The applicants attacked the provisions of section 160(d) on three fronts. They claim that the section:

(a) is inconsistent with section 16 of the Constitution, invalid and therefore of no effect;

(b) infringes the rule of law because it is vague and does not convey clearly enough what conduct is prohibited; and

(c) contravenes section 12[2] of the Constitution in that it deprives people of freedom without just cause.

Freedom of Expression

[38] Everyone has the right to freedom of expression. The general content of the right includes, among others, the freedom to hold views and opinions and to receive and impart information and ideas, and the freedom of artistic creativity. Section 16 of the Constitution provides:

> "16. Freedom of Expression
> (1) Everyone has the right to freedom of expression, which includes –
> (a) freedom of the press and other media;
> (b) freedom to receive or impart information or ideas;
> (c) freedom of artistic creativity; and
> (d) academic freedom and freedom of scientific research.
> (2) The right in subsection (1) does not extend to -
> (a) propaganda for war;
> (b) incitement to imminent violence; or
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

[2] See below para 52.

[39] Freedom of expression constitutes one of the essential foundations of a democratic society, and is one of the basic conditions for its progress and for the development of every woman and man. However, the exercise of this freedom carries with it duties and responsibilities, and is subject to such limitations as are reasonable and justifiable in a democratic society based on human dignity, equality and freedom.[3]

The impugned provision

[40] Section 160 provides:

> "160 Offences by holders of on-consumption licences
>
> The holder of an on-consumption licence who—
>
> (a) allows drunkenness or licentious conduct on the licensed premises;
>
> (b) sells or supplies liquor to a person who is in a state of intoxication;
>
> (c) allows the licensed premises to be used as a brothel or to be frequented by persons who are regarded as prostitutes;
>
> (d) allows any person—
>
> (i) to perform an offensive, indecent or obscene act; or
>
> (ii) who is not clothed or not properly clothed, to perform or to appear, on a part of the licensed premises where entertainment of any nature is presented or to which the public has access;
>
> . . .
>
> shall be guilty of an offence."

From an analysis of the above section one can discern that subsection (a) seeks to prevent drunken conduct on the licensed premises. Subsection (b) aims to control patrons and their excessive drinking. Subsection (c) targets prostitutes and

[3] Section 36 of the Constitution.

prostitution. Subsection (d) deals with performances and appearances that occur when liquor is served; it is in this context that this section falls to be interpreted.

The constitutional challenge and the vagueness attack

[41] In my view, in interpreting this statute, the majority judgment must move away from the distinction between nudity expressed through high art (i.e. theatre) and nudity that occurs at a strip club, because that is not the heart of the issue at hand. The nexus between nudity, offensive, obscene and indecent performances, and the provision of alcohol is where this Court's interpretive energies must be focused. The majority acknowledges that it is well within the government's power to regulate the use of alcohol. The contention is that, in this case, government regulation of alcohol inadvertently attenuates the constitutional right to freedom of artistic expression. I disagree with this contention.

[42] The statute does not outlaw artistic expression that involves nudity, whether in the form of erotic dancing or in a theatrical production. The law merely requires that if people are performing while "not clothed" or "not properly clothed", then the owner of the liquor licence is to ensure that no liquor is served that particular day.

[43] Section 160(d) concerns the offences committed by holders of on-consumption licences who allow the prohibited types of performances. It is logical for on-consumption license holders to be held responsible in the Act because they are actually the persons providing the alcohol, which the state seeks to regulate.

Therefore, section 160(d) must be understood to hold the licence holder liable when he or she allows persons to perform or appear as stated above on a part of the licensed premises when alcohol is being served.

[44] The section decrees that provided a licence is issued and the conditions laid down in the Act are complied with liquor may legitimately be sold at hotels, restaurants, theatres, clubs, and sports grounds. However, the relevant subsection is applicable to that "part of the licensed premises where entertainment of any nature is presented or to which the public has access." Subsections 160(a), (b) and (c), on the other hand, apply to any part of the licensed premises. This difference shows that the purpose of the legislature was to limit the section under attack to a narrower category of premises than those contemplated by section 160(a), (b) and (c). Again, my central argument is that it is in this narrow category of premises that theatres must refrain from selling alcohol when the types of performances described in subsection (d) are occurring.

[45] Furthermore there can be no vagueness as to what the phrases "not clothed" or "not properly clothed" connote for purposes of this section. "Not clothed" means in the context of this section to be in the nude or totally exposed; "not properly clothed" means scantily dressed or insufficiently dressed, so that a portion or portions of the private parts of a female or male or breasts of a female are exposed.

Limitations analysis

[46] The core business of a theatre licence holder is to offer entertainment which amounts to artistic creativity and is protected by section 16 of the Constitution. The presentation of these forms of entertainment in a bona fide theatre could legitimately involve the performance of section 160(d) acts. Given the potential dangers that arise when drunkenness and nudity are combined, it is both reasonable and justifiable for the legislature to require theatres to refrain from selling liquor on the days when such performances are being held.

[47] Section 36(1) of our Constitution concerns the limitation of rights. It states:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

[48] In my view, the High Court erred in holding that the purpose of the section is "obviously to limit freedom of expression".[4] The statute, as stated earlier, aims at regulating the sale of liquor at a place where there is nudity because alcohol can give rise to unrestrained and unruly behaviour. The statute must be understood to prevent the sale of alcohol on the days when there is a performance where people are "not

[4] *Phillips v Director of Public Prosecutions* 2002 (5) SA 556 at para 18.

clothed or not properly clothed". Thus, the purpose of the limitation is reasonable, legitimate and important.

[49] The combination of alcohol, intoxicated men and provocative nude dancing is potentially disastrous. From the face of the impugned section, it is obvious that the state is attempting to regulate and control the adversity that results from the convergence of these three elements. It is not an unduly onerous limitation for the government to require liquor license owners to refrain from selling alcohol on the days where there will be a performance with people "not clothed or not properly clothed". The above interpretation is reasonable and comports with the section's intent.

[50] There is no substance in the contention that the purpose of the provision is to force the morals of the majority onto the minority. If this were so, Parliament may have tried to prohibit erotic dancing all together. The fact is that the conduct described in subsection (d) is prohibited *only on that part of the licensed premises* where entertainment of any nature is presented or to which the public has access, and *only on the days* that liquor is being consumed. This is narrowly tailored to address the subsection's valid intent, which is to control the potentially detrimental consequences that arise from the mixture of alcohol and nudity or offensive, indecent or obscene performances.

[51] The right to freedom of artistic creativity cannot be said to have been limited substantially. The section applies only to entertainment presented at hotels, restaurants, clubs, theatres and sports grounds at which liquor is being served contemporaneously with the prohibited types of performances and only when the general public have access to these establishments. The section has some minimal impact on the freedom to receive or impart ideas and on the freedom of artistic creativity. However, it must be remembered that the impugned section does not prevent entertainers and performers from expressing their artistic creativity or communicating their ideas nor are citizens restricted in their ability to receive these communications everywhere outside the limited area to which the section applies. In terms of section 36 of the Constitution, the limitation on the right to freedom of artistic creativity must be reasonable and justifiable, and in my opinion it is. The limitation is strictly tailored to meet the limited purpose. The section is not nearly as wide as the applicants would have it. There is no less restrictive means of preventing the potentially disastrous consequences that arise from the combination of drunkenness and nudity in public places. In all the circumstances the limitation is reasonable and justifiable. There is accordingly no infringement of the right to freedom of expression.

Rule of law and the section 12 attack

[52] These two attacks can now be disposed of briefly. The finding that the conduct sought to be prevented is defined clearly enough is a complete answer to the rule of law argument. The contention related to the section 12 argument was that the

challenged provision limits the right created by section 12(1) of the Constitution because it does not constitute just cause for the deprivation of freedom. Two bases are advanced. The first, that the provision is too vague, has been rejected. It is contended secondly that the cause is unacceptable because it is concerned with "promoting a particular religious morality". As discussed earlier, there is no substance in this contention. The purpose of the prohibition is to control behaviour and circumstances at licensed premises where liquor is bought and consumed in order to prevent harm, motivated by the notorious fact that the consumption of liquor has the potential to affect human behaviour negatively.

[53] In the circumstances I find that the impugned provision is not inconsistent with the Constitution and would make the following order:

The order of the High Court is not confirmed.

NGCOBO J:

Introduction

[54] I have grave doubts whether there is any connection between the striptease dancing involved in this case and the constitutional right to freedom of expression. It is true that the freedom of artistic creativity is an incident of freedom of expression. Section 16(1)(c) of the Constitution says so. Whether the striptease dancing with

which we are concerned in this case can be said to be a form of artistic creativity is, in my view, not free from doubt. That doubt is compounded by the context in which the striptease dancing occurs. It occurs at premises to which the public is invited to consume liquor.

[55] There is much to be said for the view that what is being asserted in this case is the right of striptease dancers to expose themselves to those who are consuming liquor on the licensed premises for the purpose of enhancing sales of liquor. Whether freedom of artistic creativity guaranteed by our Constitution includes nude dancing for the primary purpose of stimulating liquor sales is not free from doubt.[1] Even if artistic creativity went that far, it may well be that a statute which limits it in such circumstances would be justifiable in terms of section 36.

[56] The purpose of the Act is to regulate the sale of liquor and matters connected with the sale of liquor. The authority of the state to grant a liquor licence

[1] Compare *Re Koumoudouros et al and Municipality of Metropolitan Toronto* 6 DLR (4th) 523 at 533 where Erbele J said:

> "Therefore assuming, without deciding, that 'expression', in the Charter includes 'artistic' expression, the conclusion from the evidence is clear that the right claimed in these cases is not a right to freedom of artistic expression but the right to expose performers' pubic areas for the purpose of stimulating liquor sales. I find it difficult to accept that the framers of the Charter had any such right in mind and the whole tenor and effect of the language of the Charter belies such a right.
>
> "The question to be decided is a question of constitutionality, not of taste, and I am satisfied that the 'freedom of expression' guaranteed by the Charter does not include the public exposure of female pubic areas for the primary purpose of selling larger quantities of liquor. Accordingly the requirement of opaque clothing in cl. 28(2) of the by-law does not infringe upon the 'freedom of expression' guaranteed by para. 2(*b*) of the Charter."

encompasses not only the authority to grant or refuse the permission to sell liquor, "but also the power to impose conditions pertinent to that permission."[2]

[57] As Yacoob J holds, the state has an interest in the control of liquor consumption. I would like to add that the overall purpose of section 160 is to reduce, as far as possible, the negative consequences of liquor being consumed in a public place. This limited purpose is reasonable, legitimate and important.

[58] In my view there may have been no constitutional difficulty with the subsection if it had not included theatres within its reach. In that event, if freedom of expression had been limited at all, it would probably have been limited to a very small extent. All that may have been prohibited then is sexually explicit conduct – a prohibition regarded by a reasonable person inspired by constitutional values as being unacceptable. All other areas of freedom of expression would have been left untouched. The right may not have been interfered with at its core. The section would have applied only to entertainment presented at hotels, restaurants, clubs and sports grounds at which liquor is sold for consumption and only when the general public have access to these establishments. The section would probably have had no impact on the freedom of the press and other media or on academic freedom and freedom of scientific research. It may well have had some minimal impact on the freedom to receive or impart ideas and on the freedom of artistic creativity.

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[2] *Ex Parte President of the Republic of South Africa: Constitutionality of Liquor Bill* 2000 (1) SA 732 (CC); 2000 (1) BCLR 1 (CC) at para 56.

[59] That said, it is not necessary on this occasion to reach any firm conclusion on any of these issues.

[60] The trouble with the impugned provision is that it goes too far. It brings within its reach premises whose very purpose is theatrical performances. As Yacoob J holds, the prohibition applies to all establishments identified by the Act which include theatres.[1] It applies to "licensed premises" and licensed premises include an auditorium where performances are staged. For this reason, it is bad.

[61] Save for the observations set out above, I concur in the judgment of Yacoob J.

SACHS J:

[62] I support the cautious approach adopted in this matter by Yacoob J. I agree fully that the provisions impermissibly trench upon freedom of expression by including theatrical performances. My concerns, however, go further. Even if only bars and not theatres were affected, even if it were constitutionally appropriate to distinguish between the high art of theatre and cabaret and the potentially coarser entertainment provided by night-clubs and pubs, even if one could, with any degree of

[1] See para 28 of Yacoob J's judgment.

constitutional confidence, draw bright lines between the erotic exposure of indlamu,[2] can-can[3] and striptease, and even if from the words of the provision exact operationally manageable standards of permissible cleavage in or transparency of dress could be divined, the substantive questions would remain: to what extent and in what way may the state dictate dress and undress in off-the-street places to which the public has access?

[63] International experience suggests that this is an area where all those concerned with interpreting and enforcing the law should look with particular care before they leap.[4] Thus, although the National Director of Public Prosecutions stands to be faulted for a lack of candour, he cannot be criticised for a failure to see the obvious. In cases involving what is objectionable in the eyes of the law, rather than what lies unbeautifully to the eye of the beholder, nothing is obvious. While nudity may be self-evident, what amounts to near-nudity is not. The legislation deals separately with rowdy behaviour. The harm or offence that either nakedness or near-nakedness may in themselves cause to consenting adult eyes in places secluded from the unsuspecting public, is far from axiomatic.[5] Lust, intensified by inebriation, may be one of the

[2] A traditional Zulu dance involving high kicks during which dancers wear outfits which do not cover their tops. Today indlamu is incorporated in various forms into contemporary choreography, both popular and high art.

[3] A dance involving high kicks and raised petticoats originally developed in Parisian nightclubs.

[4] See para 64 and 65 below.

[5] Tribe states, "the effort to separate unprotected obscenity from other sexually oriented but constitutionally protected expression had 'produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication.' " Tribe *American Constitutional Law* 2 ed (Foundation Press, Mineola 1988) 904-5. His own view on the issue is that expression is subject "to regulation in the interests of unwilling viewers, captive audiences, young children, and beleaguered neighborhoods – but *not* in the interest of a uniform vision of how human sexuality should be regarded and portrayed." Id 909-10.

seven deadly sins. But it is for religious bodies, civil society and public opinion to deal with sinful and immoral behaviour, not necessarily for the law.[6]

[64] The problem of whether it is constitutionally permissible to prohibit the combination of tipples and nipples has divided judicial minds in many open and democratic societies. In Canada, Dickson CJ pointed out that:

> "The cases all emphasize that it is a standard of *tolerance*, not taste that is relevant. What matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it …[I]t is quite conceivable that the Canadian community would tolerate varying degrees of explicitness depending upon the audience and the circumstances."[7]

The cases that followed indicated that the furnishing of massive quantities of evidence on a case by case basis did little to simplify the judicial task of determining the exact borderline between what the Canadian community would abide and what it would not.[8]

[65] The United States Supreme Court remained divided for years on the question of whether strip-teasing could be prohibited, and if so, how.[9] After battling for decades

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[6] See discussion in *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117(CC) at para 104-5.

[7] *Towne Cinema Theatres Ltd v The Queen* [1985] 1 S.C.R. 494 at 508-9.

[8] Compare *R v Tremblay* [1993] 2 S.C.R. 932; *R v Hawkins* (1993) 15 O.R. (3d) 549; and *R v Mara* (1997) 148 D.L.R. (4th). If I read these cases correctly, they boil down to saying that Canadians would tolerate the notion that you may look, but you may not touch.

[9] See above n5 at 904-919 for discussion of cases dealing with legislation aimed at suppressing obscenity in the United States.

to establish a workable definition of obscenity, Brennan J finally decided that the quest was futile.[10] By a narrow majority, the Supreme Court eventually held, however, that nude dancing in a tavern could be prohibited so as to protect strangers in public places, provided that the prohibition was narrowly tailored. As Rehnquist CJ put it:

> "It is without cavil that the public indecency statute is 'narrowly tailored'; Indiana's requirements that the dancers wear at least pasties and a G-string is modest, and the bare minimum necessary to achieve the State's purpose."[11]

[66] It is not obvious to me what degree of tailoring would establish the bare minimum that the South African community would tolerate in a bar which customers entered knowing full well what they were going to see, or even if this would be the test. Without further evidence or argument it is possible to have clear views on the propriety or otherwise of employing women to disport their bodies in an erotic manner so as to encourage the sale of liquor. The issue in this case, however, is not the propriety of such conduct, but the constitutionality of its prohibition. This is something on which this Court has heard but the skimpiest of argument and received barely a tittle of evidence.

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[10] *Paris Adult Theatre I v Slaton* 413 U.S. 49 (1973) at 86 n9 Brennan J says:

> "Whether or not a class of 'obscene' and thus entirely unprotected speech does exist, I am forced to conclude that the class is incapable of definition with sufficient clarity to withstand attack on vagueness grounds."

[11] *Barnes v Glen Theatre, Inc*. 501 U.S. 560 (1991) at 572. The Court was divided on whether or not the particular statute in question ought to be struck down. The Chief Justice was supported by four members who favoured upholding the legislation, albeit for different reasons. A dissenting opinion, reflecting the views of the remaining four members, called for a striking down of the legislation on the ground that it violated the First Amendment.

[67] In my view, the judgment of Yacoob J appropriately leaves such perplexities to be resolved on another day, and, subject to the matters emphasised above, I concur.

For the applicant:	D. Unterhalter SC and M. Chaskalson instructed by Shannon Little Attorneys, Johannesburg.
For the respondents:	No appearance.