CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 57/05

SOUTH AFRICAN LIQUOR TRADERS ASSOCIATION	First Applicant
VIRGINIA MKIZE	Second Applicant
MINKI MARYSTELLA NETSHANDAMA	Third Applicant
MOLEFI JACOB MOGODIRI	Fourth Applicant
BLANCHE MARGARET MARIA ALLIES	Fifth Applicant
DGB (PTY) LTD	Sixth Applicant
KWV SA (PTY) LTD	Seventh Applicant
JONKHEER BOEREWYNMAKERY (PTY) LTD	Eighth Applicant
PERNOD RICARD SOUTH AFRICA (PTY) LTD	Ninth Applicant
OMNIA WINES LTD	Tenth Applicant
DISTELL LIMITED	Eleventh Applicant
MOOIUITSIG WYNKELDERS (PTY) LTD	Twelfth Applicant
WINECORP (PTY) LTD	Thirteenth Applicant
EDWARD SNELL & CO LTD	Fourteenth Applicant
BRANDHOUSE BEVERAGES (PTY) LTD	Fifteenth Applicant

and

CHAIRPERSON, GAUTENG LIQUOR BOARD	First Respondent
GAUTENG LIQUOR BOARD	Second Respondent
MEC, FINANCE AND ECONOMIC AFFAIRS, GAUTENG	Third Respondent

Heard on : 2 March and 3 May 2006

Decided on : 2 June 2006

JUDGMENT

O'REGAN J:

[1] The applicants seek the confirmation of an order of constitutional invalidity made by the Pretoria High Court in respect of the definition of "shebeen" contained in section 1 of the Gauteng Liquor Act, 2 of 2003 ("the Act"). The proceedings before the High Court were unopposed and the order was made in unopposed motion court, with no reasons being given originally by the judge for the order.

[2] The definition in issue reads as follows:

> "'shebeen' means any unlicensed operation whose main business is liquor and is selling less than ten (10) cases consisting of 12 x 750ml of beer bottles".

The definition was challenged as vague on the grounds that it does not stipulate a period within which the specified quantity of beer bottles is to be sold and accordingly cannot be used to identify a shebeen with any precision at all. It was also challenged on the ground that it was irrational. The court order made by the Pretoria High Court provided that the second portion of the definition should be severed so that the definition would read as follows:

> "'shebeen' means any unlicensed operation, whose main business is liquor".

The order of the High Court will have no force and effect unless confirmed by this Court.[1]

[3] The first applicant is the South African Liquor Traders Association ("SALTA"), a corporate body which represents the interests of the broad class of liquor traders in South Africa, including taverners, shebeen owners, liquor store owners and hotels. It apparently has approximately 200 000 members and its objectives include the promotion of the interests of its members and the monitoring of liquor legislation.

[4] The second to fifth applicants are all owners of shebeens who have been issued with shebeen permits under the Act. The sixth to fifteenth applicants are manufacturers and distributors of alcoholic beverages in South Africa.

[5] The first respondent is the Chairperson of the Gauteng Liquor Board who was appointed by the third respondent in terms of section 4(3) of the Act. The second respondent is the Gauteng Liquor Board, a juristic person, established in terms of section 2 of the Act. The third respondent is the Member of the Executive Council

[1] Section 172 (2)(a) of the Constitution provides as follows:

> "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."

responsible for Finance and Economic Affairs in the province of Gauteng ("the MEC").

[6] The applicants assert that they bring the application in their own names, as well as in the public interest, and on behalf of all shebeen owners who have been granted permits in terms of the Act. SALTA furthermore asserts that it brings the application in the interest of its members. Nothing turns on the issue of standing in this case, and therefore it is not necessary to consider whether the applicants are entitled to their standing on the grounds they assert.

Background to the litigation

[7] The Act was passed during 2003. Some of its provisions came into force on 1 April 2004, and the balance, including those relevant to the current application, on 1 November 2004. It has sought to normalise the sale of liquor by shebeens for the first time. Historically, shebeens have been informal and unlicensed liquor traders selling liquor largely to customers in townships. In many cases, shebeens operate from private homes and are small traders. Their businesses have always been considered unlawful, and they have suffered the consequential vulnerability and marginalisation. The Act seeks to change this by bringing shebeens within the scheme of the Act. It provides the definition of shebeen referred to above and also provides in section 141(1)(m) that the MEC may make Regulations regarding:

> "[A] phased in approach, whereby shebeens would be given an opportunity to comply with the Act".

[8] Regulations were passed, as contemplated by section 141(1)(m) of the Act, and also came into force on the 1 November 2004. Regulation 21 provides as follows:

> "As contemplated in section 141(1)(m) of the Act —
> (a) any person who on the date of promulgation of these regulations has been conducting a shebeen shall within four months from the date of promulgation of these regulations lodge in duplicate an application with the secretary of the local committee in accordance with Form 10 in Schedule 2 for a shebeen permit; and
> (b) a shebeen permit shall be valid for a period of 18 months, from the date of promulgation of these regulations."

[9] A number of permits were issued as contemplated by Regulation 21. The terms of those permits sparked the applicants' approach to the High Court. The notice of motion annexed a number of such permits and a representative example is the following:

> "LIQUOR ACT, 2003
> SHEBEEN PERMIT
>
> Valid from 01 November 2004 – 01 May 2006
>
> Virginia Mkize is hereby licensed to sell not more than ten cases of 750ml beer, per week, upon premises and the plan approved, situated at 128 Johnny Arendse Street, Reiger Park, in the district of Boksburg such as, in accordance with the conditions of the Act or any other law, authorised to be conducted under the above-mentioned licence.
> Trading Hours From 10h00 – 02h00
> Liquor not required for immediate sale, shall be stored on the licenced premises."

It will be seen that the concept of ten cases of beer contained in the definition, has been moved to the permit and, qualified by the term "per week", now serves as an upper limit of the amount of beer which Ms Mkize may sell. Moreover, the permit does not expressly permit Ms Mkize to sell any liquor other than beer.

[10] It will also be noted that the permit was valid for a period of eighteen months from the date of promulgation of the Regulations and that those permits, on their face, lapsed on 1 May 2006. At the hearing of this matter on 3 May 2006, however, we were informed that further Regulations were promulgated on 28 April 2006 which have the effect of extending the validity of permits for a further twelve months.[2] Moreover, the amended Regulations provide that further permits could be issued for a twelve month period only upon application by shebeen owners.[3] It would appear that all permits previously issued in terms of regulation 21 are therefore now valid till 1 May 2007.

[11] Aggrieved at the terms of the permits, the applicants approached the High Court for an order declaring the definition of "shebeen" in section 1 of the Act to be inconsistent with the Constitution, on the grounds of vagueness and irrationality, as well as for ancillary orders declaring that the limit imposed upon the sale of liquor under these shebeen permits was ultra vires the terms of the legislation and therefore invalid.

[2] Regulation 2(a) of the Gauteng Liquor Amendment Regulations, 2006.

[3] Id Regulation 2(b).

[12] In the founding affidavit, it is alleged that it is not possible to run a profitable shebeen selling only ten cases of beer per week and that the livelihood of shebeen owners has therefore been placed in jeopardy. Moreover it is said, this could not have been the intention of the legislation which clearly intends to introduce a phased-in process whereby shebeen owners will obtain liquor licences. It is also asserted that there is no provision in the Act or Regulations which permits the authorities to limit the sale of liquor by shebeens to ten cases of beer.

Proceedings in the High Court

[13] The applicants launched proceedings in the High Court during April 2005. No answering affidavits were filed by the respondents and the application was enrolled for hearing on 12 October 2005. On the day of the hearing, the State Attorney on behalf of the respondents indicated to the applicants' attorneys that they did not oppose the application and consented to the relief sought. Accordingly, when the matter was called in court, the judge was informed that the parties were seeking an order by consent.

[14] The High Court accordingly made the following order:

> "By agreement between the parties, it is ordered as follows:
>
> 1. The last part of the definition of the word 'shebeen' from the words 'and is selling…' to 'beer bottles' in section 1 of the Gauteng Liquor Act, 2 of 2003, is severed.
> 2. That part of the definition referred to in paragraph 1 above is declared to be

unconstitutional and therefore of no force or effect.

3. That any condition in the shebeen permits issued by the First and/or Second Respondent or their delegate since 1 November 2004 restricting permit holders to selling not more than (or less than) 10 cases of 12 x 750ml beer bottles per week is declared to be ultra vires and invalid.

4. All conditions as referred to in paragraph 3 above in every shebeen permit issued by the First and/or Second Respondent or their delegate, are struck out.

5. The First and/or Second Respondents are directed to issue shebeen permits authorising the sale of liquor as defined in the Gauteng Liquor Act, and without any conditions relating to type and quantity of liquor to be sold.

6. The Third Respondent is directed to forthwith convey the contents of this Order in writing to the MEC of Safety and Security/Liaison, for the purpose of ensuring that the Order is communicated to all persons involved in enforcement of the Gauteng Liquor Act and the regulations thereunder.

7. The Third Respondent is directed to publish a copy of this Order in the Gauteng Provincial Gazette and in two different newspapers circulating in Gauteng, by or before 12 November 2005.

8. Notwithstanding the provisions of paragraphs 6 and 7 above, it is recorded for clarity that the operation of this Order (save for the declaration in paragraph 2 above which shall be suspended pending confirmation of invalidity by the Constitutional Court), will be with immediate effect from the date of the grant of this Order.

9. The costs of this application on the scale as between party and party as taxed, including the costs of two counsel, shall be paid by the Respondents jointly and severally, the one paying the others to be absolved.

10. The Registrar is directed within 15 days of the date of this Order to lodge with the Registrar of the Constitutional Court a copy of this Order in terms of Constitutional Court Rule 16(1)."

[15] No reasons were given by the High Court for its order as it was by consent. It is an undesirable practice for a court not to give reasons where an order is made declaring provisions of an Act of Parliament or provincial legislation to be inconsistent with the Constitution. There are two reasons for this: firstly, given the intense separation of powers concerns that arise whenever a court declares an act of a

democratic legislature to be inconsistent with the Constitution, the constitutional principle of accountability requires a court to give its reasons for its order, even where that order is unopposed. Secondly, a decision of that sort requires confirmation by this Court. In determining whether that order should be confirmed, the reasons of the court that made the original order are often of great assistance. Accordingly, once the applicants approached the Constitutional Court seeking confirmation of this order, this Court requested the High Court judge to furnish reasons for his decision, which he did. We are grateful for the assistance.

[16] The application for confirmation was lodged one day late (on 3 November 2005) and condonation was sought for the late filing. It is granted. On 9 November 2005, directions were given by the Chief Justice, enrolling the application for hearing on 2 March 2006, and calling upon the applicants to lodge written argument by 25 November 2005 and the respondents by 9 December 2005.

[17] The applicants duly lodged written argument, but no argument was received from the respondents. Accordingly on 24 January 2006, further directions were issued at the instance of the Chief Justice. In those directions, the third respondent, the MEC was "requested" to file an affidavit by 8 February 2006 addressing the following issues:

> "(i) the constitutionality of the definition of the word 'shebeen' in section 1 of the Gauteng Liquor Act 2 of 2003, in particular, whether such definition is rationally related to any legitimate government purpose; and

> (ii) the appropriate remedy to be made, in the event of the order of invalidity being confirmed by this Court".

The third respondent was also requested to file written argument by 15 February 2006.

[18] On 9 February 2006, the following letter was received from the State Attorney:

> "The above matter refers in particular your further directions dated 24 January 2006.
>
> It is our view that it is not necessary for us to file an affidavit as directed in your aforesaid letter. The matter was referred to the Constitutional Court subsequent to our consent that the relevant provisions be declared invalid. We will stand by that position and will abide by the decision of the above Honourable Court."

[19] Further directions were once again issued by the Court on 17 February 2006 calling on all parties to prepare to address argument to the Court at the hearing on the following issue:

> "Given that the State Attorney has given notice that the Third Respondent has decided not to file an affidavit or written argument as requested by the Chief Justice in directions issued on 24 January 2006, whether it is appropriate, in the circumstances of this case, for the Court to make an order compelling the third respondent to file an affidavit and lodge written argument on times and dates to be specified in the Court order."

No response to this was received from the respondents. On 1 March 2006, the attorney of record, Ms N Vacu of the State Attorney, was contacted by an official from the Registrar's office in this Court and requested to be present at the hearing on 2 March 2006.

[20] When the case was called on 2 March 2006, there was no appearance for the respondents. Nor was the State Attorney present. After hearing submissions from the applicants' counsel, the Court made the following order:

> "It is ordered that:
>
> 1. The Third Respondent lodge an answering affidavit and written argument in this matter setting out
>
> (b) on what grounds it is conceded that the terms of the definition of 'shebeen' contained in section 1 of the Gauteng Liquor Act 2 of 2003 is inconsistent with the Constitution and invalid; and
>
> (c) What the appropriate order should be, should the Court find that the definition is inconsistent with the Constitution as found by the High Court.
>
> 2. The Third Respondent's answering affidavit is to be filed on or before 24 March 2006.
>
> 3. The Applicants may lodge a replying affidavit to that affidavit on or before 5 April 2006.
>
> 4. The Third Respondent may file a further replying affidavit to the applicants' answering affidavit, if any, and must file written argument on that matter on or before 12 April 2006.
>
> 5. The Applicants may lodge supplementary written argument, if they consider it necessary to do so, on or before 19 April 2006.
>
> 6. The matter is enrolled for a further hearing on 3 May 2006.
>
> 7. (a) The costs of the hearing of 2 March 2006 are reserved;
>
> (b) The Third Respondent is called upon to show cause why the Court should not order it to pay costs on an attorney and client scale in respect of the wasted costs of the hearing on 2 March 2006; and
>
> (c) The Third Respondent's attorney is called upon to show cause why the Court should not order it to pay costs de bonis propriis in respect of the wasted costs of the hearing on 2 March 2006.
>
> 8. This order should be served by the Deputy Sheriff on the First to Third Respondents at their official addresses."

[21] Shortly after this order was made, a notice of withdrawal as attorneys of record was received from the State Attorney and new attorneys were placed on record for the MEC. Affidavits and argument were lodged by the MEC. An affidavit was also lodged by the State Attorney setting out the grounds upon which it was argued that costs de bonis propriis should not be awarded against the State Attorney (an order which would require the State Attorney to pay the costs itself). That issue, as well as the question of the MEC's liability for costs, is considered at the end of this judgment.

[22] In his affidavit, the MEC accepts that the definition of shebeen contained in the Liquor Act is vague and therefore in conflict with the provisions of the Constitution. However, he takes issue with the severance order made by the High Court and states that it is neither appropriate nor just and equitable. In support of this conclusion, the MEC points out that liquor is a harmful substance, the sale of which needs to be carefully regulated by government which is the primary purpose of the Act. He notes that the overall scheme of the Act makes it illegal for any person to sell liquor without a licence or permit issued under the Act.[4] Section 141(1)(m) is an exception to this overall scheme in that it permits the MEC to introduce a phased approach whereby shebeens will be given an opportunity to comply with the Act. This exception, the MEC argues, is a narrow one and should not be used to undermine the overall purpose of the Act. The MEC contends that the order made by the High Court severing the second part of the definition would render it impossible to regulate the amount of beer

[4] Section 127(a) of the Act provides as follows:

> "It is an offence for any person to —
> sell any liquor otherwise than under a licence or permit issued in terms of this Act or an exemption granted under section 123 or 124."

that is sold in an unlicensed shebeen or by other unlicensed retailers and would accordingly severely undermine the overall purpose of the Act.

[23] The MEC asserts that it would be appropriate for the court to remedy the unconstitutionality in the definition by reading in the words "per week" into the definition. He states that such an order would preserve the overall legislative scheme without undermining the legislative objective of introducing a period during which shebeen owners will be given an opportunity to comply with the Act. The MEC also makes clear that in his view the legislation does not allow shebeen permits to limit the quantity of other liquor that shebeen owners may sell and that, therefore, to the extent shebeen permits have been issued that purport to do so they are ultra vires and invalid.

[24] The MEC also disputes the fact that it is not possible to run a profitable shebeen operation only selling ten cases of beer per week. He points out that a shebeen owner who considers that he or she cannot make an adequate profit on this basis is always at liberty to apply for a liquor licence in terms of the Act. In this regard, he also states that the purpose of the phase-in period was not to permit large unlicensed retailers to continue to operate without obtaining liquor licences.

The constitutional challenge to the definition of "shebeen"

[25] The first issue that arises is whether the definition of shebeen is inconsistent with the Constitution. Three things are clear from the definition within the overall context of the Act: firstly, shebeens are otherwise unlicensed liquor outlets; secondly,

the Act intended to define shebeen by reference not only to the fact that shebeens are unlicensed liquor outlets but also by reference to the quantity of quarts of beer shebeens sell; and thirdly, the Act sought to empower the MEC to provide a phase-in period for shebeens as defined.

[26] The difficulty arises from the fact that the definition does not stipulate the period within which the prescribed quantity of beer must be sold: it could be defined by reference to a day, a week, a month or even a year. The absence of a stipulated period from the definition renders the definition vague. Furthermore, there is nothing in the rest of the Act which assists in any way in providing a meaning to the definition. Its meaning cannot therefore be ascertained with any precision. It is simply not clear which unlicensed liquor traders will fall within the definition and which without.

[27] As this Court has held, impermissibly vague laws and legal provisions violate the rule of law, a founding value of our Constitution.[5] In *Affordable Medicines Trust and Others v Minister of Health of the Republic of South Africa and Another*, Ngcobo J on behalf of a unanimous Court reasoned as follows:

[5] Section 1 of the Constitution provides as follows:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
> a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
> b) Non-racialism and non-sexism.
> c) Supremacy of the constitution and the rule of law.
> d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

> "The doctrine of vagueness is founded on the rule of law, which … is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly."[6] (footnotes omitted)

[28] The definition of "shebeen" in the Act is therefore impermissibly vague. It is accordingly inconsistent with the Constitution and must be declared invalid. Given this conclusion, it is not necessary to consider the alternative argument proffered by the applicants that the definition is irrational. I need not consider whether legislation that is indeed vague can ever as a matter of practicality be tested for rationality. While the reason for invalidity often has a significant impact on the remedy, a challenge on irrationality in this case, even were it successful, would not alter the discussion on remedy.

The appropriate remedy

[29] Having reached the conclusion that the definition is vague and therefore inconsistent with the Constitution, it is necessary to consider the appropriate remedy. The applicants and the MEC differed sharply as to the appropriate remedy. The applicants argued that the severance order made by the High Court was the

[6] 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 108. See also *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 246.

appropriate remedy, but the MEC disagreed and argued that the words "per week" should be read into the definition.

[30] The first question this Court must consider is whether the order made by the court that has been referred to us should be confirmed on its own terms or not. That order severed the words "and is selling less than ten (10) cases consisting of 12 x 750ml of beer bottles" from the definition. The result of that order is that a shebeen is defined simply as an unlicensed liquor operation whose main business is liquor. Is that order of severance appropriate?

[31] In early cases, this Court confirmed the approach of the pre-constitutional jurisprudence to severance while noting that at times constitutional adjudication may require different considerations to be taken into account. So, in *Coetzee v Government of the Republic of South Africa,* Kriegler J reasoned as follows:

> "Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and, second, if so, is what remains giving effect to the purpose of the legislative scheme?"[7]

[7] *Coetzee v Government of RSA; Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others* 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at para 16. This judgment cited *Johannesburg City Council v Chesterfield House (Pty) Ltd* 1952 (3) SA 809 (A) at 822 D – E and *S v Lasker* 1991 (1) SA 558 (C) at 566. See also *S v Coetzee and Others* 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC), which cites *Schachter v Canada* (1992) 93 DLR (4th) 1. *Schachter* states at 12f that a decision to sever "rests on an assumption that the legislature would have passed the constitutionally sound part of the scheme without the unsound part" and that severance should be "as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature." (At 14f).

[32] If we adopt this test for the purpose of this case, the words can be severed from the definition as proposed by the High Court to produce a definition that has an ascertainable meaning. The more difficult question is, however, whether that new definition will fit with the overall objectives of the statute. The effect of the new definition will be that any business primarily concerned with the sale of liquor and unlicensed, will fall within the terms of the definition and would in terms of the Regulation be entitled to operate unlicensed if it obtained a shebeen permit. The MEC argues that such a definition clashes with the clear overall purpose of the Act which is to regulate the sale of liquor which is perceived to be a harmful substance.

[33] The applicants respond that the provisions of section 141(1)(m) clearly contemplate an exception to the overall purpose of the Act with a subsidiary purpose of their own. That subsidiary purpose is to bring shebeens, which have previously been for all intents and purposes unregulated, within the regulatory scheme contemplated by the Act. They accordingly argue that the breadth of the post-severance definition does not offend the overall purpose of the Act when understood concomitantly with the subsidiary purpose of targeting shebeens.

[34] I cannot agree with the applicants. Although it is clear that the Act does contain a subsidiary purpose which seeks to bring shebeens within the overall framework of the Act, the broad definition proposed by the applicants, would reach far beyond shebeens to any unlicensed liquor trader. The potential harm to the wider community of such a broad definition is clear and directly in conflict with the stated

purposes of the Act. It seems to me therefore that the severance pursued in the High Court order and promoted by the applicants fails the test for a legitimate severance articulated by this Court. The definition, once severed, no longer serves the overall purposes of the Act. The order of the High Court cannot therefore be confirmed.

[35] The next question that arises is whether the reading in order proposed by the MEC is an appropriate remedy for the vagueness identified. In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, Ackermann J noted that there are two important considerations in fashioning a declaration of invalidity: the need to give appropriate and effective relief to the aggrieved litigant; and the principle of the separation of powers which requires a court to pay appropriate respect to the proper role of the legislative and executive arms of government.[8]

[36] In this case, the applicants are not complaining of a breach of one of their fundamental rights, but of an infringement of the rule of law, in that the legislation which affects them is impermissibly vague. Their constitutional complaint therefore can be addressed by any order which will render the provision ascertainable of meaning (as long as that meaning is not in conflict with the Constitution and the purposes of the Act).

[8] 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at paras 65 – 66.

[37] On the other hand, the need to pay respect to the separation of powers remains important. Ordinarily, one would achieve this by adopting an order of invalidity which impairs the legislative purpose as little as possible while removing the cause for constitutional complaint. In this regard, as Ackermann J pointed out in *National Coalition*, there is conceptually no difference between an order severing words from a legislative provision and an order reading words into that provision.[9] In the course of his comprehensive and helpful discussion of the issue, Ackermann J remarked as follows:

> "In deciding to read words into a statute, a Court should also bear in mind that it will not be appropriate to read words in, unless in so doing a Court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading in (as when severing) a Court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution."[10]

[38] The difficulty in this case is that it is not clear what the legislative scheme in respect of shebeens is. In particular, did the provincial legislature intend to cast the net for shebeens widely or narrowly? It is clear that some defining characteristic was intended, but whether the legislature intended only small shebeens to be included within the phase-in process, in which case a "per week" qualifying period might be suitable; or whether it intended to include all shebeens both small and large, in which case a "per day" qualifying period might be appropriate, is not clear from the statute. An appropriate remedy is therefore difficult to identify.

[9] Id at paras 67- 76.

[10] Id at para 75.

[39] The applicants sought to rely on the debates in the provincial legislature as published in Hansard to support their view that a wider net was being cast. Even were it permissible for this Court to look at those debates for this purpose,[11] something which I prefer not to consider, they are of no assistance in this regard. The MEC, on the other hand, asserted that in his view and in the view of the second respondent, the Gauteng Liquor Board, the net was intended to be narrower and hence their urging that we remedy the unconstitutionality by reading in the words "per week" to the definition.

[40] In my view, a court needs primarily to seek the legislative intention from the objective language of the statute. The preamble of the Act provides that the primary purpose of the Act is:

> "To provide for the control of the retail sale and supply of liquor within the Gauteng Province".

It does not mention the exemption for shebeens. There is no other provision in the Act, save for the definition and section 141(1)(m), already cited, that sheds any further light on the matter. In the absence of a clear legislative purpose, therefore, it appears to me that it is impossible for this Court to determine what tailored order of invalidity would best serve the purpose of the legislation. In the circumstances, it is my view

[11] See *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 18 – 19.

that a court should not seek to tailor its order of invalidity, but rather declare the definition to be invalid.

[41] The next question that arises is whether the order of invalidity should have immediate effect or whether the Court should suspend the order of invalidity and put the legislature on terms to remedy the invalidity within a certain period. It is clear, in this case, that if the Court makes an order suspending the declaration of invalidity, it will have to make a further order to regulate affairs in the meantime given that the definition as it is currently formulated bears no comprehensible meaning. It could not be consistent with our Constitution to leave in force a statutory provision that is meaningless. Such a remedy would be inconsistent with the rule of law and therefore could never be a just and equitable remedy within the meaning of section 172(1) of the Constitution.[12] On the other hand, a simple order of invalidity of the definition would leave open the question of whether the procedure established in Regulations promulgated by the MEC could be pursued. The Act would contain no definition of "shebeen" and there might be significant uncertainty as to who, if anyone, would qualify for permits under Regulation 21.

[12] Section 172(1) of the Constitution reads as follows:

> "Powers of courts in constitutional matters. – (1) When deciding a constitutional matter within its power, a court –
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (b) may make any order that is just and equitable, including –
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[42] Counsel for the MEC urged that if the Court were to make an order of invalidity, that such order be suspended for a period of three months so that the Gauteng Legislature could remedy the defect. He stated that three months would be an adequate period for remedial legislation to be enacted. Mr Budlender also argued that the appropriate interim relief would be for the court to order that pending the amendment of the definition, the definition be read as if the words "per week" were included in the definition and all permits issued be subject to the same qualification.

[43] The applicants argued that the appropriate relief in such circumstances would be for the words "per day" to be read into the definition. In support of their argument, they pointed to the evidence on the record which shows that in the case of the 30 issued permits for shebeen owners annexed to the papers, all those shebeens sell more than ten cases of beer per week. It is not clear that these shebeens constitute a representative sample of all shebeens but they constitute a group of shebeens whose owners have applied for permits in terms of Regulation 21. The MEC did not produce any evidence to contradict the allegations made by the deponents for the applicants to suggest that most shebeens sell considerably more beer than ten cases per week. The evidence presented by the applicants based on the affidavits of 30 shebeen owners who have applied for and received shebeen permits is that on average they sell just over 60 cases per week.

[44] Where a court seeks to regulate an interim period, it must do so in a manner that is just and equitable. Given that the MEC produced no evidence to suggest that limiting shebeen owners who have received permits to sell only ten cases of beer per week is an appropriate order in the light of the current state of the industry, it is my view that a middle route should be adopted. That involves an evaluation in the light of what is unfortunately only scanty evidence. Although a court is ordinarily reluctant to make an evaluation in such circumstances, we are satisfied in this case that the alternatives available to us are even less palatable.[13] Those alternatives would be either to strike the definition down immediately and leave the shebeen industry without any effective regulation pending new legislation by the Gauteng legislature; or to adopt the interim arrangement proposed by the MEC which in the light of the possibly incomplete evidence before us would effectively exclude many shebeen owners, including all those on the papers before us, who have sought to comply with the terms of the Act.

[45] In my view, in the light of these considerations, the just and equitable relief in the interim would be that the definition of shebeen should be read as follows:

> "'shebeen' means any unlicensed operation whose main business is liquor and is selling less than sixty (60) cases consisting of 12 x 750ml of beer bottles per week."

[13] See *Dawood and Another v Minister of Home Affairs; Shalabi and Another v Minister of Home Affairs; Thomas and Another v Minister of Home Affairs* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 64 which states that:

> "Where … a range of possibilities exists and the Court is able to afford appropriate interim relief to affected persons, it will ordinarily be appropriate to leave the Legislature to determine in the first instance how the unconstitutionality should be cured. This Court should be slow to make those choices which are primarily choices suitable for the Legislature."

Given that the terms of the shebeen permits are inextricably linked with the order of constitutional invalidity and the conditions on which that order is suspended, it is just and equitable for the court to make an order regulating those permits in the meantime.[14] All permits issued in terms of Regulation 21 shall be read to contain a limit on the amount of beer sold of 60 cases per week of quarts, but no limitation on other liquor sold. I emphasise that if the Gauteng Legislature is dissatisfied with this interim arrangement, the solution lies in its hands. It may amend the definition of "shebeen" as soon as it wishes to implement the legislative purpose it seeks.[15] The period of suspension during which this interim arrangement will operate will be six months. Although counsel for the MEC suggested that three months would be enough time to amend the legislation, we are anxious that a reasonable period be given to the Legislature. It may be that the Legislature will consider it necessary to hold hearings on the question of the manner in which shebeens are regulated and we consider it just and equitable to give a longer period than requested by the MEC.

Costs

[46] I turn now to consider the question of costs. I consider first the question of the costs of litigation in this Court, excluding the wasted costs of the hearing on 2 March 2006. The applicants have successfully pursued constitutional relief in this Court and there is no reason why they should not be awarded their costs.

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[14] See *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC) at para 35.

[15] See the remarks by Ackermann J in the *National Coalition* case, cited above n 8 at para 76.

[47] The question arises, however, as to the scale on which such a costs order should be made. The applicants point to the dilatory and unhelpful manner in which the MEC and his officials conducted the litigation both in the High Court and in this Court until after the Court made its order on 2 March 2006. Although there can be no doubt that some of the fault for that conduct is to be laid at the door of the third respondent's attorneys, as I shall set out below, in my view the MEC bears responsibility for that conduct as well. His legal advisers were in possession of many of the documents and failed to take appropriate steps to ensure that the litigation proceeded smoothly and properly. The MEC must be responsible for the conduct of his legal advisers.

[48] A court will ordinarily show its displeasure at the manner in which a litigant has conducted himself during litigation by an award of costs on the attorney and client scale. As Tindall JA remarked:

> "The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation."[16]

[16] *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 AD 597 at 607.

[49] The MEC, as an organ of state, bears a special obligation to ensure that the work of courts is not impeded.[17] Moreover in this case the applicants have been seeking relief in respect of a provision in a statute which is clearly vague on its own terms and therefore inconsistent with the Constitution. Their attempts have been bedevilled by the manner in which the litigation has been approached by the MEC and, in particular, his legal representatives including his own departmental legal advisers as well as the State Attorney. In all these circumstances, this is an appropriate matter for costs to be awarded against the MEC on the attorney and client scale.

The conduct of the State Attorney

[50] The final issue to be considered relates to the wasted costs of the hearing on 2 March 2006. It will be recalled that on that date there was no timeous appearance by the State Attorney on behalf of the MEC despite the State Attorney's having been asked to be present by an official from the Registrar's office of this Court. Moreover, the State Attorney failed to inform its client of a specific request from this Court to the MEC (in directions issued by this Court on 24 January 2006) to lodge affidavits in this matter. The affidavit lodged on behalf of the individual attorney handling the matter indicates that she did not read the communication from the Court but merely filed it, considering it to be an "update".

[17] Section 165(4) of the Constitution provides that:

> "Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."

[51] It is clear from both the affidavit and the argument tendered on behalf of the State Attorney in this Court that the attorney concerned was recently qualified and inexperienced in constitutional litigation. It does not appear from her affidavit that she sought a supervisor's advice. Nor was there any affidavit lodged by her superiors indicating what system exists in the State Attorney's office for the supervision of junior members of staff in important litigation such as this.

[52] The result is both unfortunate and serious. It is unfortunate because the effect in this case was to give the impression that the MEC, a senior member of the executive in provincial government, was not interested in assisting this Court in resolving important constitutional litigation. That impression has now been rectified. It is serious because as a matter of common practice it is the State Attorney who is briefed by the government when it is involved in litigation. Given the government's responsibility to assist the work of courts, a lapse of this sort in the State Attorney's office gives cause for grave concern.

[53] In my view, such a lapse called for an explanation to be tendered by a senior attorney in the office of the State Attorney. It was not appropriate that the only explanation forthcoming from the State Attorney's office should have been from a young, inexperienced attorney alone. In so observing, it needs to be said however that the explanation that the young attorney gave for not responding to correspondence from this Court reflected a lamentable want of professional responsibility on her part.

It also reflects on her superiors who have evidently left her inadequately supervised and trained.

[54] An order of costs de bonis propriis is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure.[18] An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy. Filing correspondence from the Constitutional Court without first reading it constitutes negligence of a severe degree. Nothing more need be added to the sorry tale already related to establish that this is an appropriate case for an order of costs de bonis propriis on the scale as between attorney and client. The order is made against the office of the State Attorney, not personally against the attorney concerned. This Court's displeasure is primarily directed against the office of the State Attorney in Pretoria whose systems of training and supervision appear to be woefully inadequate.

Order

[55] The following order is made:

1. The application for condonation for the late filing of the application for confirmation is granted.

[18] See *Immelman v Loubser en 'n Ander* 1974 (3) SA 816 (A) at 824 – 825; *Machumela v Santam Insurance Co Ltd* 1977 (1) SA 660 (A) at 663 – 664; *Waar v Louw* 1977 (3) SA 297 (O) at 304 G – H.

2. The order of constitutional invalidity made by the Pretoria High Court on 12 October 2005 is confirmed in the following terms:

(a) Paragraphs 1 – 9 of the High Court order are set aside.

(b) The definition of the word "shebeen" appearing in section 1 of the Gauteng Liquor Act, 2 of 2003 is declared to be inconsistent with the Constitution and invalid.

(c) The order made in paragraph (b) is suspended for a period of six months from the date of this order.

(d) During the period of suspension, the definition of "shebeen" contained in the Gauteng Liquor Act, 2 of 2003 is to be read as follows:

> "'shebeen' means any unlicensed operation whose main business is liquor and is selling less than sixty (60) cases consisting of 12 x 750ml of beer bottles per week."

(e) Any condition in any shebeen permit issued by the First and/or Second Respondent or their delegate in terms of Regulation 21 of the Gauteng Liquor Regulations 3/2004 promulgated on 1 November 2004 restricting the type of liquor that permit-holders may sell is declared to be ultra vires and invalid.

(f) Any condition limiting the sale of cases of 750ml bottles of beer to only ten (10) cases per week in any shebeen permit issued by the First and/or Second Respondent or their delegate is declared to be ultra vires and invalid.

(g) During the period of the suspension of the order of invalidity referred to in paragraphs (b) and (c) above, shebeen permits issued by the First and/or Second Respondent or their delegate are subject to a provision that permit-holders may sell a maximum of sixty (60) cases of 750ml beer per week.

(h) Any permit issued in terms of Regulation 21 after the date of this order but during the period of suspension referred to in paragraph (c) above shall comply with the provisions of this order.

(i) The Third Respondent is directed forthwith to convey the contents of this Order in writing to the MEC for Safety and Security/Liaison for Gauteng for the purpose of ensuring that the terms of this Order are communicated to all persons involved in the enforcement of the Gauteng Liquor Act 2003 and regulations promulgated thereunder.

3. The State Attorney is ordered to pay the applicants' wasted costs of the hearing on 2 March 2006 on the scale as between attorney and client.

4. The Third Respondent is ordered to pay the applicants' costs in the Constitutional Court and the High Court other than the wasted costs of the 2 March 2006 on the scale as between attorney and client.

Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, Ngcobo J, Nkabinde J, Sachs J, Skweyiya J, Van der Westhuizen J, and Yacoob J concur in the judgment of O'Regan J.

For the Applicants:	A Rafik Bhana instructed by Sonnenberg Hoffmann Galombik
For the Third Respondent:	S Budlender instructed by Mogotsi & Partners
For the Respondent's Attorney	KD Moroka SC and SM Lebala instructed by the State Attorney, Pretoria