THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 78/2016

In the matter between:

SHOPRITE CHECKERS (PTY) LTD **APPELLANT**

and

MEMBER OF THE EXECUTIVE COUNCIL FOR ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS: KWAZULU-NATAL **FIRST RESPONDENT**

THE PREMIER: KWAZULU-NATAL PROVINCIAL GOVERNMENT **SECOND RESPONDENT**

KWAZULU-NATAL LIQUOR AUTHORITY **THIRD RESPONDENT**

Neutral Citation: *Shoprite v MEC for Economic Development and Environmental Affairs, KwaZulu-Natal* (78/2016) [2016] ZASCA 193 (2 December 2016).

Coram: Maya AP, Petse, Swain and Zondi JJA and Schippers AJA

Heard: 4 November 2016

Delivered: 2 December 2016

Summary: Statutes: KwaZulu-Natal Liquor Licencing Act 6 of 2010: liquor licences granted under repealed national Liquor Act 27 of 1989: KwaZulu-Natal Liquor Licencing Act 6 of 2010 providing for conversion of pre-existing licences granted under 1989 Liquor Act and valid before its commencement: proximity of licenced premises to religious or learning institutions: s 101(1) read with s 48(5)*(e)* not imposing an absolute prohibition to valid pre-existing liquor licences relating to liquor premises located within a circumference of 500 metres of a religious or learning institution as defined: holder of such licence entitled to a licence certificate under s 101(1), (2) and (3) of the KwaZulu-Natal Liquor Licencing Act: such licence

certificate regarded as a licence contemplated in s 39*(b)*(i) or (ii) of the KwaZulu-Natal Liquor Act.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Chetty J sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.
2 The order of the court a quo is set aside and substituted with the following:
'1 It is declared that the KwaZulu-Natal Liquor Licensing Act 6 of 2010 (the KZN Act) does not *per se* prohibit or render unlawful the sale or continued sale of liquor for consumption off the licensed premises by a person (the licensee) in circumstances where:
1.1 such premises are situated within a circumference of 500 metres from a learning institution and/or a religious institution as defined in s 1 of the KZN Act; and
1.2 if such a licensee was the holder of a liquor licence granted pursuant to the provisions of the national Liquor Act 27 of 1989 which was in force immediately before the commencement of the KZN Act, and which licence is regarded from the said date of commencement, by virtue of s 101(1)*(a)* of the KZN Act, as a licence for the retail sale of liquor referred to in s 39*(b)*(i) or (ii) of the KZN Act, and which has not otherwise been validly cancelled or terminated.
2 Regulation 47 of the KwaZulu-Natal Liquor Licensing Regulations, 2014 (PN 45 published in *PG 1081* of 13 February 2014) is reviewed and set aside.
3 The applicant's failure to launch its review application within 180 days as provided for in s 6 of the Promotion of Administrative Justice Act 3 of 2000 is condoned.
4 The costs of the application shall be borne by the respondents jointly and severally, the one paying the other to be absolved, including the costs of two counsel where so employed.'

JUDGMENT

Petse JA (Maya AP, Swain and Zondi JJA and Schippers AJA concurring):

[1] This is an appeal against a judgment of Chetty J in the KwaZulu-Natal Division of the High Court, Pietermaritzburg. The appellant, Shoprite Checkers (Pty) Ltd, which is a well-known supermarket chain with a national footprint, applied for an order declaring:

'1. That the KwaZulu-Natal Liquor Licensing Act 6 of 2010 ("the KZN Act") does not *per se* prohibit and/or render unlawful the sale or continued sale of liquor for consumption off the licensed premises (being either a liquor store or a grocers' store) by a person in circumstances where:

1.1. such premises are situated within a circumference of 500 metres from a learning institution and/or a religious institution as defined in s 1 of the KZN Act; and

1.2. the said person was the holder of a liquor licence granted pursuant to the provisions of the national Liquor Act 27 of 1989 which licence was in force immediately before the commencement of the KZN Act, and which licence is regarded from the said date of commencement, by virtue of s l0l(l)*(a)* of the KZN Act, as a licence for the retail sale of liquor referred to in s 39*(b)*(i) and/or (ii) of the KZN Act, and which licence has not otherwise been validly cancelled or terminated;

2. Reviewing and setting aside regulation 47 of the KwaZulu-Natal Liquor Licensing Regulations, 2014 (PN 45 published in *PG 1081* of 13 February 2014) ("the Regulations");

3. Extension of the period of 180 days for the launching of this application, as envisaged in s 9 of the Promotion of Administrative Justice Act 3 of 2000, to the extent that it may be necessary;

4. In the alternative to paragraph 2 above, declaring that regulation 47 of the Regulations is inconsistent with the Constitution and invalid;

5. Directing the first and second respondents to pay the costs of this application jointly and severally, alternatively (should the third respondent oppose this application) directing the respondents to pay the costs of this application jointly and severally;

6. Granting the applicant such further and/or alternative relief as this Court may deem fit.'

[2] In the court a quo, the respondents resisted the application as they still do in this court. They, in essence, contended that granting the relief sought by the appellant would result in a two-tier system of licences. And this would allow licensees under the national Liquor Act 27 of 1989 (1989 Liquor Act), such as the appellant, to enjoy preferential treatment above persons granted licences under the KwaZulu-Natal Liquor Licencing Act 6 of 2010 (the KwaZulu-Natal Liquor Act) which, inter alia, prohibits the granting of licences to persons where the proposed liquor premises are within a circumference of 500 metres from a religious or learning institution. Such a situation the first respondent, the Member of the Executive Council for Economic Affairs, Tourism and Environmental Affairs, Province of KwaZulu-Natal (the MEC) asserted, would be inequitable.

[3] In opposing the application, the respondents filed a comprehensive affidavit deposed to by the erstwhile MEC. To the extent relevant for the present purposes the MEC stated:

'18. Under s 38 of the KZN Act no person may sell liquor *"unless that person is licenced in terms of this Act".* Chapter 6 sets out the licensing procedure and s 48 deals with some of the matters to be considered by the Authority when dealing with licence applications.

19. Relevant to this matter is the distance of licenced premises from religious or learning institutions: The Authority must:-

19.1. satisfy itself that the proposed premises are not within a 500-metre *circumference* of a religious or learning institution; and

19.2. consider the harm or prejudice that the licence will have on schools and religious institutions within a *radius* of 500 metres of the licenced premises.

(I refer to sections 48(5)*(a)*; 48(5)*(e)* and (6)*(a)* of the KZN Act.)

20. The effect of the term radius in s 48(5)*(e)* is that licenced premises may not be located within 79,6 metres of any religious or learning institution. (The distance of 79,6 metres may be rounded up to 80 metres for the sake of convenience.)

21. I submit that s 48(5)*(e)* constitutes an outright disqualification.

22. The 1989 Liquor Act had dealt with the social issues in a different manner: On the one hand it was less prescriptive when dealing with premises situated in the vicinity of a place of worship or school or in a residential area. (I refer to s 22(2)*(d)*(i)*(cc)* of the 1989 Liquor Act.) However, on the other hand it was more restrictive with regard to trading times and days.'

[4] The MEC went on to assert that there were compelling social reasons which moved the provincial government to adopt, inter alia, the policy relating to the minimum distance of licenced premises from religious and learning institutions. And that the provincial government was gravely concerned at the social ill-effects of liquor being sold from premises in close proximity to religious and learning institutions. The social ill-effects of sale of liquor from premises in close proximity to religious and learning institutions were explained in the MEC's answering affidavit, inter alia, as follows:

'23. Sections 48(5) and (6) of the KZN Act reflect the specific policy decision taken by the Provincial Government. Among these is the prohibition on locating licenced premises 80 metres from a religious or learning institution. I am advised that it is not necessary for me to deal with the reasons for this in great detail as sections 48(5) and (6) of the KZN Act are not being challenged. However, I can assure this honourable court there are compelling social reasons for the provincial government adopting this policy with regard to the distance of licenced premises from religious or learning institutions. The Provincial Government is extremely concerned at the social effects of liquor being sold from premises located within a distance of 80 metres of *any* religious or learning institution. Learners are immature and unable to make the moral or value judgments that must be made. They are at an age where they are engaging in social experimentation. Research has shown a significant link between the availability of alcohol to learners and absenteeism and repeating an academic year.

24. The social situation is exacerbated at poorer schools, where learners often do not get the support and guidance they should, and where their schools do not have the supporting sporting and cultural facilities. In such cases learners are often tempted to move away from school premises (during or after school), and to buy alcohol. They are of an age where it cannot easily be identified that they are minors, and in certain cases they may even have reached the age of majority.

25. Similarly those engaging in religious practices are entitled to be kept some distance from a point of sale.

26. The negative effects of alcohol are well documented and the Provincial Government has adopted the provisions of s 48 as but some small steps to mitigate those effects.

27. The policies were incorporated into the KZN Act after extensive public participation processes, and after consideration of extensive comments from a number of parties, including liquor manufacturers, municipalities, wholesalers and retailers, traders' associations, the gaming industry, community organisations, licensees and those providing licensing services.

28. MEC Mchunu, my colleague responsible for Transport, Community Safety and Liaison, has drawn to my attention that there are 673 liquor outlets next to places of worship, and 930 outlets next to schools in KwaZulu-Natal. This situation is particularly notable in urban areas. For example, in the eThekwini Metro there are 222 outlets next to places of worship, and 251 outlets next to schools.'

[5] In relation to the KwaZulu-Natal Liquor Act, the MEC stated the following:

'33. I am advised that it is a common approach when repealing a law to provide for the transition from the prior legal order to the new legal order, and to do so in a manner that does not unduly affect the rights of any person when the prior legislation ceases to be of force and effect, unless there is a specific and contrary intention.

34. It is for this reason that the Provincial Government provided for the conversion process set out in section 101 of the KZN Act. Section 101 provides as follows:-

34.1 A licence in force immediately before the date of commencement of the KZN Act is regarded as a licence in the category set out in the second schedule of Schedule 2 of the KZN Act [s 101(1)];

34.2 The holders of old order licences are entitled to receive new form licences without having to apply therefor [s 101(2)];

34.3 The conversion process takes place administratively upon payment of the prescribed annual fee [s 101(3)*(a)*];

34.4 Old order licensees have three years to convert their licences [s 101(3)*(b)*].

35. The licences held by the [appellant] would therefore convert into liquor store and grocers' licences contemplated under s 39*(b)*(i) and (ii) of the KZN Act. This means that the [appellant] has benefited from the more permissive trading days and hours set out in Schedule 3.

36. The conversion process in s 101 is subject to certain provisos, including the proviso in s 101(1)*(a)*(iii) of the KZN Act, that in the event that the terms and

conditions of the license are inconsistent with the provisions of the KZN Act then the provisions of the KZN Act are applicable.

37. I respectfully submit that the effect of the proviso is that any conditions in the [appellant] licences that permit it to trade less than 80 metres from a religious or learning institution are inconsistent with the provisions of the KZN Act, and the prohibitions in the KZN Act must apply.'

[6] In relation to the amnesty provisions of regulation 47(1), the MEC stated that the KwaZulu-Natal Liquor Act proscribed some of the things that were lawful under the 1989 Liquor Act, such as licenced premises being located within a circumference of 500 metres from a religious or learning institution. Because 12 of the appellant's liquor outlets are located within the prohibited distance from religious and learning institutions this meant that the Liquor Authority established under the KwaZulu-Natal Liquor Act would be compelled and justified to cancel or suspend licences in relation to such premises. But regulation 47(1) afforded pre-existing licences hit by this prohibition a mechanism to apply for a removal of the affected licences to other premises located outside the prohibited distance whilst at the same time allowing the licensee to continue to operate without interruption, albeit for a period not exceeding three years.

[7] The court a quo upheld the respondents' contentions and, in consequence, dismissed the application with costs. It subsequently granted the appellant leave to appeal to this court.

[8] The facts in this case are substantially common cause. It is only in relation to the interpretation of the relevant statutory prescripts which apply to those facts that the parties are in sharp disagreement. And they are the following.

[9] The appellant is licenced to sell liquor in its grocery stores and liquor outlets throughout the country for consumption off its licenced premises. It is the holder of 110 licences operative in the province of KwaZulu-Natal, as contemplated in s 39*(b)* of the KwaZulu-Natal Liquor Act. The majority of those licences were granted under the 1989 Liquor Act. Twelve of these licences relate to premises which are situated

within approximately 80 metres of religious and learning institutions. They were all granted under the 1989 Liquor Act, substantial parts of which were repealed on 28 February 2014 in terms of s 100 of the KwaZulu-Natal Liquor Act, read with schedule 1 thereof.

[10] On 1 August 2012 certain of the sections of the KwaZulu-Natal Liquor Act came into operation. Some of its provisions were materially different from those of the 1989 Liquor Act. As contemplated in s 101(1) read with s 101(2) of the KwaZulu-Natal Liquor Act – which will be dealt with in more detail later – the appellant applied to the Liquor Authority – established under the KwaZulu-Natal Liquor Act to grant liquor licences – for licence certificates in respect of its pre-existing liquor licences. It also paid the prescribed fees. Briefly, s 101(1) provides that a licence granted under the 1989 Liquor Act and in force immediately before the commencement of the KwaZulu-Natal Liquor Act is regarded as a licence in its relevant category from the date of commencement of the KwaZulu-Natal Liquor Act subject to certain conditions. Essentially s 101 provides for conversion, subject to certain requirements, of old-order licences granted under the 1989 Liquor Act.

[11] The appellant applied for its pre-existing liquor licences to be converted to licences as contemplated in s 39 of the KwaZulu-Natal Liquor Act. But the Liquor Authority declined to issue the requested licence certificates. It adopted the position that it was precluded from doing so because the terms and conditions of the appellant's pre-existing liquor licences that permit it to operate its liquor outlets within a circumference of 500 metres of religious and learning institutions are hit by the prohibition in s 48(5)*(e)* read with s 101(1)*(a)*(ii) and (iii) of the KwaZulu-Natal Liquor Act.

[12] The Liquor Authority also took the view that the appellant ought instead to apply for temporary amnesty under regulation 47(1) – promulgated in terms of s 99*(q)* of the KwaZulu-Natal Liquor Act – for the removal of the affected licences to premises which are not located within a circumference of 500 metres of a religious and learning institution. The appellant asserted that the MEC was not empowered to render unlawful, by way of a regulation, that which the KwaZulu-Natal Liquor Act had not declared unlawful. Nor was the MEC empowered to compel it to apply for

temporary amnesty when it had not contravened any law or to oblige it to apply for the removal of its licences from the licenced premises when its operations on such licenced premises are not unlawful.

[13] These entrenched divergent positions taken by the parties prompted the appellant to apply for a declaratory order in the court a quo in the terms mentioned in para 1 above.

[14] The court a quo rightly stated that s 101(1)*(a)*(iii) read with s 48(5)*(e)* of the KwaZulu-Natal Liquor Act was central to the determination of the dispute between the parties. It also noted that the appellant had contended 'that the prohibition [in s 48(5)*(e)*] is only applicable to those [persons] applying for new licences and not to those who are pre-existing holders of licences issued under the 1989 Act'.

[15] In reaching its conclusion, the court a quo reasoned as follows (paras 50-51):
'On a proper reading of the [KwaZulu-Natal Liquor Act], I am of the view that s 48(5)*(e)* applies as an absolute prohibition against all retail liquor licence holders, inclusive of new applicants and those who acquired licences under the 1989 [Liquor] Act. The new provisions in the [KwaZulu-Natal Liquor Act] allow the liquor authority to regulate the retail industry from an even playing-field, without one category of holders able to ply their trade in the proximity of learners, despite the state's efforts to create an enabling environment for future generations to achieve the aspirational values in our Constitution of improving the quality of life for all citizens and to free the potential of each person.

In light of the above, I find that s 101 read with s 48(5)*(e)* *per se* prohibits and renders it unlawful for a person to sell or continue to sell liquor for consumption off licenced premises (being either a liquor or a grocers' store) where such premises are within a circumference of 500m from a learning institution and/or a religious institution, and that the prohibition applies equally to new applicants for licences as well as to persons granted licences under the 1989 [Liquor] Act.'
Having come to this conclusion, the court a quo deemed it unnecessary to make a definitive determination in relation to the constitutional challenge to regulation 47(1).

[16] An analysis of the relevant statutory framework is now apposite. I propose to commence with s 22 of the 1989 Liquor Act which still applies to applications pending on the date of commencement of the KwaZulu-Natal Liquor Act. It deals with

consideration of applications for licences. It provides that the Liquor Board shall not grant an application for a liquor licence in certain defined circumstances. Of particular relevance is s 22(2)*(d)*(ii)*(cc)* which states that if the premises are situated in the vicinity of a place of worship or school or in a residential area, the Liquor Board shall not grant an application for a licence unless 'the business will be carried on in a manner that would not disturb the proceedings in that place of worship or school or otherwise prejudice the residents of that residential area'.

The KwaZulu-Natal Liquor Act

[17] The KwaZulu-Natal Liquor Act sets out in s 2 as one of its objects the following:

'(*a*) to provide for the regulation of the micro-manufacturing and the retail sale of liquor and methylated spirits;

(*b*) to provide for mechanisms aimed at reducing the socio-economic and other effects of alcohol abuse;

(*c*) to provide for public participation in the consideration of applications for registration; and

(*d*) to promote the development of a responsible and sustainable retail and micro-manufacturing liquor industry in a manner that facilitates—

(i) the entry of new participants into the industry;

(ii) diversity of ownership in the industry; and

(iii) an ethos of social responsibility in the industry.'

[18] Section 38, in turn, provides that no person may sell liquor for retail or micro-manufacture liquor unless that person is licenced in terms of the Act. A contravention of this section constitutes an offence.

[19] It bears mentioning that applications for licences under this Act are set out in Chapter 6. Section 41 deals in detail with the procedure for licence applications. Section 41(2) in particular provides that an application for a liquor licence must, inter alia, be accompanied by the physical address of the premises where the business will be conducted or a description of the location of the premises in terms of identifiable landmarks.

[20] Section 48(4)*(a)* is of importance and provides that the Liquor Authority may, in granting the application, impose such terms and conditions as it may deem fit, and such trading days and trading hours as it may determine. Of crucial importance for the present purposes is s 48(5)*(e)* which provides that before granting an application, the Liquor Authority must, in addition to the requirements set out in subsections *(a)* to *(d)* and *(f)*, satisfy itself that:

'The proposed premise is not located within a circumference of 500 metres of any religious or learning institutions.'

[21] Section 101, which deals with 'conversion of licences, approvals, notices and determinations', was also considered in detail by the court a quo. Its provisions read:

'(1) Notwithstanding the provisions of section 39, and in accordance with the transitional provisions of the Liquor Act [which is defined in s 1 as meaning the Liquor Act 59 of 2003] –

(*a*) every licence or approval set out in the first column of Schedule 2 and in force immediately before the date of commencement of this Act, is from the commencement date of this Act regarded as a licence in the category set out in the second column of Schedule 2: Provided that—

(i) the terms and conditions and trading days and trading hours applicable to such licence, immediately prior to this Act coming into effect, continue in force until the date upon which such licence is required to be renewed in terms of the Liquor Act, 1989 (Act No. 27 of 1989);

(ii) the said terms and conditions and trading days and trading hours are not inconsistent with the provisions of this Act; and

(iii) in the event that the said terms and conditions or trading days and trading hours are inconsistent with the provisions of this Act, then the provisions of this Act are applicable;

(*b*) a notice issued in terms of section 33 of the Liquor Act, 1989 (Act No. 27 of 1989), and in force immediately before the date of commencement of this Act, is regarded as conditions set out in writing in terms of sections 49 and 58 of this Act; and

(*c*) any determination made in terms of section 51 of the Liquor Act, 1989 (Act No. 27 of 1989), and in force immediately before the date of commencement of this Act, is regarded as a consent granted in terms of section 72 (1) of this Act.

(2)(*a*) The holders of the licences, approvals, notices and determinations referred to in subsection (1) are entitled to a licence certificate or permit in terms of section 62 of this Act for the relevant category of licence as contemplated in section 39, without having to comply with the application procedure for such a licence or permit contemplated in Chapter 6.

(*b*) All existing terms and conditions and trading hours applicable to such licences, approvals, notices and determinations must be endorsed on the licence certificate in accordance with subsection (1).

(3)(*a*) The holders of the licences, approvals, notices and determinations referred to in subsection (1) must receive such licence certificate or permit upon presentation to the Liquor Authority of proof of their licences, approvals, notices and determinations referred to in subsection (1) and the terms and conditions and trading hours to which such licences, approvals, notices and determinations are subject, and upon payment of the annual fee prescribed in terms of section 64.

(*b*) The holders of the licences, approvals, notices and determinations referred to in subsection (1) must obtain their licence certificates or permits under this Act within three years of the commencement of this Act.

(4) In the event that a holder does not convert the licences, approvals, notices and determinations within the prescribed period referred to in subsection (3) (*b*), such licences, approvals, notices and determinations become invalid, as provided for in the transitional provisions of the Liquor Act [59 of 2003].'

[22] Section 102(2) which, in turn, deals with the transitional arrangements and validation of pre-existing licences also bears mention. It provides that:

'(2) Notwithstanding anything to the contrary contained in this Act, on the date on which this Act comes into operation, any lawful act, determination, designation, decision, matter or any other thing done, made, taken, executed or carried out or purported to have been done, made, taken, executed or carried out by the Liquor Board or a member of staff of the Liquor Board, including a member of the Liquor Board or the Chief Executive Officer of the Liquor Board, or the responsible Member of the Executive Council, in pursuance of the Liquor Act,

is regarded to have been done, made, taken, executed or carried out or issued under this Act.'

[23] Section 99 empowers the MEC to make regulations for a variety of matters. Of importance in this case is s 99*(q)* which provides that the MEC must make regulations regarding 'the manner and form in which an application for temporary amnesty must be made'. Pursuant to this power, the MEC promulgated the regulations, published in Provincial Notice 45 in the Provincial Gazette 1081 of 13 February 2014.

[24] It is regulation 47(1) which is of relevance in this case. It provides that the Liquor Authority may grant temporary amnesty only to pre-existing and valid licence holders licenced in terms of the 1989 Liquor Act in respect of two categories of licenced premises one of which is 'licenced premises situated within an area with a 500 metre circumference from religious and learning institutions'. The second category is in relation to convenience stores franchised to a service station selling petrol, diesel or other petroleum products to the public.

[25] The court a quo was cognisant of the fact that the resolution of the divergent contentions advanced by the parties lay in the proper interpretation of the key provisions of the KwaZulu-Natal Liquor Act and regulation 47(1) set out above (paras 19-24) in accordance with the well-established canons of construction of documents, be it a statute or contract.[1] It is to that exercise that I now turn.

Interpretation of the provisions

[26] A useful point of departure is the Constitution.[2] Section 39(2) of the Constitution enjoins the courts to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation. (See *Investigating Directorate: Serious Economic Offenses v Hyundai Motor Distributors (Pty) Ltd & others*; *In re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others* 2001 (1) SA 545 (CC) paras 21-22.) The appellant's right which is implicated in this case is the right to, inter alia,

[1] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.
[2] Constitution of the Republic of South Africa Act 108 of 1996.

freely choose trade, namely to freely engage in an economic activity of its choice as contained in s 22 of the Constitution. However, this right may be regulated by law. And, as this court made plain in *Endumeni*,[3] the 'inevitable point of departure is the language of the provision itself' which must be read in context and having regard to the purpose of the provisions and the background to the preparation and production of the document.

[27] In this court, counsel for the respondents strongly relied, as he did in the court a quo, on the provisions of s 101(1) read with s 48(5)*(e)* of the KwaZulu-Natal Liquor Act. He submitted that liquor licences granted under the 1989 Liquor Act did not, with the commencement of the KwaZulu-Natal Liquor Act, continue as deemed licences under the latter Act. Rather, so the argument proceeded, they were conversions which are subject to the provisos to s 101(1)*(a)*. The material provisos are contained in s 101(1)*(a)*(ii) and (iii). These provide that the terms and conditions and trading days and trading hours attaching to pre-existing licences must not be inconsistent with the provisions of the [KwaZulu-Natal Liquor] Act. And, that if they are, the provisions of the Act prevail.

[28] In support of their contentions, the respondents asserted that the concept of 'terms' of the licence as envisaged in the KwaZulu-Natal Liquor

Act includes the premises at which the sale of liquor is conducted. That is the position because s 41(2)*(a)* requires that the premises must be identified in the application, and the licence is granted subject to 'terms and conditions' which must of necessity include the premises. Accordingly, the conversion of the appellant's pre-existing 12 licences would be hit by the absolute prohibition imposed by s 48(5)*(e)* of the KwaZulu-Natal Liquor Act.

[29] To my mind the respondents' contentions are unsustainable. It is true that s 101(1)*(a)* is made subject to the provisos that the terms and conditions, trading

[3] Above para 18.

days and trading hours relating to pre-existing licences continue in force unless they are inconsistent with s 101(1)*(a)*(i), (ii) and (iii), in which event the provisions of the KwaZulu-Natal Act would prevail and thus apply.

[30] In my view it is manifest from the provisions of s 101 that holders of pre-existing licences are entitled to licence certificates in terms of s 62 of the KwaZulu-Natal Liquor Act without having to comply with the application procedure for such licence. The entitlement of the holder of a licence to such a licence certificate is subject to the Liquor Authority being satisfied, upon presentation of proof of the licence and payment of the prescribed annual fee, that the holder had a valid licence on the date of commencement of the KwaZulu-Natal Liquor Act.

[31] Section 62(1) in turn provides, in peremptory terms, that the Chief Executive Officer must, once a licence has been granted by the Liquor Authority, issue a licence certificate in the prescribed form which must, inter alia, include: (a) the premises in respect of which a licence has been granted; and (b) the terms and conditions upon which the licence was granted, including the trading days and trading hours.

[32] It follows from the interpretation of s 101(1) discussed above that s 48(5)*(e)* of the KwaZulu-Natal Liquor Act is not applicable to applications for conversions under s 101(1). This must be so for at least two reasons. First, s 48(5)*(e)* is contained in Part 2 of Chapter 6 which deals with applications for retail sale of liquor for consumption on or off premises. Second, s 101(2)*(a)*, in express terms, excludes the application procedure for a licence as contemplated in Chapter 6. However, counsel for the respondents strongly relied on the third proviso to s 101(1)*(a)*. He contended that the 'terms' of the licence include the premises. And because the appellant's premises are located within a circumference of 500 metres of religious and learning institutions as defined in s 1 of the KwaZulu-Natal Liquor Act, the appellant's 12 pre-

existing licences are inconsistent with s 48(5)*(e)* which is an absolute prohibition applicable to all licences.

[33] These contentions, in my view, cannot be upheld. The location of the premises was not a term or condition of the appellant's licences under the 1989 Liquor Act. Nor can the location of the premises be a term or condition under the KwaZulu-Natal Liquor Act. Moreover, both the 1989 Liquor Act and the KwaZulu-Natal Liquor Act draw a clear distinction between premises relating to a licence and the terms and conditions upon which a licence may be granted. There are three clear contextual indicators of this in the latter Act. First, as previously mentioned, s 41(2)*(a)* provides that an application for a liquor licence must include and be accompanied by 'the physical address of the premises where the business will be conducted or a description of the location of the premises in terms of identifiable landmarks'. It therefore goes without saying that an application for a licence unaccompanied by the physical address of the premises or a description of the location would be still-born. Second, the opening words 'before granting the application' in s 48(5) serve as a clear indication that the Liquor Authority may not grant an application for a liquor licence unless all six requirements in that section have cumulatively been met. The question whether or not these requirements have been met would therefore logically arise before the approval or granting of the licence. Third, as already mentioned in para 31 above, s 62(1)*(a)* provides that after the Liquor Authority has granted a licence and the prescribed fee has been paid, the Chief Executive Officer must issue a licence certificate which must, inter alia, include: (a) the premises in respect of which a licence has been granted (s 62(1)*(a)*(iii)); and (b) the terms and conditions upon which the licence was granted, including the trading days and trading hours (s 62(1)*(a)*(iv)). This is further reinforced by s 48(4)*(a)*(i) which states that the Liquor Authority must, after having considered an application for a licence, either grant such application 'subject to such terms and conditions [as] it may deem fit'. This must then mean that the decision to grant the application (in relation to specified premises as disclosed upfront in the application) precedes the consideration of any terms and conditions that the Liquor Authority may deem fit to impose. Put differently, the question whether or not to

attach terms and conditions to a licence arises only once the requirements of sections 41(2) and 48(5) have been satisfied.

[34] To my mind, the meaning attributed to the language of the provisions of the KwaZulu-Natal Liquor Act discussed above, with due regard to the context and the purpose of the provisions, is a more plausible and sensible one. On this score I am fortified by the statement in *Commissioner, South African Revenue Service v Bosch & another* [2014] ZASCA 171; 2015 (2) SA 174 (SCA), made in the context of statutory interpretation, which is instructive. This court said (para 9):

'. . . There may be rare cases where words used in a statute or contract are only capable of bearing a single meaning, but outside of that situation it is pointless to speak of a statutory provision or a clause in a contract as having a plain meaning. One meaning may strike the reader as syntactically and grammatically more plausible than another, but, as soon as more than one possible meaning is available, the determination of the provision's proper meaning will depend as much on context, purpose and background as on dictionary definitions or what Schreiner JA referred to as "excessive peering at the language to be interpreted without sufficient attention to the [historical] contextual scene".'

[35] Accordingly, even if one were to accept that the divergent interpretations for which the parties contended are both tenable, there is a compelling reason why the appellant's contentions must prevail. More than a century ago in *Curtis v Johannesburg Municipality* 1906 TS 308 at 311 Innes CJ said:

'The general rule is that, in the absence of express provisions to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation. The legislature is virtually omnipotent, but the courts will not find that it intended so inequitable a result as the destruction of existing rights unless forced to do so by language so clear as to admit of no other conclusion.'

(See also *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 (3) SA 210 (CC) para 26.)

[36] In *Nissan SA (Pty) Ltd v Commissioner for Inland Revenue* 1998 (4) SA 860 (SCA) this court said (at 870I-871A):

'. . . If on one interpretation of the amended provision it would retroactively destroy vested rights acquired . . . in terms of the provision before its amendment, but on another interpretation it would not, that would provide, I think, a strong reason for preferring the latter interpretation unless the language used cannot possibly accommodate it. . . .'

As to the nature of a right inherent in a liquor licence, this court, in *Pietermaritzburg Corporation v South African Breweries Ltd* 1911 AD 510 at 511, pointed out that although a liquor licence operates on specified premises, it has a commercial value apart from the premises to which it relates. (See also the minority judgment of Madlanga J in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape & others* [2015] ZACC 23; 2015(6) SA 125 (CC) para 132.)

[37] Thus, there is, in my view, much to be said for the appellant's submission that had the provincial legislature intended to impose an absolute prohibition also in respect of pre-existing licences in relation to licenced premises located within a circumference of 500 metres of religious or learning institutions, it would have done so in the clearest of terms as it has done in s 95(1) of the KwaZulu-Natal Liquor Act in relation to sale of liquor in convenience stores franchised to service stations selling petrol, diesel or other petroleum products to the public. Bearing the aforegoing considerations in mind, there can be no doubt that s 48(5)*(e)* cannot bear the meaning ascribed to it by the court a quo.

[38] Finally, it was argued on behalf of the respondents that to hold that s 48(5)*(e)* does not apply to pre-existing licences would result in an untenable situation. This was so because it would mean that the appellant would retain its 12 licences free of the statutory obligation imposed under s 22(2)*(d)*(i)*(cc)* of the 1989 Liquor Act. As mentioned earlier, s 22(2)*(d)*(i)(cc) provided that the Liquor Board shall not grant an application for a liquor licence if the premises are situated in the vicinity of a place of worship or school or in a residential area, unless the business will not be carried on

in a manner that would not disturb the proceedings in that place of worship or school or prejudice the residents of that residential area. And, as the statutory obligation provided for in s 22(2)*(d)*(i)*(cc)* 'would not be endorsed on the licence certificate in terms of s 101(2)*(b)*, it being not a term or condition applicable to the affected licences, the appellant would thereby obtain a licence certificate under s 101(2)*(a)* free of the encumbrance arising from s 22(2)*(d)*(i)*(cc)* of the 1989 Liquor Act following its repeal. In order to obviate such an anomalous result it was therefore necessary to construe s 22(2)*(d)*(i)*(cc)* as a term of the licence. Seen in this light it would thus be inconsistent with s 48(5)*(e)*.

[39] The answer to this argument, in my opinion, is that advanced in the countering submissions on behalf of the appellant. And it is this. Section 12(2)*(c)* of the Interpretation Act 33 of 1957 provides that: '[w]here a law repeals any other law, then unless the contrary intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed.' And absent a contrary intention manifest from the KwaZulu-Natal Liquor Act, it must ineluctably follow that the statutory obligation incurred under s 22(2)*(d)*(i)*(cc)* remains extant. (See, for example, *Chagi & others v Special Investigating Unit* 2009 (2) SA 1 (CC) paras 31-32; *Msunduzi Municipality v MEC for Housing, KwaZulu-Natal & others* 2004 (6) SA 1 (SCA) para 21.)

[40] This then brings me to the application to review and set aside regulation 47(1)*(a).* Although the conclusion to which I have come in relation to the interpretation of sections 48(5) and 101 of the KwaZulu-Natal Liquor Act is dispositive of this appeal, the appellant persisted in its quest to have regulation 47(1)*(a)* reviewed and set aside. The review application was launched in the court a quo on 7 October 2014. As the regulations were promulgated on 13 February 2014 the review application was brought 55 days outside the 180 day period prescribed in s 7(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Consequently, the appellant applied for condonation in terms of s 9 of PAJA. This application was not opposed by the respondents, presumably because they had not

suffered any prejudice as a consequence of the delay. Thus, nothing further need be said in relation to this issue save to say that in light of the respondents' stance and the reasons proffered by the appellant for the delay and the dictates of justice it should be granted.

[41] As previously mentioned, regulation 47(1) empowers the Liquor Authority to grant temporary amnesty only to pre-existing and valid licence holders licenced under the 1989 Liquor Act in the two categories of licence holders specified therein. First, where the licenced premises are, in terms of the KwaZulu-Natal Liquor Act, situated within a circumference of 500 metres of religious and learning institutions. Similarly, it requires licence holders who sell liquor in convenience stores franchised to a service station selling petrol, diesel of other petroleum products to the public to apply for temporary amnesty.

[42] The validity of regulation 47 was impugned on two bases. First, it was submitted on behalf of the appellant that the KwaZulu-Natal Liquor Act does not prohibit pre-existing licence holders in category (i) from continuing trading in their premises. Second, in relation to category (ii) and following the insertion of s 95(1A)[4] into the KwaZulu-Natal Liquor Act, the prohibition on sale of liquor in convenience stores franchised to service stations does not apply to pre-existing licence holders. Consequently, so the argument went, s 99(1)*(q)* does not place an obligation on holders of pre-existing licences mentioned in the two categories of regulation 47(1) to apply for temporary amnesty. Second, it was contended that regulation 47(1) violates the principle of legality to the extent that it purports to render unlawful what the KwaZulu-Natal Liquor Act has not declared unlawful. And hence regulation 47 serves no rational purpose.

[4] Subsection (1A) was inserted by s 5 of the KwaZulu-Natal Liquor Licensing Amendment Act 3 of 2013 and came into operation on 13 February 2014.

[43] The respondents argued that the regulation is authorised and serves a rational purpose. In support of their contentions the respondents, relying on the judgments of the Constitutional Court in *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development & another*; *Executive Council, KwaZulu-Natal v The President of the Republic of South Africa & others* 2000 (1) SA 661 (CC) paras 122-124; *Justice Alliance of South Africa v The President of the Republic of South Africa* [2011] ZASCC 23; 2011 (5) SA 388 (CC) paras 52-55, contended that regulation 47(1) is authorised by the KwaZulu-Natal Liquor Act and thus rational. The respondents' contentions are, in my view, predicated on the supposition that the court a quo was correct in its conclusion, namely that s 48(5)*(e)* also applies to pre-existing licences granted under the 1989 Liquor Act and sought to be converted under s 101(1).

[44] In *Pharmaceutical Manufacturers Association of SA & another: In Re Ex Parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) – a case concerned with the exercise of executive powers by the President – the Constitutional Court reiterated that 'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement.'[5]

[45] The Constitutional Court went on to say (para 86):

'The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational.'

In *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) para 58 the Constitutional Court

[5] Para 85.

stated that it was 'central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power or perform no function beyond that conferred upon them by law'. Accordingly, whenever action, by the Executive or other functionaries fails to pass the rationality requirement it will be liable to be set aside as unlawful. And in light of the earlier conclusion that sections 48(5)*(e)* and 95(1) do not apply to pre-existing licences as the court a quo found, it follows that regulation 47 does not serve any rational purpose and can therefore not survive. It is therefore liable to be set aside as irrational. Indeed, nowhere does the KwaZulu-Natal Liquor Act state under what circumstances must an application for temporary amnesty be made. The only reference to amnesty is in s 40 which finds no application in this case.

[46] It remains to note that the policy considerations that underpin the provisions of s 48(5)*(e)* as explained in the respondents' answering affidavit referred to in paras 4 and 5 above are undoubtedly laudable. And, as the courts are enjoined to be forever cognisant of the exclusive sphere of the executive and legislative arms of government[6], it is necessary to emphasise that this appeal is not about government's powers to formulate policy nor to pass legislation. Rather, it is all about interpretation of the words used in the KwaZulu-Natal Liquor Act in the context of the overall scheme of the Act. (See in this regard: *Norvartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] ZASCA 111; 2016 (1) SA 518 (SCA) para 28.). Should the outcome of this case be regarded as undesirable, then the remedy still lies with the legislature. (Compare *Weare & another v Ndebele NO & others* [2008] ZACC 20; 2009 (1) SA 600 (CC) para 58.)

[47] It follows from all of what has been said above that the court a quo was wrong in its conclusion. Accordingly the appeal must succeed. The following order is made:
1 The appeal is upheld with costs, including the costs of two counsel.
2 The order of the court a quo is set aside and substituted with the following:

[6] *National Treasury & others v Opposition to Urban Tolling Alliance & others* [2012] ZACC 18; 2012 (6) SA 223 (CC) paras 65-68.

‘1 It is declared that the KwaZulu-Natal Liquor Licensing Act 6 of 2010 (the KZN Act) does not *per se* prohibit or render unlawful the sale or continued sale of liquor for consumption off the licensed premises by a person (the licensee) in circumstances where:

1.1 such premises are situated within a circumference of 500 metres from a learning institution and/or a religious institution as defined in s 1 of the KZN Act; and

1.2 if such a licensee was the holder of a liquor licence granted pursuant to the provisions of the national Liquor Act 27 of 1989 which was in force immediately before the commencement of the KZN Act, and which licence is regarded from the said date of commencement, by virtue of s 101(1)*(a)* of the KZN Act, as a licence for the retail sale of liquor referred to in s 39*(b)*(i) or (ii) of the KZN Act, and which has not otherwise been validly cancelled or terminated.

2 Regulation 47 of the KwaZulu-Natal Liquor Licensing Regulations, 2014 (PN 45 published in *PG 1081* of 13 February 2014) is reviewed and set aside.

3 The applicant’s failure to launch its review application within 180 days as provided for in s 6 of the Promotion of Administrative Justice Act 3 of 2000 is condoned.

4 The costs of the application shall be borne by the respondents jointly and severally, the one paying the other to be absolved, including the costs of two counsel where so employed.’

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JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	J J Gauntlett SC (with G A du Toit) (Heads of argument prepared by M W Janisch SC with G A du Toit) Instructed by: Werkmans Attorneys, Tygervalley c/o McIntyre & Van der Post, Bloemfontein
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