

# IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

## Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill

Case CCT 12/99

Decided on 11 November 1999

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### Media Summary

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*The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

1 The Constitutional Court has given its first decision in a case involving a Bill passed by Parliament but referred to it by the President of the Republic of South Africa for a decision on its constitutionality. The case is also the Court's first decision on the question of exclusive provincial powers.

2 President Mandela in March 1999 referred the Liquor Bill [B 131B-98], passed by Parliament in November 1998, to the Constitutional Court to decide on its constitutionality. In doing this, the President for the first time invoked his power under s 79 of the Constitution to refer a Bill to the Court if he has "reservations" about its constitutionality. In this case, the President expressed "reservations about the constitutionality of the Bill to the extent that the Bill deals with the registration for the manufacture, wholesale distribution and retail sale of liquor", thereby intruding on the provincial legislatures' exclusive powers regarding liquor licences. In terms of Schedule 5A of the Constitution the provinces have exclusive legislative powers in regard "liquor licences".

3 The President of the Constitutional Court issued directions inviting interested political parties and organs of state to make representations concerning the constitutionality of the Bill. The Western Cape Provincial Government and the Minister of Trade and Industry responded and appeared before the Court.

4 The Minister of Trade and Industry contended that the Bill was not a liquor licensing measure because the matters it regulated fell within the national legislature's competence and its provisions dealing with liquor licensing were incidental to its pursuit of national competencies. The Minister contended that even if the Bill encroached on the provinces' exclusive powers this was justified in terms of s 44(2). This provision allows the national government to "intervene" into the area of exclusive provincial legislative competence when this is necessary for certain purposes, which include the maintenance of "economic unity".

5 In a unanimous judgement, Cameron AJ held that the Liquor Bill was unconstitutional in that the national government had not succeeded in justifying the Bill's intervention in the field of retail liquor sales, nor in the case of micro-manufacturers of liquor, whose operations are essentially provincial. Cameron AJ held that insofar as it can be said that "liquor licences" in Schedule 5A applies to all liquor licences, the national government had made out a case justifying its intervention in creating a national system of registration

for manufacturers and wholesale distributors of liquor and in prohibiting cross-holdings between the three tiers in the liquor trade.

6 The judgment considers the exclusive provincial legislative competencies against the background of the Constitution's distribution of governmental power. This is located in the national, provincial and local spheres, which are distinctive and interrelated and subject to the principle of cooperative governance. The provinces are accorded power primarily in regard to matters which may appropriately be regulated within each province, though subject to override by the national government in terms of s 44(2).

7 The provinces' exclusive legislative competence in regard "liquor licences" must be interpreted against the backdrop of the national government's concurrent power to regulate "trade" and "industrial promotion". The Court held that "liquor licences" is narrower than liquor trade and that national government has the power to regulate liquor trade other than liquor licensing.

8 The Court held that in a case of overlap between the concurrent powers and exclusive powers of provinces it may be necessary to establish the substance of the legislation. Cameron AJ concluded that the substance of the Liquor Bill is directed at three objectives: (a) the prohibition on cross-holdings between the three tiers involved in the liquor trade, namely, producers, distributors and retailers; (b) the establishment of uniform conditions, in a single system, for the national registration of liquor manufacturers and distributors; and, in a further attempt at establishing national uniformity within the liquor trade; (c) the prescription of detailed mechanisms to provincial legislatures for the establishment of retail licensing mechanisms.

9 The Court held that the Bill's prohibition of cross-holdings falls within the national legislature's competence to regulate trade. The national system of registration for producers and wholesalers may well also fall within the national legislature's competence to regulate trade, since the provinces' exclusive power in relation "liquor licences" was not in the first instance intended to encompass manufacturing and distribution of liquor since these activities are inter-provincial and international. The Court held that in any event national government had succeeded in showing that if the exclusive provincial competence regarding "liquor licences" extends to production and distribution, its interest in maintaining economic unity authorises it to intervene in these areas under s 44(2). However the Court concluded that the Minister failed to show that the national interest required uniform national legislation prescribing detailed mechanisms to provincial legislatures for the establishment of retail licensing mechanisms.

10 The Western Cape Provincial government also raised a point about the parliamentary procedure according to which the Bill was adopted. This the Court rejected as having no merit.