IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 1633/2014

In the matter between:

SHOPRITE CHECKERS (PTY) LIMITED Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL FOR TOURISM AND ENVIRONMENTAL AFFAIRS: KWAZULU-NATAL First Respondent

PREMIER – KWAZULU-NATAL PROVINCIAL GOVERNMENT Second Respondent

KWAZULU-NATAL LIQUOR AUTHORITY Third Respondent

Summary: KwaZulu-Natal Liquor Licencing Act 6 of 2010 – applicability of section 48(5)(e) to pre-existing licence holders under Liquor Act 27 of 1989 – observance of requirement that no licenced premises to be within 500m circumference of school or religious institution. Whether liquor licence constitutes property under s 25 of Constitution – whether relocation of licenced premises – deprivation for the purposes of s 25(1).

O R D E R

Delivered: 20 November 2015

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1. Application dismissed.
2. No order as to costs.

J U D G M E N T Delivered: 20 November 2015

CHETTY J

1. The issue for determination in this matter is whether the KwaZulu-Natal Liquor Licensing Act 6 of 2010 (the KZN Act) prohibits the applicant, Shoprite Checkers, a retailer, from operating twelve (12) of its existing liquor outlets on the basis that these fall within a radius of 80m of an institution of learning or a religious institution. This calls for an assessment of competing interests – at the one side is the provincial government, which is striving to address the socio-economic implications of having access to liquor in close proximity to schools and religious institutions, even though this may have been condoned under the previous regulatory regime. On the other side of the equation are the interests of the applicant a corporate entity seeking to protect its licence to trade in the sale of liquor under circumstances where such continued trading is at variance with prevailing governmental policy. This tension was accurately captured in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) where the Court at para 50 noted:

> „The preamble to the Constitution indicates that one of the purposes of its adoption was to establish a society based, not only on 'democratic values' and 'fundamental human rights', but also on 'social justice'. Moreover the Bill of Rights places positive obligations on the State in regard to various social and economic rights. *Van der Walt* [*The Constitutional Property Clause* (Juta, Kenwyn, 1997) aptly explains the tensions that exist within s 25:
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> > "[T]he meaning of s 25 has to be determined, in each specific case, within an interpretative framework that takes due cognisance of the inevitable tensions which characterise the operation of the property clause. This tension between individual rights and social responsibilities has to be the guiding principle in terms of which the section is analysed, interpreted and applied in every individual case."
>
> The purpose of s 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not

limited thereto, and also as striking a proportionate balance between these two functions.”“ (footnotes omitted)

2. The relief sought by the applicant is the following:

a. „Declaring 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 circumstance where:

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

i. 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 is regarded from the date of commencement of the KZN Act, by virtue of section 101(1)(a) of the KZN Act, as a licence for the retail sale of liquor referred to in section 39 (b) (i) and/or (ii) of the KZN Act, and which licence has not otherwise been validly cancelled or terminated;

b. 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);

c. Extension of the period of 180 days for the launching for this application, as envisaged in section in section 9 of the Promotion of Administrative Justice Act (NO 3 of 2000), to the extent that it may be necessary;

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

e. Directing and 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.‟

3. After the hearing of argument on 4 June 2015, judgment was reserved. At the time I was mindful that the matter of *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape & others* 2015 (6) SA 125 (CC) had been argued in the Constitutional Court and judgment was reserved. Upon the handing down of the decision of the Constitutional Court on 30 June 2015, I requested both parties to furnish me with their supplementary submissions in light of the Court‟s decision. The last of the responses was received by me on 28 July 2015.

BACKGROUND

4. The applicant is the holder of 110 retail licences that allow it to sell liquor off the premises (both at liquor stores and at grocers‟ stores). The majority of these licences were granted under the Liquor Act 27 of 1989 (the 1989 Act). Of this number, 12 licences (11%) are in respect of premises that are situated within 80m of a learning or religious institution. These “affected premises” are spread throughout the geographic area of KwaZulu-Natal, including the areas of Pinetown, Pietermaritzburg, Scottburgh, Amanzimtoti, Durban North and Dube Village.

5. It is not disputed by the respondents that in granting these licences under the 1989 Act, the Liquor Board acting in terms of s 32(1), would have issued a licence to sell liquor on premises approved by the Board, provided that such premises was not specifically excluded. It is also not disputed that the 1989 Act contained no restriction on the operation of a liquor store based on its proximity to a religious or learning institution. Provided the operation of a liquor store took place without causing a disturbance to the functioning of a place of worship or a school, and there was no prejudice to the residents of a particular neighbourhood, in terms of s 22(2)(d)(cc) such operation would be condoned. It is clear that the Board used the criteria of amenity interference as the yardstick by which it would gauge whether to grant a licence.

6. The Constitution, in Schedule 5, Part A, provides that one of the functional areas of exclusive provincial legislative competence is that of liquor licenses. In or about 1997 the national legislature began a process of drafting new national liquor

legislation to replace the 1989 Act. The Liquor Bill, which eventually resulted, was referred to the Constitutional Court to decide on its constitutionality, particularly with regard to the issue of whether the granting of liquor licenses was a national or provincial competence. The Constitutional Court found that the Bill represented an encroachment by the national legislature into an area of exclusive provincial legislative competence. The Court in *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC), held at para 58 that:

> „The structure of the Constitution… suggests that the national government enjoys the power to regulate the liquor trade in all respects other than liquor licensing. For the reasons given earlier, this, in my view, includes matters pertaining to the determination of national economic policies, the promotion of inter-provincial commerce and the protection of the common market in respect of goods, services, capital and labour mobility."

At para 79 the Court found that:

> „… the licensing competence in respect of retail sales of liquor falls squarely within the exclusive provincial legislative power afforded by Schedule 5."

7. Following the decision in *Liquor Bill,* the provinces thereafter proceeded to enact provincial liquor legislation allowing for the regulation of retail liquor licensing in the provinces. In KwaZulu-Natal, the KZN Act was enacted, and the first sections thereof came into operation on 1 August 2012. After consultation with the National Minister, by proclamation in General Notice No. 34 on 26 February 2014, the 1989 Act ceased to be applicable in the province.

<u>THE KZN LIQUOR ACT</u>

8. Section 101 of the KZN Act provides for the conversion of licences and approvals and provides in sub-section (1)(a) as follows:

> „(1) Notwithstanding the provisions of section 39, and in accordance with the transitional provisions of the Liquor Act-
>
> *(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 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;

…

(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." (my underlining)

9. Section 38 of the KZN Act provides that „no person may sell liquor for retail or micro-manufacture liquor *unless that person is licensed in terms of this Act'.* Section 1 defines a "*licensed person*" as a *'person to whom a licence has been issued or who is regarded as licensed in terms of this Act'*. Section 41 sets out the process to be followed by a person applying for a liquor licence. In that regard it bears noting that s 41(2)(b)(i) provides that the person applying for the licence must provide a detailed motivation and specify "the proximity of the proposed premise to learning institutions, religious institutions and other licenced premises".

10. Section 48 deals with applications for licences for the retail sale of liquor for consumption, on and off the premises. The provisions of s 48(5) and (6) of the Act are set out below in full, as they are relevant to the determination of this dispute.

> „(5) Before granting an application, the Liquor Authority must satisfy itself that-
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> *(a)* the granting of the application will be in the public interest;
>
> *(b)* the applicant is not disqualified from holding a licence in terms of this Act;
>
> *(c)* the premises upon which the sale or consumption of liquor will take place are or will upon completion be suitable for use by the applicant for the purposes of the licence;
>
> *(d)* the use of the proposed premises for the proposed activity would not be contrary to existing zoning laws or land use rights;
>
> *(e)* the proposed premise is not located within a circumference of 500 metres of any religious or learning institutions; and
>
> *(f)* the proposed premise is not located within a circumference of 500 metres of other licensed premises within residential areas.
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> (6) In determining whether the application will be in the public interest as contemplated in subsection (5)*(a)*, the Liquor Authority must consider, without detracting from the generality thereof,-
>
> *(a)* the prejudice or harm, or potential prejudice or harm, of the proposed licence to or on residents, property owners, other businesses including licensed liquor premises, property values, schools and religious

institutions within a radius of 500 metres surrounding the proposed premises or in close proximity thereto; and

(b) the extent to which the proposed licence will contribute to, or detract from, the achievement of the objects of the Act, including the extent to which the proposed licence-

(i) will or is likely to impact on the socio-economic rights of society, including the prevalence of crime, and the costs of alcohol abuse;

(ii) will facilitate the entry of new participants and diversity in the liquor industry; and

(iii) will contribute to the fostering of an ethos of social responsibility in the liquor industry." (my underlining)

11. It is common cause that this application is to be resolved on the basis of an interpretation to be accorded to the provisions of s 101(1)(a)(iii) read with s 48(5)(e) of the KZN Act as to whether it *per se* prohibits the applicant, and by implication others who may be similarly situated, from operating liquor outlets within 80m of a school or religious institution. In essence, the applicant contends that the prohibition is only applicable to those applying for *new* licenses and not to those who are pre-existing holders of licenses issued under the 1989 Act. The applicant contends that as the holder of pre-existing licenses, s 48(5)(e) does not apply to it, and even if it did, the removal of this right to trade where it currently does, would constitute an arbitrary deprivation of property, and accordingly a violation of the right to property protected under s 25 of the Constitution.

12. As this matter hinges on the interpretation to be placed on the so-called "offending section" of the KZN Act, a useful starting point is the approach to interpretation of agreements set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) where the Court at para 18 stated:

„Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.

> Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. ….A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The „inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document. (my underlining).

13. Mr *Janisch*, who appeared with Ms *Du Toit* for the applicant, made it clear at the outset of the hearing that the applicant does not challenge the prohibition imposed by the KZN Act that no *new* licences will be granted in respect of premises located within 80m of a school or place of worship. Similarly, I did not understand the applicant to challenge the rationale of the first respondent in introducing the prohibition. To this end, the contentions advanced by the first and second respondents as to the compelling social reasons for the provincial government adopting a policy which prohibits a liquor licence being granted in respect of premises falling within a radius of 80m of a school or religious institution, are unchallenged. In this regard, it bears noting that the provincial government was concerned at the social effects of liquor being sold from premises located within a distance of 80m of a school or a place of worship. It contended that some learners are immature and unable to make moral or value judgements, and at an age where they are susceptible to social experimentation. In addition, the availability of alcohol is exacerbated in poorer schools, where learners do not get the necessary support and guidance, and are easily tempted to buy alcohol.

14. The respondents submit that the policy of locating licensed premises outside of an 80m radius was reached after extensive public participation with liquor manufacturers, retailers, traders associations and others. According to the first respondent, the MEC for Transport, Community Safety and Liaison estimates that

there are 673 liquor outlets next to places of worship, and 930 outlets next to schools in KwaZulu-Natal. In the region of the eThekwini Municipality alone, there are 222 outlets next to places of worship, with 251 outlets located next to schools.

15. In light of the above factors, the respondents submit that sound policy considerations were taken into account in the formulation of the prohibition contained in s 48(5) and (6) of the KZN Act. It was furthermore not disputed that the Constitutional Court in the *Liquor Bill* case confirmed that provincial liquor boards are entrusted with considerable leeway in applying "community considerations" on the registration of retail premises (see para 78 of *Liquor Bill*).

16. Accordingly, the applicant‟s only concern is whether the provisions of s 101 read with s 48(5)(e) apply to the holders of pre-existing licences acquired under the previous liquor licencing regime. If it does not, they submit that Regulation 47 which was promulgated to make provision for a temporary amnesty must then be struck down as unconstitutional on the basis that it is a "dead-letter", serving no purpose by its continued existence. On the other hand, if it is found that the KZN Act operates to prohibit both new licence holders and pre-existing licence holders from operating within a radius of 80m of a school or place of worship, then, the respondents submit, Regulation 47 should remain intact, as it may well be a lifeline to allow the applicant to apply for amnesty, pending a conversion of its existing licence, to bring it into conformity with the provisions of the current KZN Act.

17. Mr *Dickson SC*, who appeared on behalf of the respondents, submitted that the prohibition contained in s 48(5)(e) applied to all persons who wished to operate a liquor outlet, and that the legislature did not intend to create a two-tier system of those with "old order rights" and new applicants. What was equally important, according to the respondents, was the context within which the legislative changes contained in s 48(5) and (6) were adopted as a means to address the negative impact which alcohol has on the lives of young people. Accordingly, the provisions of the KZN Act must be seen as a legislative response from the provincial government based on policy and community considerations. In *Weare v Ndebele* 2009 (4) BCLR 370 (CC) the Court stated at para 58:

> „The applicants" argument therefore fails to show that the policy decisions made and being made in KwaZulu-Natal fall outside the bounds of legitimate legislative choice. It is for the legislature to select the means to achieve the objectives of government. It is also for the legislature to decide when the moment has arrived to change methods and reform legislation. If it is not shown that the duty to uphold the Constitution requires courts to interfere, these choices are the Legislature"s to make."

INTERNAL REMEDIES

18. Before dealing with the merits of the application, it is necessary to dispense with two preliminary points raised by the respondents. The first relates to an apparent non-compliance on the part of the applicant with the provisions of Rule 16A(1)(a) which provides that:

> „Any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the relevant affidavit or pleading."

The respondents contend that the requirement of a Rule 16A notice in a matter such as this would be crucial as a decision by this Court on the applicability of s 48(5)(e) of the KZN Act to pre-existing liquor licence holders would have ramifications for holders other than the applicant. In *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 63 Ngcobo J described the role of the *amicus* as:

> „…not a party to litigation, but believes that the Court's decision may affect its interest. The *amicus* differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An *amicus* joins proceedings, as its A name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the Court because of its expertise on or interest in the matter before the Court. It chooses the side it wishes to join unless requested by the Court to urge a particular position."

Rule 16A allows for the opportunity of the broadening of the scope of the litigation and invites parties with a "legitimate" interest in the outcome to participate to the extent that they may raise matters not already before the Court and also protect the interests of those parties on whose behalf they have been admitted as friends of the

Court. See *Phillips v SA Reserve Bank & others* 2013 (6) SA 450 (SCA) para 31; C*hildren's Institute v Presiding Officer, Children's Court, Krugersdorp, & others* 2013 (2) SA 620 (CC).

19. In response, Mr *Janisch* pointed out that the applicant had indeed complied with Rule 16A and that such notice was posted on the notice board on 21 August 2014, being the same day on which papers in this matter were issued out of this Court. This could not be disputed by the respondents and on that basis the first point raised by the respondents falls away. There has been no application for any other party to be admitted as *amicus*, nor has this Court received any written submission from any interested party. The matter falls accordingly to be decided on the basis of the documents and written submissions before me.

20. The second point *in limine* is that as the applicant operates premises which would appear to fall foul of the provisions of s 48(5)(e) of the KZN Act, it ought to have applied for a temporary amnesty, provided for in Regulation 47. The contention of the respondents is that this application to review and declare Regulation 47 unconstitutional is premature in that had the applicant applied for amnesty, it may well have been granted. As such, the respondents contend that the applicant has failed to exhaust its internal remedies as required in terms of s 7(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). It is further contended that the applicant has failed to exhaust the provisions of s 61 of the KZN Act.

21. The applicant denied that its application was premature and submitted that an application for temporary amnesty in terms of Regulation 47 is not an internal remedy. It is an avenue followed by a licence holder who recognises that he is non-compliant and asks for a temporary reprieve to get his affairs in order. I agree with the argument of the applicant, particularly as the import of Regulation 47 is only to provide a temporary reprieve for a non-compliant licence holder, until he applies to have his licence transferred to new, compliant premises. It is no solution to the problem, and hence cannot be construed as a "remedy". In addition, it would make no sense, nor would it be logical, for the applicant to utilise the provisions of Regulation 47, the very mechanism which it contends has no place in the regulatory framework.

22. In so far as the provisions of s 61 of the KZN Act are concerned, sub-section (1) provides for an appeal by a person "*affected by a decision taken by the Liquor Authority and who wishes to appeal against the decision*". In the matter before me, there is no evidence of a "*decision*" taken by the liquor authority, adverse to the interests of the applicant. The applicant"s complaint in this matter lies against a legislative provision of the KZN Act, and not a decision of the Liquor Authority. As such, I find no basis for the application of s 61, or for it to be considered as an internal remedy in the context of s 7(2) of PAJA.

23. Accordingly, I find no merit in the preliminary points raised by the respondents. I now proceed to deal with the merits of the application.

24. As set out earlier, the outcome of this application hinges on an interpretive dispute between the two parties on either side of the regulatory framework. Counsel for the applicant"s contention that s 48(5)(e) does not apply to pre-existing licence holders is premised on an interpretation of the language used in the transitional provisions, found in s 101 of the KZN Act. In particular, it was contended that every licence acquired under the 1989 Act was, upon that Act ceasing to operate, a licence in terms of the new KZN Act, subject to certain formalities which included the payment of certain prescribed fees.

25. In substantiation of this argument Mr *Janisch* placed much emphasis of the wording of sub-section 1(a) which states that every licence in force *immediately prior* to the commencement of the KZN Act would be recognised as a licence upon the date of its commencement. In so far as the respondents contention that holders of pre-existing licences do not have a "free pass" and do not acquire immunity from the provisions of the KZN Act, counsel for the applicant contended otherwise, and submitted that the legislature specifically excluded pre-existing licence holders from having to comply with the application procedure contained in Chapter 6 of the Act, of which s48 forms part thereof. In this regard, the applicant relied on the precise wording contained in s 101(2)(a) of the Act which states that:

„(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." (my underlining)

26. The applicant submitted that the use of the word "*entitled*" in sub-section (2)(a) above could only have been used to convey an entitlement to a licence under the KZN Act, without anything more on the part of the licence holder. This argument appears to be strengthened when regard is had to the wording employed in the section that a holder of a licence is entitled to a licence under the new Act "*without having to comply with the application procedure*". This argument is amplified when regard is had to the wording in s 101(3)(a) which also provides that licence holders under the 1989 Act *"must*" receive a licence or certificate or permit upon presentation to the Liquor Authority of proof of their pre-existing licences and after payment of the annual fees prescribed in the Act. The effect of this, it was submitted, was that upon the issuance of a licence, the holder thereof is "*permitted to commence trade forthwith*" (see s 63(3)).

27. The applicant"s argument, as I understood it, was that s 101(2)(a) prescribes a route that pre-existing licence holders are required to follow in order to validate or perfect their old licences under the KZN Act by simply following the administrative procedures set out, and on the payment of certain prescribed fees. According to the applicant, s 101(2)(a) exempts it from having to comply with the procedures set out in s 48, which are applicable only to applicants for new licences. On this basis, the liquor authority has no discretion but to issue a licence to a pre-existing licence holder. Counsel for the applicant submitted that the language used in s 101(3)(a) does not permit the liquor authority any room to reconsider the application or to impose additional or new standards, such as that contained in s 48(5)(e) of the Act. As set out earlier, much emphasis was placed on the peremptory language used in s 101(3)(a). If it was the intention of the legislature that a pre-existing holder of a licence had to undergo the same scrutiny and be subjected to the same standard of compliance as a new applicant, it was submitted by the applicant that the legislature would have stated this much in the Act. On the contrary, it expressly, on the

applicant‟s version, exempts pre-existing holders from the application process set out in Chapter 6 of the Act.

28. On the applicant‟s version, if on an interpretation of s 101(2)(a) it is found that the applicant was not required to comply with the application procedure set out in Chapter 6 of the Act, then the only conclusion that this Court can reach is that pre-existing liquor licence holders are not bound by the provisions of s 48(5)(e). In developing this argument further, Mr *Janisch* stressed that the section uses the word "application", which must suggest that the section only applies to the procedure to be followed in determining the applications for new licences. I do not agree with this submission. To do so would be to accept unreservedly the contention that the applicant, as a pre-existing licence holder, is not bound by the provisions of the KZN Act to the extent that it imposes conditions not existent under the 1989 Act. While it is correct that s 48 does not refer to existing licence holders and only refers to an "application" which must be considered by the liquor authority, it cannot be said that on this basis alone the legislature intended to exclude all pre-existing holders from complying with the provisions of s 48, particularly where the terms and conditions of their pre-existing licence differs from the current regulatory regime. An "*applicant*", as used in the section, could refer to either category of person seeking a licence – new or pre-existing under the 1989 Act.

29. Section 48(7) provides that:

> „A liquor licence issued to a licencee where the provisions as contemplated in section 41(2)*(f)*; section 41(2)*(i)*; or section 41(2)*(j)* are met, then such licence remains valid until such time as the consent contemplated in the said sections are either withdrawn or revoked by the persons authorised to do so.‟

It must follow therefor that licences are not issued for specified periods and are not subjected to scrutiny at the time of renewal, as is the case in other countries. Even where renewals are required, courts have taken the view that those applying to renew their licences should not be subjected to the same degree of scrutiny as new applicants. In this regard James J. Leonard, Liquor License-Privilege or Property?, 40 *Notre Dame L. Rev.* 203 (1965) where at 215, the author states the following:

> „Most courts seem to take the position that there is no continuing interest in a liquor license. That is, in the absence of statutory provisions to the contrary, the former holder of a license has no rights different from those of any other person when applying for renewal of his license, and, upon expiration, the holder is not entitled to renewal as a matter of right. However, at least one federal court and a number of Pennsylvania courts take the position that the discretion of an administrator should not be as broad in refusing renewal of a license as it is in passing upon the original application and, by implication, that there is a continuing right in a liquor license. Preference for a holder over an applicant would seem just in the light of the substantial investment which the holder has made." (footnotes omitted)

30. According to the respondents, the interpretation that s 101 (dealing with licences under the 1989 Act and their conversion or validation under the KZN Act) must be read in the context of sub-section 1(a)(ii) which states that licences acquired under the Liquor Act and in force before the commencement of the KZN Act, would continue to remain in force provided that the "*terms and conditions and trading days and trading hours are not inconsistent with the provisions of this (KZN Liquor) Act*." In the event that they are inconsistent with the "*terms and conditions*" of the KZN Liquor Act, sub-section (1)(a)(iii) provides that "*the provisions of this Act are applicable*".

31. Mr *Dickson* contended that this interpretation favoured an application of s 48(5)(e) to all liquor licences – whether pre-existing or new – and created as an absolute prohibition the operation of liquor retail outlets within a 80m radius of a school or place of worship. It was further contended that the use of the words "*terms and conditions*" in s 101 must entail a reference to the licenced premises from which liquor is sold. This section suggests that where the terms and conditions of a licence acquired under the national Liquor Act are inconsistent with the provisions of the new KZN Act, then the provisions of the latter must apply (see s 101(1)(a)(iii)).

32. Counsel for the applicant countered this argument by reference to s 62, dealing with the conditions precedent for a licence to be issued. Section 62(1)(a) draws a distinction between *"the premises* in respect of which a licence or permit has been granted" (see s 62(1)(a)(iii)) and "the *terms and conditions* upon which the

licence or permit was granted" (see 62(1)(a)(iv)). It was contended that the words "*terms and conditions*" could never have been used in the KZN Act to refer to the licenced premises, and in any event would be non-sensical for the liquor authority to issue a licence on condition that that the applicant is not permitted to trade thereat. A licence cannot be granted without a reference or attachment to licenced premises (see s 62(1)(a)). It was not in dispute that a licence attaches to particular premises, which must be set out in the application to the liquor authority.

33. It was argued by the applicant that "*terms and conditions*" could include restrictions on the age of persons to whom alcohol could be sold, and other similar provisions, but could not be interpreted as a reference to the "premises" from where liquor was to be sold. There is much to be said for the argument of the applicant however, I am of the view that this is too narrow an interpretation of the KZN Act. In my view, the words "*terms and conditions*" as used in s 101(1)(a)(iii) must be given a wider meaning, and not be compartmentalised to focus on only some aspects of the licence. The question to be asked is whether the pre-existing licence complies in all respects with the provisions of the KZN Act. If not, the provisions of the KZN Act must apply.

34. The applicant further contended that what the KZN Act established was a two tier application process, one for those with pre-existing liquor licences and one for new applicants. According to the applicant, it is only the latter category that was obliged to comply with the restriction imposed in s 48(5)(e). In substantiation of this two-tier approach, counsel referred to the provisions of s 95 which specifically entrenches the right of pre-existing licence holders located at service stations. The section provides that:

> „Service stations
>
> (1) No person may sell liquor in a convenience store franchised to a service station selling petrol, diesel or other petroleum products to the public.
>
> (1A) The provisions of subsection (1) do not apply to convenience stores licensed to sell liquor before the coming into operation of this Act.
>
> [Subsec (1A) inserted by section 5 of Act 3 of 2013 w e f 13 February 2014.]"

35. With reference to s 95(1A), it was contended that this was clearly a legislative response to an outcry from service station owners who complained that their pre-existing licence to sell liquor had been unfairly interfered with by the legislature. While the KZN Act came into operation on 1 August 2012, the amendment contained in sub-section (1A) came into operation much later on 13 February 2014. I am unable to agree with the applicant‟s contention that its position is no different from that of a convenience store at a service station. The legislature deemed it prudent, for whatever reason, to pass the amendment in sub-section (1A). This Court has no idea what prompted that approach. What is clear though is that this particular exemption was only granted to service stations. No case has been made out before us for unfair discrimination or disparate treatment between different categories of retail outlets or licence holders.

36. While s 95(1A) allows a convenience store franchised to a service station to continue selling liquor as it had under the 1989 Act, Mr *Dickson* disputed that this entailed that service stations were exempt from the strictures contained in s 48(5)(e) of operating within 500m of a school or religious institution. Even if he is wrong with regard to the blanket prohibition argument that s 48(5)(e) applies to *all* retail liquor licence holders, this still does not assist the applicant in terms of its two-tier approach, based on a distinction in the way that the liquor authority is obliged to treat pre-existing and new licence holders.

37. What s 95(1A) does, in my view, is to allow stores at service stations who sold liquor under the 1989 Act to continue doing so under the new Act. New stores, established after the coming into operation of the KZN Act may not sell liquor. That constitutes an absolute prohibition, and on my interpretation, irrespective of how far the service station is located from a school or religious institution. The reason for this, I would assume, has nothing to do with the *“community considerations*” alluded to earlier as the rationale for s 48(5)(e). On the contrary, it has everything to do with fighting the scourge of drunken driving. One way of doing this is to keep alcohol as far away from motorists. As I have stated earlier, the reason of why s 95(1A) was enacted is not before this Court. I am not convinced of the applicant‟s reliance on this provision for its contention that the legislature intended to differentiate in the way

it considered pre-existing licence holders from new applicants for the purposes of the application of s 48(5)(e).

REGULATION 47

38. Accordingly, the applicant submitted that if I were to accept its argument that s 101, read with s 48(5)(e), did not apply to pre-existing licence holders, then Regulation 47 which provided for temporary amnesty for licence premises situated within an area of a 500m circumference from learning and religious institutions, had no application to pre-existing holders, that it served no rational purpose and should accordingly be struck down.

39. Counsel further contended that Regulation 47 was an example of "regulatory overenthusiasm", and has been made without any legislative of authority contained in the enabling Act, and without rational purpose. To this extent, it was submitted that Regulation 47 offends the principle of legality and falls to be declared invalid in terms of s 172 (1)(a) of the Constitution.

40. In response, the respondents contend that the KZN Act specifically gives the first respondent the power to make regulations, and specifically the manner and form in which an application for temporary amnesty must be made (see s 99(1)(q)). Moreover, s 99(1)(x) is wide enough, in my view, as a catch-all provision allowing the first respondent to make Regulation 47.

41. It was further contended even if the applicant succeeds in this application, the principle of avoidance should apply and this Court should allow the Regulation to remain intact in as much as it does not impinge on the rights of the applicant, who would have succeeded in achieving the relief it sought. As I understand the principle, Courts should defer as much as possible in respect of policy matters, to the executive and legislative arms. The principle further dictates that remedies should be first found in the common law or legislation which must be interpreted or developed in a manner consistent with the Constitution. Direct constitutional remedies should be a last resort, unless the interests of justice dictate otherwise. See *Nyathi v MEC for the Department of Health, Gauteng & another* 2008 (5) SA 94 (CC) at 144 where the Constitutional Court affirmed the well-established principle

that where it is possible to decide a case, civil or criminal, without reaching a constitutional issue, that route should be followed. This principle was affirmed in *Zantsi v Council of State, Ciskei, & others* 1995 (4) SA 615 (CC) para 4 where Chaskalson P said:

> „It is only where it is necessary for the purpose of disposing of the appeal, or where it is in the interest of justice to do so, that the constitutional issue should be dealt with first by this court. It will only be *necessary* for this to be done where the appeal cannot be disposed of without the constitutional issue being decided; and it will only be *in the interest of justice* for a constitutional issue to be decided first, where there are compelling reasons that this should be done.. . . In view of the far-reaching implications attaching to constitutional decisions, it is a rule which should ordinarily be adhered to by this and all other South African Courts before whom constitutional issues are raised."

42. Counsel for the respondents submitted further that no good reason existed for the Court to strike down Regulation 47, particularly if the applicant were to be unsuccessful in this application. In that event, as the opportunity for temporary amnesty would apply to the category of holders to which the applicant belongs, it could well be the only life-line available to apply for amnesty while it prepares to bring an application to relocate its premises to a location complainant with s 48(5)(e). For reasons which follow, it is not necessary for me to delve any further into the issue of the constitutionality of Regulation 47.

43. The respondents argued that the weakness in the applicant"s case is that it maintains that its liquor licence acquired under the 1989 Act constitutes a vested right which cannot be changed or altered by the regulatory authority responsible for issuing the licence. Mr *Dickson* submitted that the *Liquor Bill* case affirmed the prerogative of the provincial governments to formulate their own regulatory regime when considering whether to grant liquor licences. In so doing, the Constitutional Court accepted that the provincial governments could take into account "*community considerations*". The contention of the applicant is that it has a licence which allowed it to operate as a retail liquor outlet, even though it is located within a 80m

radius of a school or place of worship. That right to trade, it contends, cannot be interfered with, even by the regulatory authority.

44. The respondents attacked the contention that the legislature intended creating a two-tier approach towards the regulation of liquor licences. To do so, it contended, would be highly inequitable and result in a "super class" of licence holders whose rights were forever immune from interference by the provincial government and the Liquor Authority. It bears noting that the Constitutional Court in *Shoprite Checkers supra* para 68 recognised that a licence has value, is capable of being transferred and is sufficiently permanent. The "benefits" of remaining in a location inconsistent with s 48(5)(e) could, in theory, endure perpetually. A licence could be sold or transferred, with the applicant or its successor in title retaining the benefit of additional trading hours and days (s 78, Schedule 3) but still operating within a 80m radius of a school or religious site.

45. Practically, if I were to find in favour of the applicant, it would have the effect that 12 of its stores could operate in a manner inconsistent with the prevailing norms and standards set by the provincial government for the regulation of retail liquor trade. In the *Liquor Bill* case para 56 the Constitutional Court said the following about a liquor licence:

> „ …a liquor licence is the permission that a competent authority gives to someone to do something with regard to liquor that would otherwise be unlawful. The activity in question, as emerges from the judgment of Innes J, is usually the sale of liquor at specified premises. It also seems to me that the term "liquor licences" in its natural signification encompasses not only the grant or refusal of the permission concerned, but also the power to impose conditions pertinent to that permission, as well as the collection of revenue that might arise from or be attached to its grant."

46. Justice Froneman, writing for the majority in *Shoprite Checkers supra,* on whether a liquor licence constituted property, observed at para 58 that:

> „A liquor licence is thus an entitlement to do business that would otherwise have been unlawful. The competence to do this kind of business originates from state

> approval and its continuance is dependent on state powers of amendment, cancellation and regulation."

On the issue of whether a liquor licence constituted property, Moseneke DCJ stated the following at para 122:

> „A licence is a bare permission to do something that would otherwise be unlawful. It is normally issued to overcome a statutory prohibition. Further, licences are subject to administrative withdrawal and change. They are never absolute, often conditional and frequently time-bound. They are never there for the taking, but instead are subject to specified pre-conditions."

47. In the article Liquor License-Privilege or Property? *supra* at 203 the point is made that when faced with a problem involving a liquor license, most courts start with the premise that such a license is a governmental grant which authorizes the grantee to engage in a business which would otherwise be unlawful. Counsel for the respondents correctly submitted there is no right contained in the Constitution to sell liquor. This is borne out by the view expressed in *Crowley v Christensen* 137 U.S. 86 (1890) where it is stated at 91 that:

> „There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of the state or of a citizen of the United States."

48. Having regard to the nature of the "entitlement" to hold a liquor licence, I do not agree with the applicant"s contention that pre-existing liquor licence holders" right to trade is exempt from compliance with the provisions of s 48(5)(e) of the KZN Act. Numerous aspects of our lives are subjected to regulation. Recent amendments have been effected to provide for the renewal of motor vehicle licences, with a proviso that the person doing so must provide proof of residence. Failure to do so will result in the motor vehicle licence lapsing. Similarly, when the Department of Transport decided on the issue of new "credit card" sized driver"s licences, all licenced drivers were required to apply for the new licence. An added requirement was that each applicant was to undergo an eye test. Failure of the eye test resulted in the licence not being re-issued. This had the effect of a revocation for a failure to

comply with the new standards imposed by the regulatory authority. The requirement was probably aimed at ensuring greater road safety. In the same way, banks require proof of residence of their customers by the production of a utility statement or similar proof mandated by the Financial Intelligence Centre Act 38 of 2001. Failure to do so would result in one not being able to transact using one‟s bank account or credit card. In the same way, mobile phones can be suspended on the basis that a subscriber has failed to furnish proof of his or her residence as required in terms of the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002. Examples of recent regulatory incursion can also be found in relation to firearm licences. The state decided to amend the Firearms Control Act 60 of 2000 to restrict the number of hand-guns owned by an individual to two. It then required all gun owners to hand in their firearms to the state, after which all licensees were required to undergo a written competency test. This amendment was no doubt aimed at reducing the number of illegal firearms which contributed directly to the high crime rate in our country. However, in the event of an existing firearm licence holder failing the competency test, he or she was precluded from possessing a firearm in terms of the Firearms Control Act. There are numerous analogies where rights which we may have exercised for years without interruption, are now made subject to compliance with new conditions.

49. The respondents contend that they are not interfering with or retarding the applicant‟s right to trade, the only hurdle that the applicant must satisfy is that its premises are located outside of a 80m radius from a school or place of worship. Similarly to liquor, there is no constitutional guarantee to possess a firearm. It is a grant of permission by the state which would render possession otherwise unlawful.

50. On a proper reading of the KZN 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 Act. The new provisions in the KZN 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.

51. 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 Act.

Arbitrary deprivation of property?

52. Having arrived at the above conclusion, I am required to consider the applicants argument that the prohibition in s 48(5)(e) to its 12 outlets would result in an arbitrary deprivation of its property in contravention of s 25(1) of the Constitution. The applicant relied on the decision of Smith J in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism: Eastern Cape & others* [2015] 1 All SA 239 (ECG) that a liquor licence constitutes property for the purposes of the Constitution and that a blanket prohibition on the sale of liquor from premises within a circumference of 500m of a school or place of worship would constitute a deprivation and would be arbitrary (see too *Mkontwana v Nelson Mandela Metropolitan Municipality & another* 2005 (1) SA 530 (CC).

53. The Constitutional Court in *Shoprite Checkers* recognised that in light of the public law origin of a liquor licence, it does not fit easily into a private law conception of rights and property. The Court at para 70 confirmed the High Court"s finding that a grocers" licence to sell wine under the 1989 Act constituted property. Importantly, the Court noted that although the holders of grocer"s wine licences finally lost the right to sell wine and groceries on the same premises, the Eastern Cape Government had „softened the hurt" by allowing those affected to apply for a conversion of that right which now would allow the sale of all kinds of liquor, although not on the same premises as the grocery business. Although there was a loss of "some legal entitlement", the Court at para 76 reasoned that in the "greater scheme of things it was not too much", but enough to constitute a deprivation under s 25(1) of the Constitution.

54. In the matter before me, Mr *Dickson* argued that the liquor licence did not constitute property. That contention has now been denuded by the finding of the Constitutional Court. However, even if the licence did constitute property, counsel for the respondent submitted that s 101 read with s 48(5) did not deprive the applicant of its right to property. It was open to the applicant to sell its premises or relocate to a compliant site. The Constitutional Court in *Shoprite Checkers*, with reference *to FNB (supra)* held at para 77 that:

> *'FNB* held that a deprivation of property is arbitrary when the law does not provide sufficient reason for the deprivation or when it is procedurally unfair. A "complexity of relationships" must be considered in determining whether sufficient reason has been provided. The eventual standard can range from rationality to proportionality. In *Mkontwana*, the Court stated that the lighter standard may be applicable if the nature of the right to property is not strong and the deprivation not too heavy." (footnotes omitted)

55. Applying the above standard, I am of the view that the implication of the applicant having to comply with the provisions of s 101 and 48(5)(e) of the KZN Act may entail a degree of hardship, but this does not equate to an "arbitrary deprivation" required for a successful challenge in terms of s 25(1) of the Constitution. This finding is bolstered by the views in para 83 of *Shoprite Checkers* that the regulatory change brought about by the legislature in the Eastern Cape:

> „…did not extinguish any fundamental rights of holders of grocer"s wine licences or fundamental constitutional values. Rationality would thus be sufficient reason to avoid a finding of arbitrariness. …The same applies to the justification of ensuring that questions of control and exposure to the sale of liquor in a grocery store are ameliorated. … Opinion may also be divided on whether children are worse off by being exposed to the sale of wine in a grocery store than being in the vicinity of premises where only liquor is sold."

56. The measures adopted in the Eastern Cape were an attempt by the provincial government to control or limit the exposure of liquor in grocery stores, to which

children would have access. For the purposes of this decision, it is not necessary to consider in any detail the rationale behind the adoption of the policy. Matters of policy are issues best left for the legislature, which is given a wide discretion in selecting the means to achieve its constitutionally permitted objectives (see *Albutt v Centre for the Study of Violence and Reconciliation, & others* 2010 (3) SA 293 (CC)). Indeed, counsel for the applicant herein made it abundantly clear that the applicant was not concerned with the motivation behind the adoption of the measures contained in s 48(5)(e). It simply sought a ruling that it was not bound to follow the provisions of s 48(5). On that basis, and in the absence of some glaring disparity, the Court must assume that the means employed by the legislature of prohibiting liquor outlets within a 80m radius of a school or religious institution, was rationally related to the objective of not tempting children, especially in poorer communities, from experimenting with liquor, and consequently contributing towards absenteeism at school, as well as other related problems.

57. In the result, I am satisfied that although the applicability of the prohibitions contained in s 48(5)(e) of the KZN Act constitute an interference with, and a diminution of, the applicant‟s vested right to trade as a licenced holder in premises from which it has been operating for some considerable time, and in respect of which it may have invested in terms of its development, the legislative measures imposed by the respondents do not strip it of its right to trade. As counsel for the respondents correctly pointed out, it simply requires the applicant to continue with its right to trade, but from a different premises.

Costs

58. With regard to costs, the applicant has been unsuccessful in all aspects of the relief sought. In the event that it prevailed, the applicant sought costs of two counsel. In dealing with costs, Mr *Dickson* submitted that the respondents should be granted costs, but at the same time recognised the application of the Constitutional Court decision in *Biowatch Trust v Registrar, Genetic Resources, & others* 2009 (6) SA 232 (CC) to the present matter. While the applicant sought to challenge the applicability of the KZN Act to its pre-existing licences, and failed, the matter also concerned the secondary aspect of whether the application of the KZN Act resulted

in an arbitrary deprivation of property. That, in my view, would be sufficient to invoke the approach of the Courts towards costs were a "constitutional issue" arose. In *Affordable Medicines Trust & others v Minister of Health & another* 2006 (3) SA 247 (CC) para 139, the Constitutional Court held that as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs. Ngcobo J said the following:

> „The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. ….The ultimate goal is to do that which is just having regard to the facts and the circumstances of the case. In *Motsepe v Commissioner for Inland Revenue* this Court articulated the rule as follows:
>
> > "[O]ne should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the State, particularly, where the constitutionality of the statutory provision is attacked, lest such orders have an unduly inhibiting or "chilling" effect on other potential litigants in this category. This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this Court, no matter how spurious the grounds for doing so may be or how remote the possibility that this Court will grant them access. This can neither be in the interest of the administration of justice nor fair to those who are forced to oppose such attacks.""

59. The issues raised by the applicant cannot be described as either frivolous or vexatious. The applicant raised an issue which would not only have an impact for the operation of 12 of its outlets, but by all accounts the decision in this application would have implications for hundreds of other liquor licence holders currently operating in a manner that is inconsistent with the policy articulated by the provincial government in s 48(5)(e). The applicant has not sought to merely label the litigation

as constitutional as a means of avoiding the implication of costs. In fairness to Mr *Janisch*, he merely asked for costs of two counsel in the event of the applicant being successful. No argument was addressed to me on costs in the event of the application failing. Counsel probably accepted that the usual rule relating to costs in civil cases would apply. However, as the Court noted in *Biowatch supra* para [25], I am satisfied that the issues raised by the applicant were "genuine and substantive, and truly raised constitutional considerations relevant to the adjudication". In *Biowatch* para 28, and appropriately in the context of the issues raised in the matter before me, the Court considered the approach towards costs where state regulation is challenged. The Court held:

> „Constitutional issues are far more likely to arise in suits where the state is required to perform a regulating role, in the public interest, between competing private parties. One thinks of licences, tender awards, and a whole range of issues where government has to balance different claims made by members of the public. Usually, there will be statutes or regulations which delineate the manner in which the governmental agencies involved must fulfil their responsibilities. …In essence the dispute turns on whether the governmental agencies have failed adequately to fulfil their constitutional and statutory responsibilities. Essentially, therefore, these matters involve litigation between a private party and the state, with radiating impact on other private parties. In general terms costs awards in these matters should be governed by the over-arching principle of not discouraging the pursuit of constitutional claims…."

In light of the above, and in the exercise of my discretion, I am satisfied that each party should pay its own costs.

Order

61. The following order is made:

1. The application is dismissed.

2. There is no order as to costs.

JUDGE M R CHETTY

Appearances:

For the First Applicant:	Adv. M W Janisch & G A Du Toit Instructed by Venns Attorneys Pietermarizburg- 033 355 3175
For the First Respondent:	Adv. A J Dickson SC Instructed by PKX Attorney Pietermaritzburg – 033 347 5354
Date of hearing:	4 June 2015
Date of judgment:	20 November 2015