CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 216/14

In the matter between:

SHOPRITE CHECKERS (PTY) LIMITED Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL FOR ECONOMIC DEVELOPMENT, ENVIRONMENTAL AFFAIRS AND TOURISM, EASTERN CAPE First Respondent

GOVERNMENT OF THE EASTERN CAPE PROVINCE Second Respondent

EASTERN CAPE LIQUOR BOARD Third Respondent

Neutral citation:	*Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape and Others* [2015] ZACC 23
Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jappie AJ, Khampepe J, Madlanga J, Molemela AJ, Nkabinde J, Theron AJ and Tshiqi AJ
Judgments:	Froneman J (main): [1] to [90] Moseneke DCJ (concurring): [91] to [130] Madlanga J (dissenting): [131] to [169]
Heard on:	12 March 2015
Decided on:	30 June 2015
Summary:	Eastern Cape Liquor Act 10 of 2003 — confirmation of order of constitutional invalidity of section 71(2) and (5) and Schedule — constitutional invalidity not confirmed

Grocer's wine licence under Liquor Act 27 of 1989 terminated — licence to trade commercially — property — no arbitrary deprivation by change in regulatory regime

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ORDER

An application for confirmation of the order of constitutional invalidity of the Eastern Cape Division of the High Court, Grahamstown, and an application for leave to appeal against other orders made by the High Court:

1. The declaration of constitutional invalidity is not confirmed.
2. The application for leave to appeal is dismissed.
3. There is no order as to costs.

JUDGMENT

FRONEMAN J (Cameron J, Jappie AJ and Nkabinde J concurring):

Introduction

[1] This case raises the question whether a commercial trading licence that allows selling wine in a grocery store constitutes property under section 25 of the Constitution.[1] If it does, can it be said that the legislative termination of the licence, coupled with the opportunity to continue selling wine together with other liquor at separate premises but not in grocery stores, amount to deprivation of property?

[1] Section 25(1) reads:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

Lastly, if these two hurdles are successfully cleared, what is sufficient reason for the regulatory change to escape a charge of arbitrariness?

[2] The applicant (Shoprite) seeks confirmation of an order made by the Eastern Cape Division of the High Court, Grahamstown (High Court) declaring certain provisions of the Eastern Cape Liquor Act[2] (Eastern Cape Act) constitutionally invalid.[3] The Eastern Cape Act introduced a new regulatory framework for the sale of liquor in 2003. In terms of the pre-existing legislative framework,[4] Shoprite was licensed to sell wine with food in its grocery stores (grocer's wine licence). The transitional provisions of the Eastern Cape Act allowed the holder of a grocer's wine licence to continue to sell wine with food at the same premises for a period of 10 years after the commencement of the Act, now under the guise of a "registration". The holder could, however, after five years from the date of commencement of the Act, apply for registration to sell all kinds of liquor in separate premises.[5] Absent further registration, the permission to sell wine with food on the same premises lapsed 10 years after the commencement of the Act.

[3] Shoprite contended that this change of regulatory regime amounted to an arbitrary deprivation of its property. The High Court agreed. Before us is an application for confirmation of the High Court order.[6] Not only do the respondents

[2] 10 of 2003.

[3] Section 71(2) and (5) read with the relevant parts of the Schedule to the Act were declared invalid. Certain words in the Second Schedule to the Act, associated with grocer's wine licences, were excised and section 71(5) was excised from the rest of section 71.

[4] The now-repealed Liquor Act 27 of 1989 (1989 Liquor Act). The change from national to provincial legislation is of no moment in this case. In 1997, the National Assembly commenced the legislative process that resulted in the national Liquor Bill [B 131B–98] (1998 Bill), which was intended to replace the 1989 Liquor Act. In *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* [1999] ZACC 15; 2000 (1) SA 732 (CC); 2000 (1) BCLR 1 (CC) (*Liquor Bill*), this Court subsequently found the Bill to be constitutionally invalid as it constituted an inadmissible intrusion into the exclusive provincial legislative power to regulate retail liquor licensing. The 1998 Bill was thus revised and ultimately resulted in the new Liquor Act 59 of 2003. Several provincial legislatures, including the Eastern Cape Provincial Legislature, then enacted their own provincial legislation to regulate the retail sale of liquor.

[5] Section 71(5) of the Eastern Cape Act.

[6] Section 167(5) of the Constitution provides:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity

oppose the confirmation application,[7] they also seek leave to appeal against the dismissal by the High Court of certain preliminary objections relating to urgency and non-joinder of the Minister of Trade and Industry (Minister). The dismissal of these preliminary objections opened the door to deal with the constitutional challenge in the High Court. A determination in their favour in the application for leave and on the merits of the appeal would mean that the High Court should not have reached the constitutional challenge.

[4] The question of property is fiercely contested in South African society. There is, as yet, little common ground on how we conceive of property under section 25 of the Constitution, why we should do so, and what purpose the protection of property should serve. This exposes a potential fault line that may threaten our constitutional project. This judgment suggests that our evolving conversation on this issue should continue to seek our conception of property within the framework of values and individual rights in the Constitution. It further asserts that the level of constitutional protection should depend on the kind of constitutional interest involved and the core purpose associated with that type of property interest.

[5] The overall effect of the judgments in this case is that the declaration of invalidity cannot be confirmed. Broken down, a majority – this judgment and that of Madlanga J – holds that grocer's wine licences are property under section 25 of the Constitution and that Shoprite was deprived of this property in terms of the provisions of the Eastern Cape Act. Madlanga J's judgment holds that the deprivation was arbitrary. I hold differently, namely that the deprivation was not arbitrary. In his separate concurrence with this judgment, agreeing that the order of constitutional invalidity should not be confirmed, Moseneke DCJ also holds that the provisions of the Eastern Cape Act are not arbitrary. On the question of arbitrariness there is thus

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made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force."

[7] The first respondent is the Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and the second respondent is the Government of the Eastern Cape Province (collectively, Province). The third respondent is the Eastern Cape Liquor Board (Liquor Board).

also a majority. Moseneke DCJ disagrees, however, with the holding that the grocer's wine licences constitute property.

Issues

[6] In sum, the constitutional issues are these:

(a) Does the entitlement to commercial trade under state licence or regulation amount to property under section 25?

(b) If it does, do the impugned provisions of the Eastern Cape Act deprive holders of their property?

(c) If yes, is that deprivation arbitrary?[8]

Factual background

[7] The Liquor Board granted Shoprite grocer's wine licences in terms of the 1989 Liquor Act[9] for approved supermarkets throughout the Eastern Cape between 1989 and January 2003.[10] The holder of a grocer's wine licence was prohibited from selling liquor other than wine.[11] The 1989 Liquor Act made provision for the lapse or withdrawal of grocer's wine licences in certain instances.[12] It was common cause, however, that Shoprite's licences had neither lapsed nor been withdrawn in accordance with any of the relevant provisions.

[8] The Eastern Cape Act differs from the 1989 Liquor Act in a number of ways. It does not provide for separate licences in respect of different types of liquor.[13] Holders of licences are permitted to sell only liquor on the premises, unless the

[8] These follow the first three stages of the seven stage enquiry set out in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR (CC) (*FNB*) at para 46. The parties agreed that the fourth stage, justification under section 36(1) of the Constitution, does not arise. The last three stages deal with expropriation, which is not at issue here.

[9] Section 20(b)(iv).

[10] Section 87.

[11] Section 88.

[12] Section 107 dealt with the lapse of licences and section 120 provided for the removal of licences.

[13] Section 20 of the 1989 Liquor Act provided for 18 licences whereas section 20 of the Eastern Cape Act provides for five categories of registration.

Premier of the province determines otherwise.[14] However, grocer's wine licences granted under the 1989 Liquor Act continued to be valid as "registrations" under the Eastern Cape Act for 10 years after the latter's commencement. The proviso was that after five years they could be converted into proper registrations.[15] The Eastern Cape Act came into effect in 2004. Shoprite did not convert its grocer's wine licences into full scale registrations to sell liquor at different premises. The 10 year period of validity of erstwhile grocer's wine licences lapsed on 14 May 2014 under the Eastern Cape Act's transitional provisions.

[9] In about September 2013, Shoprite's representative met with a representative of the Liquor Board to discuss the imminent lapsing of its grocer's wine licences. After taking legal advice, Shoprite also addressed a letter to the Premier of the Eastern Cape. Further exchanges bore no fruit and Shoprite launched an application in the High Court on a semi-urgent basis, seeking a declaration that the relevant provisions of the Eastern Cape Act that replaced its entitlements under the 1989 Liquor Act were constitutionally invalid.

High Court

[10] The Province sought to derail Shoprite's application on several preliminary grounds, two of which were persisted in before us, namely that the urgency was self-created and that the Minister should have been joined as a party to the proceedings. The High Court held that the postponement of the hearing and the time granted to the respondents to file a supplementary affidavit cured any prejudice the respondents may have suffered as a result of the truncated time periods. It also held

[14] Section 43(1) of the Eastern Cape Act reads:

> "Despite any other law, a registered person may also sell such goods on the registered premises or conduct the business thereon, that the Premier may prescribe."

[15] Id section 71(5), which reads:

> "The holder of a grocer's wine licence in terms of the Liquor Act, 1989, who is deemed to be registered to sell wine by virtue of the conversion contemplated in subsection (2), must be entitled to sell wine as defined in section 1 of the Liquor Products Act, 1989, for a period of ten years after the commencement of this Act: Provided that the holder of such registration may, at any stage after expiry of a period of five years from the date of commencement of this Act, apply for registration to sell all kinds of liquor in separate premises as prescribed."

that the matter was urgent because Shoprite's right to sell table wine from its ordinary grocery stores would have come to an automatic end on 14 May 2014.

[11] In relation to the non-joinder argument, the respondents contended that the Minister was a necessary party to the proceedings and should have been joined. The High Court found that there was no merit in this argument, as the regulation of retail sale of liquor is an area of provincial competence and falls exclusively within provincial powers under Schedule 5 of the Constitution. The Minister had no direct and substantial interest in the matter.

[12] On the merits of Shoprite's application for a declaration of constitutional invalidity, the High Court ruled in its favour. The Court held that its entitlement under the grocer's wine licence constituted property for the purposes of section 25(1) of the Constitution, that Shoprite was deprived of this property, and that the deprivation was arbitrary.

[13] The High Court applied the test set out in *FNB* for deciding a case where the constitutional validity of deprivation of property has been challenged.[16] The Court found that there have not been any authoritative pronouncements on these questions insofar as liquor licences are concerned. It also found that South African courts have, however, (a) consistently recognised the inherent commercial value of liquor licences; (b) acknowledged the increasing importance of rights acquired by way of "governmental largesse" in modern society; and (c) construed the terms "property" and "arbitrary" expansively for the purposes of the protection afforded by section 25.[17] It found that a licence granted by the State to a person or corporation to trade in a certain commodity – which endures for as long as the recipient conducts itself in accordance with the conditions attaching to the licence, and which entitles the recipient to invest substantial sums on the understanding that the relevant

[16] *FNB* above n 8.

[17] *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism: Eastern Cape and Others* [2014] ZAECGHC 106; 2015 (1) BCLR 102 (ECG) (High Court judgment) at para 40.

administrative functionary is by law precluded from arbitrarily revoking the licence – must be worthy of the protection afforded by section 25 of the Constitution.[18] The Court further found that the commercial value of a licence can be objectively determined and is not dependent on the mere subjective interest in the licence.[19] Once the licence is granted, it brings into existence an enforceable personal incorporeal right which entitles the recipient to trade in accordance with the conditions attached. These rights are also transferable, subject to approval by the licensing authority.[20] The right to sell liquor is thus, according to the High Court, clearly definable and identifiable by persons other than the holder; has commercial value; is capable of being transferred; and is sufficiently permanent, in the sense that the holder is, in terms of administrative law, protected against arbitrary revocation thereof by the issuing authority.[21]

[14] The effect of the impugned provisions was to deprive Shoprite of its right to sell table wine at its grocery stores permanently. The interference with this right was substantial and thus resulted in a deprivation of property.[22] Relying on *FNB*, *Agri SA*[23] and *Mkontwana*,[24] the High Court found that the licences constituted more than bare permissions to sell liquor, but commercially valuable rights to sell table wine in specified grocery stores. Those rights had been terminated by the enactment of the impugned provisions.[25] The right to sell table wine at those stores would not be revived by registrations under the Eastern Cape Act, which would have a negative impact on Shoprite's business and marketing strategies.[26]

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[18] Id at para 47.

[19] Id at para 60.

[20] Id at para 61.

[21] Id at para 62.

[22] Id at paras 71-2.

[23] *Agri SA v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) (*Agri SA*).

[24] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) (*Mkontwana*).

[25] High Court judgment at para 68.

[26] Id at para 69.

[15] The reasons advanced for the deprivation were based on policy considerations requiring the simplification of the processes in relation to applications for and enforcement of these licences. This had resulted in a substantial reduction in the categories of licences available. There were also concerns about the ability of licensees to enforce proper control over the sale of liquor in the context of a supermarket as opposed to separate premises where only liquor is sold. The open display of liquor in a store frequented by young people is undesirable. The High Court found these justifications insufficient. The purported need for simplification of the system could not justify the deprivation of the pre-existing rights in respect of which no applications would have been required.[27] In relation to the alleged difficulties with enforcement, the Court held that the respondents had failed to provide details of what those difficulties were and how they affected regulation during the transitional period.[28] The Court considered it significant that of all the provinces to have enacted provincial legislation to regulate the retail sale of liquor, the Eastern Cape was the only province where the sale of table wine in grocery stores was prohibited.[29]

[16] In light of its findings in the preceding three stages of the enquiry, the Court did not find it necessary to consider a section 36 justification. It considered that the test for arbitrariness under section 25 was more stringent than the analysis envisaged under section 36(1).[30]

[17] The High Court thus declared section 71(2) and (5) of the Eastern Cape Act, read with the relevant parts of the Schedule, invalid. It severed the offending wording from the impugned provisions and the Schedule. Pending the confirmation of the order by this Court, the High Court ruled that Shoprite could continue to sell wine in

[27] Id at para 83.

[28] Id at para 84.

[29] Id at para 86.

[30] Id at para 88.

accordance with its existing licences, and that the Liquor Board was interdicted from taking any action against Shoprite for doing so. The respondents were ordered to pay the costs of the application, including the costs of two counsel.

In this Court

Shoprite's submissions

[18] Shoprite applied to this Court for confirmation of the declaration of constitutional invalidity. Shoprite relied on this Court's decisions in *Agri SA*,[31] *Opperman*[32] and *Law Society*,[33] as well as a number of academic sources and European Court of Human Rights jurisprudence, for its argument that the licences in question do in fact constitute property under section 25 of the Constitution. In particular, it cited the factors considered by this Court in *Opperman* in reaching the conclusion that a claim based on unjustified enrichment is property under section 25. These are that the claim (i) had monetary value; (ii) could be disposed of and transferred; and (iii) could be counted as an asset in the holder's estate.[34] It submitted that licences, permits and quotas issued by administrative functionaries pursuant to statutory powers, which have commercial value, and which have vested in the holder, ought to fall within the ambit of section 25. Shoprite argued that the rights granted to it fall within this category.

[19] It was submitted that treating rights of this nature as property will not make legislative regulation impossible, because only some deprivations, not all, will give rise to a challenge based on arbitrariness. On the other hand, depriving this kind of right of constitutional protection will substantially devalue the worth of constitutional property protection in a modern economy where such rights are increasingly common.

[31] Above n 23 at para 44.

[32] *National Credit Regulator v Opperman and Others* [2012] ZACC 29; 2013 (2) SA 1 (CC); (2013) (2) BCLR 170 (CC) (*Opperman*) at para 63.

[33] *Law Society of South Africa and Others v Minister for Transport and Another* [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) (*Law Society*) at paras 83-4.

[34] *Opperman* above n 32 at para 58.

[20] Shoprite submitted that the impugned provisions took away its pre-existing grocer's wine licences, which had continued in force under the transitional provisions of the Eastern Cape Act. Their termination was not as a result of an administrative decision, but was legislatively imposed and automatic. No challenge to undo that legislative change lies under the Promotion of Administrative Justice Act (PAJA).[35]

[21] The test for arbitrariness, Shoprite argued, is a type of proportionality analysis, namely whether there is sufficient reason for the deprivation, taking into account all the relevant factors such as the purpose the deprivation seeks to achieve; the nature of the property deprived and its holder; and the extent of the deprivation. The deprivation was total and, therefore, the respondents must give persuasive reasons therefor. The reasons advanced by the Province and the Liquor Board for the deprivations are insufficient to justify the extinction of the grocer's wine licences. Shoprite submitted that it is not enough for a party seeking to justify a deprivation to make general statements in support of the measure. Evidence is needed and was not provided. In the absence of that evidence, the conclusion must be that there is no sufficient reason for the deprivation, hence it is arbitrary.

[22] Finally, Shoprite contended that section 36 finds no practical application because once it has been determined that a deprivation is arbitrary, it cannot be said that it was reasonable and justifiable in terms of that section.

The respondents' submissions

[23] The Province and Liquor Board contended that the grocer's wine licences were converted into registrations under section 20(a) of the Eastern Cape Act. They argued that the inevitable consequence of this was that Shoprite became the holder of registrations as opposed to grocer's wine licences. Given that Shoprite's case is premised on the argument that the grocer's wine licences constituted property, the respondents argued that the High Court erred in concluding that the grocer's wine

[35] 3 of 2000.

licences remained valid and lapsed on 14 May 2014. To the extent that these licences were property and Shoprite was deprived thereof, the respondents contended that the deprivation took place on 14 May 2004.

[24] The respondents further contended that the order of the High Court has the effect of creating a category of registration in addition to those provided for in section 20 of the Eastern Cape Act and would render the registration inconsistent with that section. This cannot be countenanced because it amounts to legislating for a category not contemplated by the Legislature.

[25] It was also submitted that neither the grocer's wine licences under the 1989 Liquor Act nor the registrations under the Eastern Cape Act are property for the purpose of section 25. To hold otherwise would transgress the caution expressed in *Law Society* that the "definition of property for purposes of constitutional protection should not be too wide to make legislative regulation impracticable".[36] The findings of this Court in *Agri SA*, *FNB* and *Opperman* do not serve as authority for the contention that an interest with commercial value necessarily constitutes property. Public law entitlements and other kinds of government largesse may be withdrawn unilaterally by administrative authorities, something which is, so they contend, not easily compatible with regarding them as property.

[26] The respondents relied on this Court's finding in *Liquor Bill*[37] that liquor licences are bare permissions. This kind of permission is, they contend, part of the framework designed to impose control by the State over the use of a dangerous substance with negative socio-economic consequences in balance with the potential economic benefits of trading in liquor. The permission is not freely transferrable. Shoprite relied on various subjective interests (like its business model) to support the contention that the licences were property, despite the fact that this Court has held that subjective interests are not determinative. It was contended that the Court must

[36] *Law Society* above n 33 at para 83.

[37] Above n 4.

consider the meaning of property in this case in the context of an interpretive framework that takes into account the tensions between individual rights and the State's positive social responsibilities. Viewed in this context, the grocer's wine licences did not constitute property.

[27] If the Court finds that they did amount to property, the respondents contended that there was no deprivation as the application Shoprite could have made to obtain a registration under the Eastern Cape Act would have been a mere formality given that it probably already complied with all the requirements. In any event, in light of the opportunity to convert the licences to registrations, any deprivation that there may have been was not substantial. If there was a deprivation, the respondents submitted that it does not constitute the removal of "all the incidents of ownership".[38]

[28] Any deprivation was nevertheless justified on the basis of the reasons set out in evidence on affidavit. This evidence related to "legislative facts" that courts are not in a position to second-guess.[39] No basis thus exists for finding that the deprivation was arbitrary.

Leave to appeal

[29] The application for leave to appeal by the Province and the Liquor Board must be dismissed. It is not in the interests of justice for this Court to grant leave in relation to findings on urgency in the High Court.[40] And, for the reasons stated in the High Court judgment, there are no reasonable prospects of success in relation to either urgency or joinder.[41]

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[38] *FNB* above n 8 at para 100.

[39] *S v Lawrence; S v Negal; S v Solberg* [1997] ZACC 11; 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) (*Lawrence*) at paras 52-4.

[40] In *City of Cape Town and Another v Robertson and Another* [2004] ZACC 21; 2005 (2) SA 323 (CC); 2005 (3) BCLR 199 (CC) at para 2, this Court found that it can consider issues arising from orders other than those dealing with the declaration of constitutional invalidity if they are related to constitutional matters and it is in the interests of justice to do so. The finding of the High Court in this case does not raise a constitutional issue nor does it implicate an arguable point of law of general public importance.

[41] See [10] and [11].

Constitutional challenge

General

[30] It is as well to emphasise upfront two aspects that have a material bearing on the issues to be decided. The first is that this is a frontal "root and branch" challenge to the constitutional validity of the impugned provisions of the Eastern Cape Act. The second is that what is challenged is a legislative change to the regulatory framework for the sale of liquor, not its administrative enforcement.

[31] The enquiry into the constitutional invalidity of legislation frontally challenged is an objective one. In *Ferreira v Levin*, this Court emphatically stated:

> "The answer . . . is that the enquiry is an objective one. A statute is either valid or 'of no force and effect to the extent of its inconsistency'. The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach."[42]

[32] What this means is that it is not only Shoprite's subjective entitlement to protection of its property that needs to be examined. The enquiry should be whether the holding of a grocer's wine licence could, objectively, be regarded as property and, if so, whether the impugned provisions of the Eastern Cape Act arbitrarily deprived holders of their property.

[42] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (*Ferreira v Levin*) at para 26.

[33] The importance of the second feature, namely that it is a challenge to legislation that seeks to bring about a new regulatory framework, is threefold. The first is that Shoprite's complaint here raises a problem of legal transition from one regulatory regime to another,[43] and does not touch upon or question the State's competence to regulate in a particular manner once the validity of the regulatory regime is accepted. Put in other words, what Shoprite challenges is legislative action by the Province, not administrative action.[44] It is no answer to Shoprite's claim to tell it to seek a remedy under PAJA, because it does not attack the exercise of administrative conduct. Its challenge must be met at the level it is directed – at the legislative level. The second is that if the potential number of licensees that may challenge legislation is at all relevant to determine whether property warrants protection, then a frontal challenge to the new regulatory legislation will not open any floodgates of legislation. It will occur only once, when the new legislation's constitutional validity is challenged. The third is, as will be seen later, that courts allow considerable latitude to governmental changes to regulatory frameworks. There is little danger of overzealous interference with the power of other branches of government to regulate economic life.

[34] In the introduction to this judgment, mention was made of the contested nature of our country's conversation about the protection of property and the potential danger this holds for the success of our constitutional project. We need to be open about why this is so. The explanation lies in our history and in the pre-constitutional conception of property, which entailed exclusive individual entitlement. Put simply, that is largely a history of dispossession of what indigenous people held, and its transfer to the colonisers in the form of land and other property, protected by an economic system that ensured the continued deprivation of those benefits on racial and class

[43] Alexander "Property as a Fundamental Constitutional Right – The German Example" (2003) 88 *Cornell Law Review* 733 at 761-2.

[44] See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at paras 21-6, 32-3 and 40-1.

lines.[45] That history of division probably also explains the concerns both the previously-advantaged and disadvantaged still have. The former fears that they will lose what they have; the latter that they will not receive what is justly theirs.

[35] This leads to the constitutional property clause in the Constitution being regarded with suspicion from different perspectives. At opposite ideological extremes is the view that "property is theft",[46] against the view that the protection of property lies not only at the heart of atomised individual personal autonomy but also a truly efficient free market economic system.[47] On less extreme lines lie the contrasting fears that giving too much protection to private property will inhibit the State's role to effect the transformation that the Constitution requires, as against the view that not giving enough protection will also undermine transformation by inhibiting economic development.

[36] Given our history, these contrasting perspectives are understandable, but they can only be effectively addressed by seeking a conception of property in the Constitution itself, and not by falling back on preconceived notions of property not rooted in the Constitution. The task of all, but especially the courts, is to seek our own constitutional conception of property within the normative framework of the fundamental values and individual rights in the Constitution. The level of constitutional protection would then depend on the kind of constitutional property interest involved and the core purpose associated with that type of interest.

[45] Compare *Agri SA* above n 23 at para 1; *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) at paras 10-29; and *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (*PE Municipality*) at paras 16-23.

[46] Guérin (ed) *No Gods, No Masters: An Anthology of Anarchism* (AK Press, Oakland 2005) at 48 and 55 and Proudhon *What is Property? An Inquiry into the Principle of Right and of Government* (Humboldt Publishing Company, New York 1840).

[47] See generally Posner *Economic Analysis of Law* 8 ed (Aspen Publishers, New York 2011).

[37] The seminal start in this process was made by this Court in *FNB*. It saw the interpretation of section 25 as an exercise to be done in the context of our history and the Constitution as a whole:

> "The subsections which have specifically to be interpreted in the present case must not be construed in isolation, but in the context of the other provisions of section 25 and their historical context, and indeed in the context of the Constitution as a whole. Subsections (4) to (9) all, in one way or another, underline the need for and aim at redressing one of the most enduring legacies of racial discrimination in the past, namely the grossly unequal distribution of land in South Africa. The details of these provisions are not directly relevant to the present case, but ought to be borne in mind whenever section 25 is being construed, because they emphasise that under the 1996 Constitution the protection of property as an individual right is not absolute but subject to societal considerations.
>
> 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 (1997) aptly explains the tensions that exist within section 25:
>
> > '[T]he meaning of section 25 has to be determined, in each specific case, within an interpretative framework that takes due cognisance of the inevitable tensions which characterize 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 section 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."[48] (Footnotes omitted.)

[38] On the facts in *FNB* it was not necessary to interrogate the meaning of property under section 25 in any detail:

[48] *FNB* above n 8 at paras 49-50.

> "At this stage of our constitutional jurisprudence it is, for the reasons given above, practically impossible to furnish – and judicially unwise to attempt – a comprehensive definition of property for purposes of section 25. Such difficulties do not, however, arise in the present case. Here it is sufficient to hold that ownership of a corporeal movable must – as must ownership of land – lie at the heart of our constitutional concept of property, both as regards the nature of the right involved as well as the object of the right and must therefore, in principle, enjoy the protection of section 25."[49] (Footnote omitted.)

[39] There are a number of reasons why it is necessary to take the investigation into what conception of property we hold for the purposes of section 25 a bit further. The first is that *FNB* requires that each individual case must be adjudged within our constitutional framework. And, whether articulated or not, each decision on whether to protect a particular property interest or not rests on some assumption as to why it merits, or does not merit, constitutional protection.[50] Better then to articulate the underlying reasons for the protection in order to ensure that these often unarticulated premises fall within the constitutional framework.

[40] The cases decided under the property clause in this Court have, in the main, not been concerned with property issues that push at the margins of the private law understanding of property.[51] The most recent one of particular relevance to the

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[49] Id at para 51.

[50] Compare Alexander above n 43 at 737-9.

[51] In the most recent judgment of this Court decided under the property clause, *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport and Others* [2015] ZACC 15 at para 16, the Court was concerned with "money in hand".

Agri SA above n 23 dealt with mineral rights and *Du Toit v Minister of Transport* [2005] ZACC 9; 2006 (1) SA 297 (CC); 2005 (11) BCLR 1053 (CC) dealt with gravel on land.

Law Society above n 33 at paras 83-4, stated:

> "For present purposes let it suffice to state that the definition of property for purposes of constitutional protection should not be too wide to make legislative regulation impracticable and not too narrow to render the protection of property of little worth. In many disputes, courts will readily find that a particular asset of value or resource is recognised and protected by law as property. In other instances, determinations will be contested or prove elusive.
>
> Happily, in this case, given the conclusion I reach, it is unnecessary to resolve the debate whether a claim for loss of earning capacity or for loss of support constitutes 'property'. I will assume without deciding in favour of the applicants that a claim for loss of earning capacity or of support is 'property'."

question before this Court now, *Opperman*, extended protection to the personal right of an enrichment claim, but did so squarely within the parameters of existing private law:

> "This Court has not specifically found that personal rights emanating from contract, delict, or enrichment are indeed *property* under section 25. Our constitutional jurisprudence accepts that deprivation of ownership of corporeal property constitutes deprivation for purposes of section 25. Without discussing the specific point, this Court has also accepted a trade mark to be property, albeit incorporeal, deserving protection under section 25. Intellectual property, even though incorporeal, is of course different from an enrichment claim. The right to claim restitution on the basis of enrichment is a personal right. It can only be enforced against a specific party or parties, in this case the consumer who received the money. It is not a real right in property like, for example, ownership or a usufruct, enforceable against all. Section 25 deals with *property* and not with *ownership*. But reliance has been placed on the link to ownership in evaluating whether there is a deprivation or whether section 25 comes into play.
>
> . . .

Previously, in *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* [2010] ZACC 20; 2011 (1) SA 293 (CC); 2011 (2) BCLR 189 (CC) (*Offit Enterprises*) at para 46, when dealing with immovable property, this Court found:

> "To my mind, the conduct the applicants complained of is not what was envisaged by the protection afforded in the property clause of the Constitution. One must not forget that property rights are not absolute. It is inevitable that, with a scheme like the Coega IDZ, landowners in the designated area will be affected. In this case, however, at no time has that scheme disabled the applicants from using or exploiting their land. The applicants are still free to sell, develop, or make reasonable use of their land." (Footnote omitted.)

In *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* [2006] ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC), this Court accepted that loss of goodwill is protected by section 25 of the Constitution in order to make the submission that goodwill is to a legal person what earning capacity is for a natural person.

In another case dealing with immovable property, *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* [2009] ZACC 24; 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC) (*Reflect-All*) at para 38, this Court stated:

> "I accordingly agree with the conclusion by the High Court that sections 10(1) and 10(3) of the Infrastructure Act deprive the applicants in some respects of the use, enjoyment and exploitation of their properties."

In *Mkontwana* above n 24 at para 33, another case concerning immovable property, the Court stated:

> "Alienation of immovable property is ordinarily completed by transfer to the new owner in the office of the registrar of deeds. The right to alienate property is an important incident of its use and enjoyment."

> In the circumstances of this case, the recognition of the right to restitution of money paid, based on unjustified enrichment, as property under section 25(1) is logical and realistic."[52] (Footnotes omitted.)

[41] What is at stake here, namely the entitlement to commercial trade under a state licence or regulation, does not sit comfortably with private law notions of property. In 1985, Wiechers and Carpenter commented on the pre-Constitution position:

> "[O]ne often finds, in the administrative-law relationship, a wide variety of rights, powers and privileges which the subject acquires by statute or by virtue of the democratic constitutional system. . . .
>
> It would be very difficult to explain these rights of private persons and subjects in the light of a private-law system of rights, because these rights differ radically, as regards both character and scope, from private law rights. It is possibly in this regard that one may justifiably refer to public-law rights. These public-law rights are rights which are based on some aspect of the broader general interest in which the subject shares, such as the effective regulation of trade, the realization of constitutional democracy, public health and general residential and living conditions, and to which public law affords legal protection. However, the courts are sometimes reluctant to recognize the statutory rights of subjects, even though such rights are of material interest to the subject."[53] (Footnotes omitted.)

They then continued, with poignant resonance to the issue before us:

> "This hesitant approach in the recognition of acquired statutory rights is particularly apparent in regard to the living and residence rights of urban Blacks. It is as if the courts allow themselves, in the matter of recognition of these rights, to be unconsciously influenced by the socio-political climate; fortunately, these essential rights of subjects have gained increasing recognition of late."[54] (Footnote omitted.)

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[52] *Opperman* above n 32 at paras 61-3.

[53] Wiechers and Carpenter *Administrative Law* (Butterworths, Durban 1985) at 73-5.

[54] Id at 75.

[42] That hesitant recognition matured into our constitutional democratic settlement, the Constitution, which includes a provision that "a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or is entitled, to the extent provided by an Act of Parliament, either to tenure that is legally secure or to comparable redress".[55] There are other similar kinds of potential constitutional entitlements in section 25: to bring about equitable access to all South Africa's natural resources;[56] to gain equitable access to land;[57] and to land restitution.[58] In addition to these land-related entitlements there are specific provisions dealing with socio-economic rights: access to adequate housing;[59] health care services;[60] sufficient food and water;[61] and social security.[62] Every citizen too, has the right to choose their trade, occupation or profession freely.[63] Subject to the Constitution, the courts must apply customary law where applicable.[64]

[43] More generally, the Constitution envisages a society based on the fundamental values of dignity, freedom and equality.[65] The Bill of Rights "affirms the democratic values of human dignity, equality and freedom" and the State must "respect, protect, promote and fulfil the rights in the Bill of Rights".[66] The Bill of Rights declares that "everyone has inherent dignity" and protects the right of all "to have their dignity respected and protected".[67] When interpreting the Bill of Rights, a court, tribunal or

[55] Section 25(6).

[56] Section 25(4)(a).

[57] Section 25(5).

[58] Section 25(7).

[59] Section 26(1).

[60] Section 27(1)(a).

[61] Section 27(1)(b).

[62] Section 27(1)(c).

[63] Section 22.

[64] Section 211(3).

[65] Section 1(a).

[66] Section 7(1) and (2).

[67] Section 10.

forum "must promote the values that underlie an open and democratic society based on human dignity, equality and freedom".[68]

[44] A conception of property that accords with those founding values is what should animate the question of determining the kind of property that deserves protection. In *Pillay*,[69] Langa CJ quoted with approval this passage of Ackermann J in *Ferreira v Levin*:

> "Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity."[70]

[45] In relation to a citizen's right to choose a vocation freely,[71] in *Affordable Medicines*[72] (per Ngcobo J) this Court stated:

> "Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity . . . . One's work is part of one's identity and is constitutive of one's dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of her or his life. And there is a relationship between work and the human personality as a whole. 'It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person's existence'."[73] (Footnote omitted.)

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[68] Section 39(1)(a).

[69] *MEC for Education, KwaZulu-Natal, and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (*Pillay*) at para 63.

[70] *Ferreira v Levin* above n 42 at para 49.

[71] Section 22 provides:

> "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

[72] *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*).

[73] Id at para 59, taking the translation of the *Bundesverfassungsgericht* (Federal Constitutional Court) decision in the *Pharmacy Case* 7 BVerfGE 377 from Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 2 ed (Duke University Press, Durham and London 1997) at 274.

[46] What flows from this is, first, that to determine what kind of property deserves protection under the property clause cannot be restricted to private law notions of property. To do so would exclude other potential constitutional entitlements that may deserve protection from the ambit of protection under the property clause. It could also inadvertently lead to a failure to subject private law notions of property to constitutional scrutiny in order to ensure that they accord with constitutional norms.[74] Extending our conception of property to embrace constitutional entitlements beyond the original ambit of private common law property will ensure that the property clause does not become an obstacle to the transformation of our society, but central to its achievement.[75] In all of this, the fundamental values of dignity, equality and freedom play a central role. Our conception of property must be derived from the Constitution.[76]

[47] This Court has emphasised that the individual is not an island unto itself. In *Pillay*, the importance of this was explained:

> "The notion that 'we are not islands unto ourselves' is central to the understanding of the individual in African thought. It is often expressed in the phrase *umuntu ngumuntu ngabantu* which emphasises 'communality and the interdependence of the members of a community' and that every individual is an extension of others."[77] (Footnotes omitted.)

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[74] Section 39(2) requires that the development of the common law "must promote the spirit, purport and objects of the Bill of Rights". See also section 39(1)(a) above n 68.

[75] Compare Van der Walt *Constitutional Property Law* 3 ed (Juta & Co Ltd, Cape Town 2011) at 185-6.

[76] In the *Groundwater Case* (1981) 58 BVerfGE 300, (translated in Kommers and Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 3 ed (Duke University Press, Durham and London 2012) at 642) the *Bundesverfassungsgericht* held:

> "The concept of property as guaranteed by the constitution must be derived from the constitution itself. This concept of property in the constitutional sense cannot be derived from legal norms [ordinary statutes] lower in rank than the constitution, nor can the scope of the concrete property guarantee be determined on the basis of private-law regulations."

In view of the supremacy of the Constitution in our law, it seems eminently sensible to adopt the same approach to our property clause.

[77] Above n 69 at para 53. See also Ackermann *Human Dignity: Lodestar for Equality in South Africa* (Juta & Co Ltd, Cape Town 2012) at 109-15 and Cornell and Muvangua (eds) *Ubuntu and the Law, African Ideals and Postapartheid Jurisprudence* (Fordham University Press, New York 2012) at 285-300.

[48] The other building blocks for the proper conceptualisation of property and the function that its protection will serve have already been laid in *FNB*: (i) the protection of property as an individual right is not absolute but subject to societal considerations;[78] (ii) that property should also serve the public good is an idea by no means foreign to pre-constitutional property concepts;[79] and (iii) neither the subjective interest of the owner in the thing owned, nor the economic value of the right of ownership, can determine the characterisation of the right.[80]

[49] That section 25 must be interpreted with the values of dignity, equality and freedom in mind was emphasised in *PE Municipality*.[81] That case also foreshadows the recognition of instances of property not recognised previously in private law:

> "The blatant disregard manifested by racist statutes for property rights in the past makes it all the more important that property rights be fully respected in the new dispensation, both by the State and private persons. Yet such rights have to be understood in the context of the need for the orderly opening up or restoration of secure property rights for those denied access to or deprived of them in the past."[82]

And later:

> "In sum, the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. . . . The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights

[78] *FNB* above n 8 at para 49.

[79] Id at para 52.

[80] Id at para 56.

[81] Above n 45 at para 15.

[82] Id.

> of ownership over the right not to be dispossessed of a home, or *vice versa*."[83] (Footnote omitted.)

[50] The objective normative values of the Constitution thus require us to determine what kind of property deserves protection under the property clause, by reference to the Constitution itself. The fundamental values of dignity, equality and freedom necessitate a conception of property that allows, on the one hand, for individual self-fulfilment in the holding of property, and, on the other, the recognition that the holding of property also carries with it a social obligation not to harm the public good. The function that the protection of holding property must thus, broadly, serve is the attainment of this socially-situated individual self-fulfilment. The function of personal self-fulfilment in this sense is not primarily to advance economic wealth maximisation or the satisfaction of individual preferences, but to secure living a life of dignity in recognition of the dignity of others. And where the holding of property is related to the exercise, protection or advancement of particular individual rights under the Bill of Rights, the level of the protection afforded to that holding will be stronger than where no relation of that kind exists.

[51] Acceptance that the constitutional conception of property may embrace different kinds of entitlements also brings with it the acceptance that, when confronted with legal transitions, the entitlements of the past do not necessarily warrant protection in perpetuity, provided that appropriate and reasonable transitional provisions are made. This consideration underlay this Court's decision in *Agri SA*.[84]

[52] This Court has often gained guidance and insight from the German Basic Law and the interpretation and application of that Basic Law by the *Bundesverfassungsgericht* (Federal Constitutional Court), mindful of the differences between that Basic Law and our Constitution in historical and social context as well as

[83] Id at para 23.

[84] Above n 23 at paras 73-4 (judgment of Mogoeng CJ) and 86-9 (judgment of Froneman J).

the text.[85] Of course the German approach cannot be divorced from its historical and social context and the textual provisions of the Basic Law, which is different in many ways from ours. Therefore, to determine whether a similar kind of approach is called for in our law we need to consider whether it would fit into the framework of values of our own Constitution.

[53] It is nevertheless instructive that the approach outlined above is not dissimilar to the German experience. Early on, in 1954, in the *Investment Aid Case* the Federal Constitutional Court declared:

> "The image of humankind in the Basic Law is not that of isolated, sovereign individuals. On the contrary, the Basic Law has resolved the tension between individual and society in favour of coordination and interdependence with the community without touching the intrinsic value of the person."[86]

[54] That premise later led the Court to conclude that the core purpose of the constitutional protection of property was not economic, but personal and moral,[87] where, in the *Hamburg Flood Control Case*, it stated:

> "Article 14(1) of the Basic Law guarantees property both as a legal institution and as a concrete right held by the individual owner. To hold property is an elementary constitutional right that must be seen as sharing a close nexus with the protection of personal liberty. Within the general system of constitutional rights its function is to secure for its holder a sphere of liberty in the economic field in which he or she can lead a self-governing life."[88]

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[85] See, for example, *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) SA 193 (CC); 2015 (2) BCLR 127 (CC) (*H*) at paras 28-32. In Van der Walt and Kleyn "Duplex Dominium: The History and Significance of the Concept of Divided Ownership" in Visser (ed) *Essays on the History of Law* (Juta & Co Ltd, Cape Town 1989) at 235-43 the differences between the German and South African positions in regard to property as an institution are noted.

[86] *Investment Aid Case* (1954) 4 BVerfGE 7 (translated in Kommers and Miller above n 76 at 625).

[87] Alexander above n 43 at 746.

[88] *Hamburg Flood Control Case* (1968) 24 BVerfGE 367 (translated in Kommers and Miller above n 76 at 632).

[55] The German approach is illuminating in the sense that it demonstrates that the constitutional protection of the holding of property need not be premised on an economic theory of property that holds that the core purpose of property must be wealth satisfaction or the satisfaction of individual preferences.[89] The Court has stated:

> "From the constitutional guarantee of property the owner cannot derive a right to be permitted to make use precisely that which promises the greatest possible economic advantage."[90]

[56] Against this background, the specific issues of property, deprivation and arbitrariness must now be assessed.

Property

[57] The dispute here is about a liquor licence. In *Liquor Bill*, this Court characterised a liquor licence as—

> "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 . . . 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."[91]

[58] 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. This is not the only kind of potential property interest that stems from

[89] Alexander above n 43 at 745.

[90] *Groundwater Case* above n 76 at 345 (translated in Alexander id at 756).

[91] *Liquor Bill* above n 4 at para 56.

state grant. So do social and welfare rights.[92] The public law origin of these interests is often used as an argument to deny them protection as property.

[59] This stems from the difficulty alluded to earlier, namely that they do not fit easily into a private law conception of rights and property.[93] In our pre-constitutional law, these kinds of interests were only recognised once vested.[94] That recognition allowed limited procedural protection only under administrative law, which could be extinguished by the exercise of original legislative powers.[95] On that approach, Shoprite's permission to sell food and wine in its stores would not qualify as property to be protected under section 25.[96] But even under pre-constitutional common law it was recognised that this was too narrow a view. Legal standing to challenge administrative decisions was gradually extended also to include those in whom rights had not yet vested, but who had a legitimate expectation in the outcome of the decision.[97] That development is still continuing.[98] It would be a retrogressive step to use pre-constitutional notions of vesting to determine the ambit of property that needs to be protected under the Constitution.

[60] All property is subject to the law and regulation by the law. In that wide sense, the holding of all property is dependent on state "largesse". The intensity of regulation may depend on the purpose for which the property is held and the purpose

[92] The socio-economic rights under our Constitution fall within this category, but they are not at issue here. We need not consider whether, because of their constitutional pedigree, they may deserve stronger protection as property under section 25. Compare *Transkei Public Servants Association v Government of The Republic of South Africa and Others* 1995 (9) BCLR 1235 (Tk) (*Transkei Public Servants Association*) at 1246-7.

[93] At [41].

[94] See, for example, *Natal Bottle Store-Keepers and Off-Sales Licenses Association v Liquor Licensing Board for Area 31 and Others* 1965 (2) SA 11 (D) at 16H-17A.

[95] *Brown v Cape Divisional Council and Another* 1979 (1) SA 589 (A) at 602D.

[96] This kind of interest was not protected in the pre-1994 application of the Expropriation Act 63 of 1975, as far as I could ascertain.

[97] *Administrator, Transvaal and Others v Traub and Others* [1989] ZASCA 90; 1989 (4) SA 731 (A) at 761D-F.

[98] See *Zulu and Others v eThekwini Municipality and Others* [2014] ZACC 17; 2014 (4) SA 590 (CC); 2014 (8) BCLR 971 (CC) at paras 26-9 (judgment of Zondo J) and para 53 (judgment of Van der Westhuizen J) and *Ferreira v Levin* above n 42. Compare *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and Others* [2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC) and Hoexter "The Enforcement of an Official Promise: Form, Substance and the Constitutional Court" (2015) 132 *SALJ* 207.

for which regulation is considered necessary. The purpose for which property is held may have a close relationship with a person's fundamental rights. That may, in general, require greater judicial scrutiny of its regulation. A more tenuous link may justify less intrusion.

[61] As noted earlier, the enquiry in a frontal challenge to the constitutional invalidity of legislation is an objective one. The important distinction between an objective enquiry and a subjective one is illustrated by the question whether Shoprite's interest in the grocer's wine licence is one that conceivably serves individual self-fulfilment, not in the sense of mere commercial well-being, but in the sense of running a business as work that forms part of "one's identity and constitutive of one's dignity"?[99] If it is, then, on the strength of the close correlation between the holding of the licence and the fundamental right to choose one's trade or vocation, a finding that it is property for the purposes of section 25(1) is likely. But if Shoprite, as a commercial corporate entity, does not fit the notion of serving individual self-fulfilment, that is not necessarily the end of the matter. Then we must enquire, further, whether the legislation, once again objectively, includes persons that may have been holders of similar grocer's wine licences, and who could conceivably be entitled to the close constitutional connection. And if there are, the constitutionality of the impugned provisions must be adjudged on that objective basis.

[62] The right to choose one's vocation freely is one given to "citizens" in the Bill of Rights.[100] But in *FNB*, this Court, in dealing with the contention that legal persons do not enjoy protection under section 25, stated:

> "In this regard section 8(4) of the Constitution provides as follows:
>
> > 'A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.'

[99] *Affordable Medicines* above n 72 at para 59 (judgment of Ngcobo J), as quoted in [45].

[100] Above n 71.

. . .

> We are here dealing with a public company. It is trite that a company is a legal entity altogether separate and distinct from its members, that its continued existence is independent of the continued existence of its members, and that its assets are its exclusive property. Nevertheless, a shareholder in a company has a financial interest in the dividends paid by the company and in its success or failure because she ' . . . is entitled to an *aliquot* share in the distribution of the surplus assets when the company is wound up'. No matter how complex the holding structure of a company or groups of companies may be, ultimately – in the vast majority of cases – the holders of shares are natural persons.
>
> More important, for present purposes, is the universal phenomenon that natural persons are increasingly forming companies and purchasing shares in companies for a wide variety of legitimate purposes, including earning a livelihood, making investments and for structuring a pension scheme. The use of companies has come to be regarded as indispensable for the conduct of business, whether large or small. It is in today's world difficult to conceive of meaningful business activity without the institution and utilisation of companies.
>
> Even more so than in relation to the right to privacy, denying companies entitlement to property rights would ' . . . lead to grave disruptions and would undermine the very fabric of our democratic State'. It would have a disastrous impact on the business world generally, on creditors of companies and, more especially, on shareholders in companies. The property rights of natural persons can only be fully and properly realised if such rights are afforded to companies as well as to natural persons. I therefore conclude that FNB is entitled to the property rights under section 25 of the Constitution".[101] (Footnotes omitted.)

[63] We were referred to a number of decisions of the European Court of Human Rights where commercial licences to trade were recognised as property under Protocol 1 to the European Convention on Human Rights, which provides that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions".[102] The Supreme Court of the United States of America has, in *Bell v*

[101] *FNB* above n 8 at paras 41-5.

[102] Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (European Convention on Human Rights), which reads in full:

Burson,[103] also held that the holder of a state driver's licence or business licence has a firmly established property right in that licence, because "[o]nce licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood".[104] The difficulty in finding too much comfort in these cases is that the European cases are based on a provision that explicitly extends protection to legal persons, and that the constitutional protection in *Bell v Burson* was limited to procedural protection under the due process clause, not the takings clause,[105] of the United States Constitution.[106] In the end, as must always be the case, we must determine the issue on our own understanding of the fundamental values and protected rights under the Constitution.

[64] If a natural person had been in the position of Shoprite, she would have had an easier task of convincing a court that the grocer's wine licence granted by the State enabled her to conduct a business vocation of her choice that was essential to her living a life of dignity in that there was a "relationship between [her] work and [her] human personality as a whole".[107] So the correct question to ask, as noted above,[108] is whether her interest in the business licence would qualify as property protected under section 25(1). This is still an objective enquiry. It is not the subjective assertion of the person involved that determines the outcome, but the court's assessment of the objective validity of that assertion. I do not find it too difficult to imagine that a

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> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[103] *Bell v Burson, Director, Georgia Department of Public Safety* 402 US 535 (1971) (*Bell v Burson*).

[104] Id at 539.

[105] The takings clause requires that just compensation be paid where private property is taken for public use. It is the equivalent of our expropriation clause found at section 25(2) of the Constitution.

[106] See the discussion of the reaction of the United States courts to the by-now famous article by Reich "The New Property" (1964) 73 *Yale LJ* 733 in Van der Walt (2011) above n 75 at 165-7 and Alexander above n 43 at 766-7.

[107] At [61].

[108] At [62].

person who wishes to run a small business might have found the opportunity to run a grocery store, with the added advantage of selling wine, as the single chance to run a business successfully, without which it might otherwise have been difficult to do so. But it would, objectively, be a step too far to say that it would be impossible to do so.

[65] Shoprite's holding of the same property interest, not as a natural person, but by virtue of legal corporate personality, cannot change the objective nature of the constitutional challenge.[109] At most, it might have had a bearing on its standing to bring the application, but that was not in issue before us.

[66] The holding of a grocer's wine licence at the will of the State by a natural person under the provisions of the 1989 Liquor Act, as well as under the transitional provisions of the Eastern Cape Act, may well fall within property protected under section 25. Neither Act contains anything to suggest that a licence of this kind cannot be held by a person who needs it to live a life of individual self-fulfilment and reciprocal dignity to others.

[67] A grocer's wine licence entitled its holder to carry on the business of selling wine with other groceries and foodstuffs on the same premises. Under the 1989 Liquor Act the licence remained in force for an indefinite period; under the transitional provisions of the Eastern Cape Act, only for a determined period. The licence could be withdrawn only under certain prescribed conditions. The licence was capable of being transferred under administrative approval. Subject to compliance with the statutory conditions for its issue, continuance and transferral, it gave rise to a personal legal claim for its enforcement.

[68] There is much to be said for the High Court's finding that once the licence is granted, an enforceable personal incorporeal right is vested in the recipient to trade in

[109] Section 8(4) of the Constitution provides:

> "A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."

accordance with the conditions attached. These rights are transferable, subject to approval by the licensing authority. The right to sell liquor is thus clearly definable and identifiable by persons other than the holder; has value; is capable of being transferred; and is sufficiently permanent, in the sense that the holder is, in terms of administrative law, protected against arbitrary revocation by the issuing authority.[110] This is close to recognition on conventional private law grounds. The potential objective link to constitutionally sanctioned self-fulfilment only strengthens the case for recognition of it as property.

[69] The last issue which needs to be addressed is whether Shoprite's argument that the claim had much commercial value plays any role in determining whether it is property for the purposes of section 25(1). Both *Agri SA* and *FNB* have made it clear that it does not play a determinative role. The value lies in the object of the right, not its commercial value.[111] And that would remain the case even if the licence was held by a natural person.

[70] I thus proceed on the finding that the holding of a grocer's wine licence in terms of the 1989 Liquor Act and its registration counterpart in the transitional provisions of the Eastern Cape Act constitute property for the purposes of section 25(1) of the Constitution.

[71] I have had the pleasure and privilege of reading the concurrence written by my Brother, the Deputy Chief Justice. I remain unconvinced that the approach in this judgment will lead to "difficult property jurisprudence", as he suggests. That we must seek our conception of property in the Constitution seems to me almost self-evident. And it is always an objective enquiry, not a subjective one. On the facts here, vesting in the conventional sense occurred when the grocer's wine licences were originally issued. We may legitimately differ on whether a particular instance justifies the constitutional link in cases that are not covered by existing notions of property, but if

[110] High Court judgment at para 62.

[111] *Agri SA* above n 23 at para 42 and *FNB* above n 8 at para 56.

we do not have that standard, individual determination by the courts of what constitutes property runs the risk of being labelled arbitrary.[112]

[72] I have also had the pleasure and privilege of reading the dissent of my Brother, Madlanga J. We agree that the grocer's wine licences are property, but he considers the link I make to other constitutional rights and values to determine the purpose for the protection of property as unnecessary and a devaluation of the independent right to hold property. It is a powerful argument, but I do not see how that approach makes it unnecessary to discern the purpose for which the holding of property must be protected under the Constitution.

Deprivation

[73] Previous decisions of this Court require interference with property that is significant enough to have a legally relevant impact on the rights of the affected party before deprivation of property under section 25 is established.[113] Once again, in

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[112] Compare Van der Walt "Retreating from the FNB Arbitrariness Test Already? Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng" (2005) 122 *SALJ* 75 at 89.

[113] See *Reflect-All* above n 51 at paras 35-6:

> "In determining whether sections 10(1) or 10(3) amount to deprivations of property, regard must be had to what the Court said in [*FNB*], the leading judgment regarding the property clause in the Constitution. This Court held per Ackermann J that 'in a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation'. In *Mkontwana*, this Court expanded the notion of deprivation of property for the purposes of section 25. This Court remarked, per Yacoob J:
>
> > 'Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. . . . [S]ubstantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.'
>
> And in her concurring judgment, O'Regan J remarked:
>
> > '[S]ome deprivations of property rights, although not depriving an owner of the property in its entirety, or depriving the holder of a real right of that real right, could nevertheless constitute a significant impairment in the interest that the owner or real right holder has in the property. The value of the property in material and non-material terms to the owner may be significantly harmed by a limitation of the rights of use or enjoyment of the property. *If one of the purposes of section 25(1) is to recognise both material and the non-material value of property to owners, it would defeat that purpose were, 'deprivation' to be read narrowly.*' (Emphasis added.)" (Footnotes omitted.)

determining the constitutional validity of legislation, the enquiry is objective: has the holder of a grocer's wine licence in the position of Shoprite been deprived of something legally substantial by the impugned provisions of the Eastern Cape Act?

[74] Under the 1989 Liquor Act, the constitutional and legal significance for the holder of a grocer's wine licence existed at the following levels:

(a) for persons whose choice of trade or occupation depended on trading in liquor, it provided an opportunity to do so;

(b) it allowed holders to sell wine and groceries on the same premises; and

(c) the permission to do so was for an indefinite period.

[75] The transitional provisions of the Eastern Cape Act affected (b) and (c), but not (a). Holders of grocer's wine licences finally lost the right to sell wine and groceries on the same premises 10 years after the commencement of the Eastern Cape Act.[114] But the Eastern Cape Act softened that hurt by allowing them to apply for a conversion of that right to a registration under the new Act to sell all kinds of liquor, albeit not on the same premises as a grocery business, after five years.[115] Even if holders did not take the opportunity to convert within the 10 year time frame, they still had the same right as anyone to apply for registration to trade in liquor, including wine.

[76] So yes, holders of grocer's wine licences in the position of Shoprite lost some legal entitlement, whether after five years or 10, but in the greater scheme of things it was not too much. But I think it was enough to qualify as deprivation under section 25(1).[116] Shoprite lost the ability to sell table wine in its existing grocery

[114] Section 71(5) of the Eastern Cape Act, as quoted above at n 15.

[115] Id.

[116] See *Agri SA* above n 23 at paras 50-3. In *Offit Enterprises* above n 51 at para 41, this Court stated:

> "Our jurisprudence is clear that the physical taking of property is not required to constitute a deprivation, and it suffices for one or more of the entitlements of ownership to be impacted upon. Whilst direct or physical interference is not necessary, the impact must be of sufficient magnitude to warrant constitutional engagement. A court must give consideration to the

stores. Its use and enjoyment of its licences has been hampered by this legislative intervention.

Arbitrariness

[77] *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.[117] A "complexity of relationships" must be considered in determining whether sufficient reason has been provided. The eventual standard can range from rationality to proportionality.[118] 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.[119]

[78] Procedural unfairness is not in issue. Further, it is common cause that there was extensive consultation with stakeholders, including Shoprite, before the Eastern Cape Act was adopted.

[79] The complexity of relationships between means (deprivation) and ends (purpose of the law); between the purpose of the law and the person holding property; and between the purpose of the law and the nature of the property and extent of the deprivation, mentioned in *FNB*, may now be examined more closely. That examination must be done in the context of the normative approach to which the strongest protection of property will be related where its protection best enhances or protects fundamental values or rights under the Constitution.

> extent to which the use and enjoyment of the land has been diminished. As stated by the Appellate Division in a different context, '[s]ubstantial interference is a matter of duration and degree.'" (Footnotes omitted.)

See also the judgment of O'Regan J in *Mkontwana* above n 24 at para 89, quoted above in n 113.

[117] *FNB* above n 8 at para 100.

[118] Id.

[119] Above n 24 at paras 34-5.

[80] And it is here where the lack of deprivation of any entitlement to other fundamental rights, or diminution of any interest served by the values of the Constitution, may come into play. If the deprivation is of property closely connected to fundamental rights and constitutional values, then sufficient reason for the deprivation should approximate proportionality. If not, rationality might suffice.

[81] Some analogous guidance for this approach can be found in this Court's treatment of the right to choose one's trade, occupation and profession freely under section 22 of the Constitution. In *Affordable Medicines* the Court stated:

> "Where the regulation of a practice, viewed objectively, is likely to impact negatively on the choice of a profession, such regulation will limit the right freely to choose a profession . . . and must therefore meet the test under section 36(1). Similarly, where the regulation of practice, though falling within the purview of section 22, limits any of the rights in the Bill of Rights, [it] must meet the section 36(1) standard."[120]

And:

> "Where the regulation, viewed objectively, would have a negative impact on choice, the regulation must be tested under section 36(1). In other cases, the test is one of rationality."[121]

[82] Substitute "proportionality" for a section 36(1) justification, and its application in determining arbitrariness in property deprivation under section 25, may be to say that where the regulatory legislative deprivation (viewed objectively) would extinguish the right of choice of vocation, or any other fundamental right or constitutional value, arbitrariness must, in terms of *FNB*, be tested against proportionality. In other cases, rationality will be sufficient reason.

[120] *Affordable Medicines* above n 72 at para 80.

[121] Id at para 92.

[83] Objectively viewed, the change in regulatory regime brought about by the Eastern Cape Act 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. And, on the facts on record before us, it is quite rational to change the regulatory regime of liquor sales to provide for simplification in the licensing system. Some might say the advantages of simplification are minimal, but that does not upset the rationality of the means used to achieve the end of simplification.[122] 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. It is not too difficult to imagine that it is easier to keep control of the sale of liquor in premises where only liquor is sold, than otherwise. 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.

[84] But these differences of opinion are not the kind of issues courts should interfere with too readily. They are mostly instances of legislative facts where courts should not easily interfere with the choices made by legislatures.[123] The fact that the

[122] In *Albutt v Centre for the Study of Violence and Reconciliation, and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 51, this Court stated:

> "The executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution. This is true of the exercise of the power to pardon under section 84(2)(j)."

In *Democratic Alliance v President of the Republic of South Africa and Others* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) at para 32, this Court found:

> "The reasoning in these cases shows that rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional."

[123] See *Lawrence* above n 39 at paras 52-4 and 67-70.

Eastern Cape is the only province in the country that chose to terminate grocer's wine licences is an instance of democratic choice rather than evidence of irrationality or unreasonableness.

[85] The differences between legislative facts and "adjudicative facts" is outlined by Hogg when he notes:

> "Adjudicative facts are facts about the immediate parties to the legislation – 'who did what, where, when, how, and with what motive or intent'; legislative facts are facts of a more general character concerning the social or economic milieu which gave rise to the litigation. In most litigation only adjudicative facts are relevant, and no attempt is made to adduce evidence of legislative facts. Accordingly, the rules of evidence are nearly all addressed solely to the finding of adjudicative facts."[124] (Footnote omitted.)

He notes that when dealing with legislative facts, the courts must apply a rationality test which seeks to determine whether there is a rational basis for the legislative judgment of whether the facts exist. This rationality test ensures that the courts exercise restraint and do not interfere with the Legislature's functions.[125]

[86] Lastly, it should not be forgotten that the deprivation occurred only after holders of grocer's wine licences were allowed to continue selling wine in their grocery stores for 10 years and were given the opportunity of making an application to sell wine in separate liquor stores within five years of the commencement of the Eastern Cape Act. That seems eminently reasonable and non-arbitrary.

Section 36 justification

[87] The parties are in agreement that if arbitrariness is found under the *FNB* formulation, justification under section 36(1) will be difficult to find. The reason, I think, should now be clear. The nature of any infringement of the right to protection

[124] Hogg "Proof of Facts in Constitutional Cases" (1976) 26 *University of Toronto Law Journal* 386 at 395.

[125] Id at 397.

of property under section 25(1) is dependent on the substantive constitutional or other interest affected. Once the interest is identified and the *FNB* approach to arbitrariness is applied, there can be no further independent infringement that would require further justification under section 36.

[88] For these reasons, confirmation must be withheld.

Costs

[89] *Biowatch* principles apply to the confirmation application.[126] The application for leave to appeal in respect of urgency and joinder was an attempt to avoid constitutional issues, but in our discretion we find it just that each party should pay its own costs.

Order

[90] The following order is made:

1. The declaration of constitutional invalidity is not confirmed.
2. The application for leave to appeal is dismissed.
3. There is no order as to costs.

MOSENEKE DCJ (Mogoeng CJ, Khampepe J, Molemela AJ and Theron AJ concurring):

Introduction

[91] I have profited from reading the strongly reasoned judgment of my colleague, Froneman J (main judgment). I am grateful for and support its narration of the background facts. I concur in the manner in which the main judgment disposes of the preliminary issues and in the final order it makes. More precisely, I agree that this Court should not confirm the High Court's order of constitutional invalidity because

[126] *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

the impugned provisions of the Eastern Cape Act[127] are not inconsistent with the Constitution and therefore not invalid. In sum, I arrive at the same destination but along a different path.

[92] I have also benefited from reading the dissenting judgment of my colleague, Madlanga J. He would have confirmed the declaration of constitutional invalidity. I disagree with that outcome and the reasons that he advances for that result.

[93] The main judgment concludes that the holding of a grocer's wine licence under the impugned Eastern Cape Act "constitute[s] property for the purposes of section 25(1) of the Constitution".[128] It then goes down the route that the impugned provisions[129] have deprived Shoprite of its property but that the deprivation was not arbitrary.

[94] It is needless, I think, to characterise Shoprite's grocer's wine licence as constitutional property. The same outcome may be arrived at without deciding the difficult and fluid question whether it is property. It should suffice to test the challenged provisions for rationality. In that event, one simply asks whether the provisions pursue a legitimate government purpose, and if so, whether the statutory means resorted to are arbitrary or reveal naked preference or another illogical or irrational trait. In substance the arbitrariness enquiry here would, in process and substance, be no different from the arbitrariness enquiry under section 25(1).

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[127] Above n 2.

[128] Main judgment at [70].

[129] Section 71(2) of the Eastern Cape Act provides:

> "Every exemption, licence or approval referred to in the first column of the Schedule hereto and in force immediately before the date of commencement of this Act, must be deemed from that date to be a registration in the category referred to in the second column of that Schedule."

Section 71(5) of the Eastern Cape Act provides:

> "The holder of a grocer's wine licence in terms of the Liquor Act, 1989, who is deemed to be registered to sell wine by virtue of the conversion contemplated in the subsection (2), must be entitled to sell wine as defined in section 1 of the Liquor Products Act, 1989, for a period of ten years after the commencement of this Act: Provided that the holder of such registration may, at any stage after the expiry of a period of five years from the date of commencement of this Act, apply for registration to sell all kinds of liquor in separate premises as prescribed."

[95] However, if one must decide whether a liquor licence is property in the hands of its holder, I would part ways with the main judgment. I would hold that it is not property, and that the High Court was mistaken when it rendered the impugned provisions invalid for the reason that Shoprite had been deprived of property arbitrarily.

What did the statute take away from Shoprite?

[96] To prosper in my stance, I must first ask: what has Shoprite been deprived of? Until 14 May 2014, Shoprite was the holder of a liquor licence to sell table wine from 27 supermarkets in the Eastern Cape. The licence was granted under the 1989 Liquor Act[130] and extended under the Eastern Cape Act. By operation of section 71(2) and (5) of the Eastern Cape Act,[131] the licence lapsed on 14 May 2014. It is the effect of these two provisions that the High Court held amounted to arbitrary deprivation of the grocer's wine licences.

[97] Here are the original attributes of the licences in issue. Once granted, they remained in force for an indefinite duration. The licensing authority had the power to suspend or withdraw the licences under specified and limited circumstances.[132] The power was triggered where there had been a report by a designated police officer

[130] Above n 4.

[131] Read with the relevant part of the Schedule.

[132] Section 15(1) of the 1989 Liquor Act provides:

> "The Board may, after the consideration by it of—
>
> . . .
>
> (b) a matter contemplated in section 11(3)(b), (c) or (d)—
>
> (i) suspend for an indefinite time or for such period as it may determine or withdraw from such dates as it may determine, a licence . . . which is the subject of the report, complaint or objection concerned, or any right or privilege which is attached thereto;
>
> (ii) declare the licence concerned to be subject to such conditions or further conditions as it may in its discretion impose; or
>
> (iii) take such other steps as it may think fit".

based on a contravention by the holder of licence obligations or other statutory requirements[133] or a complaint relating to licensed premises[134] or an objection to a licence.[135] Following a request for advice by a member of the executive council of a province (MEC), an MEC had the power to suspend or withdraw a licence where the relevant licensing authority had recommended that he or she do so.[136] The 1989 Liquor Act did not specify the circumstances in which the MEC could exercise the power. But it is self-evident that its exercise could not be arbitrary. It had to be for good reason and properly related to the purpose of the suspension or withdrawal. In any event, a decision of that order would be fully reviewable under PAJA.[137]

[98] The licences could be transferred, although the transfer required approval.[138] A licence could also lapse when abandoned in writing by the holder; where the holder failed to pay the applicable licence fees by the prescribed date; when withdrawn; when set aside by a competent court; and on a date when it was replaced by another licence granted.[139]

[99] It is important that Shoprite's grocer's wine licences were never suspended or withdrawn, nor did they lapse, for the entire period from their grant up to 14 May 2014.

[100] On 11 December 2003 the Eastern Cape Act replaced the 1989 Liquor Act. Its date of commencement was 14 May 2004. For now, what is important are the

[133] Section 15(1)(b)(i) read with section 11(3)(b) and sections 141 and 142 of the 1989 Liquor Act.

[134] Section 15(1)(b)(i) read with section 11(3)(c) of the 1989 Liquor Act.

[135] Section 15(1)(b)(i) read with section 11(3)(d) of the 1989 Liquor Act.

[136] Section 125(b) read with sections 15(2), 15(1)(e)(ii) and 11(3)(g) of the 1989 Liquor Act.

[137] Above n 35.

[138] Chapter 10 of the 1989 Liquor Act. An application for the transfer of a licence involved a substantive application by the transferee, which was broadly similar to a new application.

[139] Sections 32A and 107 of the 1989 Liquor Act. Section 32A(1) provides:

> "The chairperson may at any time after the issue of a licence . . . and with the concurrence of the holder thereof, replace such licence by the issue of another licence of the same kind in respect of the premises concerned free of charge to the holder thereof."

transitional arrangements. Grocer's wine licences that were in force at the commencement of the Act were deemed to be registrations for the retail sale of wine for consumption off the premises.[140] The registrations would be valid for a period of ten years after 14 May 2004, after which they would lapse. Holders of the registrations were entitled, at any time after the end of five years, to apply for registration to sell all kinds of liquor, not just table wine, on premises other than the same supermarket or grocery store premises. Despite the transitional arrangements, Shoprite elected not to apply to convert its grocer's wine licences. On 14 May 2014, the registrations lapsed automatically, compelling the applicant to close the table wine sections in each of its 27 affected stores.

[101] The High Court correctly concluded that "[t]he legal effect of the transitional provisions [was] that a grocer's wine licence, issued in terms of the 1989 Liquor Act, remained valid until 14 May 2014, after which it . . . automatically lapse[d]".[141] The impugned provisions that authorised the lapsing, it thought, amounted to arbitrary deprivation of property "to the extent that they provide for the lapsing of grocer's wine licences after a period of ten years after the commencement of the Act".[142]

[102] I think the lapsing caused Shoprite to lose the entitlement and business opportunity to sell table wine in its supermarkets alongside other groceries. And yet the legislative transition entitles it to apply for registration to sell all kinds of liquor, not just table wine, on separate premises other than the same supermarket or grocery store. Its real grievance is not that it lost the licences and the ability to conduct a liquor business but that it may no longer pursue a business strategy and model that it prefers and cherishes. Shoprite wants to sell its table wine alongside groceries. The lawgiver has ruled that it be sold in separate premises. I ask whether this loss of a preferred business opportunity or model ranks as property? I must also ask: why

[140] See section 20(a) of the Eastern Cape Act:

> "An application for registration in terms of this Act may be made in respect of . . . the retail sale of liquor for consumption off the premises where the liquor is being sold".

[141] High Court judgment at para 29.

[142] Id at para 94(b).

would it be constitutionally impermissible for the provincial legislature to regulate anew the conditions under which Shoprite or anyone else may sell liquor to the public?

What is property?

[103] I agree with the main judgment that, in assessing whether an interest constitutes property, we must have regard to the history of our country in relation to notions of property and to the property clause in our Constitution. It follows that section 25 of the Constitution must be interpreted against this backdrop. The observations of Professor van der Walt in this regard are apposite:

> "[E]xisting and new property interests are recognised and protected when and in so far as it is necessary to establish and uphold an equitable balance between individual property interests and the public interest, with due regard for the historical context within which property holdings were established and the constitutional context within which they are now protected."[143]

[104] There is no comprehensive definition of constitutional property in South Africa.[144] As *FNB* warned, it would not be judicially prudent to formulate one. This is so because "property" is a word of wide and varied import. Section 25 does not refer to "real rights" or "ownership" or "possessions". It uses a broader and more inexact version of "property".[145] Except for the hint that property is not limited to land,[146] it does not furnish us with preset notions of property. For one reason, the threshold question whether an interest is property must be dealt with on a case-by-case basis. Ordinarily, little difficulty will be posed when deciding whether vested ownership of corporeal and incorporeal things under the common law, or customary

[143] Van der Walt (2011) above n 75 at 189.

[144] See *FNB* above n 8 at para 51, where this Court held that it is judicially unwise to formulate a comprehensive definition of constitutional property.

[145] Currie and De Waal *The Bill of Rights Handbook* 5 ed (Juta & Co Ltd, Cape Town 2005) at 536.

[146] Section 25(4)(b) of the Constitution.

law or legislation, would pass for property under the property clause. For this proposition I draw useful guidance from the following remarks by Roux and Davis:

> "In the absence of any other obvious starting point, it is submitted that the enquiry into whether an interest is protected by section 25 should begin by asking whether the interest is recognised as a property right at common law, customary law or in terms of legislation. Thereafter, the court should consider whether extending constitutional protection to the interest would be consistent with the Bill of Rights, having regard to the values underlying the final Constitution".[147] (Footnote omitted.)

[105] Under the common law our courts have always extended protection to real rights, starting with ownership or other interests in corporeal things and in incorporeal personal rights.[148] In turn, customary law recognised a hierarchy of real rights in physical things like personal effects, house property, family property and communal property. It also allowed for personal rights to delivery of livestock, grain and other goods and services, and recognised claims for damages and other interests.[149] Unsurprisingly, with the advent of section 25 the courts have, case by case, but cautiously, recognised ownership of or interest in real or incorporeal personal rights as protectable under the property clause.[150]

[106] In *Opperman*, Van der Westhuizen J considered whether an enrichment claim constituted "property" and held:

> "The right to claim restitution on the basis of enrichment is a personal right. It can only be enforced against a specific party or parties, in this case the consumer who received the money. It is not a real right in property like, for example, ownership or a usufruct, enforceable against all. Section 25 deals with *property* and not with

[147] Roux and Davis "Property" in Cheadle et al (eds) *South African Constitutional Law: The Bill of Rights* Issue 17 (2014) at 20-15.

[148] See *Agri SA* above n 23 and *Opperman* above n 32.

[149] See Bekker *Seymour's Customary Law in Southern Africa* 5 ed (Juta & Co Ltd, Cape Town 1989) at 71 and Bennett *Customary Law in South Africa* (Juta & Co Ltd, Cape Town 2004) at 420-21.

[150] See *Law Society* above n 33; *Reflect-All* above n 51; and *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC).

> *ownership*. But reliance has been placed on the link to ownership in evaluating whether there is a deprivation or whether section 25 comes into play."[151] (Emphasis in the original and footnote omitted.)

He concluded that the personal right to restitution of money paid, based on unjustified enrichment, was property under section 25(1).[152]

[107] In *Agri SA*, Mogoeng CJ, without deciding, proceeded on the basis that a right to exploit minerals is "property".[153] Later he referred to "property with economic value".[154] He did not refer to a right to mine, but rather to mineral ownership. On any approach, he was dealing with a right or interest in mining.

[108] The difficulty comes in when deciding whether what has been termed "new property" should be recognised for the purposes of section 25, and further, whether a distinction must be made between these various forms of incorporeal property.

[109] After acknowledging that the starting point in this enquiry is our Constitution, the main judgment draws much of its reasoning from comparative law. A brief look at other jurisdictions should suffice. The approach of international jurisdictions towards the protection of incorporeal property or "new property" has remained contested. It includes "public law entitlements" like social welfare rights and other kinds of government "largesse" like licences, quotas and tenders.[155]

[110] Other countries have defined property variously. Some have held that a licence constitutes property and others have not, depending on their constitution and social context. In Ireland, courts have assumed, without deciding, that certain licences were

[151] *Opperman* above n 32 at para 61.

[152] Id at paras 63-4.

[153] *Agri SA* above n 23 at paras 38-46.

[154] Id at para 44.

[155] See Van der Walt *The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996* (Juta & Co Ltd, Cape Town 1997) at 40-1 and Roux "Property" in Woolman et al (eds) *Constitutional Law of South Africa* Service 6 (2014) vol 3 at 46-16.

valuable property rights.[156] In *Hand* and *Hempenstall* the Irish courts made an important qualification that property rights originating in licences are subject to "legitimate legal restraints"[157] and as they are creatures of statute, they are subject to changes, which can result in diminution of those rights.[158]

[111] The European Court of Human Rights has specifically recognised the economic interest in a liquor licence and held that the threshold enquiry had been met for that licence to constitute a "possession" in terms of Article 1 Protocol 1 of the European Convention on Human Rights.[159] In comparison, the Court of Appeal in Trinidad and Tobago has held that a driving licence does not constitute "property".[160]

[112] The US Supreme Court has extended the meaning of "property" to include disparate and diverse interests like driver's licences, high school education, disability benefits, expectation of continued employment, access to public utility services, welfare benefits and a prisoner's good time credits.[161] However, in *Cleveland v*

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[156] See *Hempenstall and Others v The Minister for the Environment* [1994] 2 IR 20 (*Hempenstall*). This matter was about a change in regulations which resulted in hackney (the other form of public service vehicle) licences becoming unlimited. Taxi operators contended that this was an unjust attack on their taxi licences which are valuable property rights. See also *Hand v Dublin Corporation* [1991] 1 IR 409 (*Hand*). In this matter, the renewal of a trading licence was denied due to the criminal behaviour of the licence holder. However, the Court held that even if the right to earn a livelihood constituted property, it is subject to legitimate regulation and cannot be unqualified.

[157] *Hand* id at 419 quoting Costello J in *Attorney General v Paperlink Ltd* [1984] ILRM 373 at 384.

[158] *Hempenstall* above n 156 at 28.

[159] *Tre Traktörer AB v Sweden*, no 10873/84, ECHR 1989. This matter concerned revocation of a licence to sell alcoholic beverages for failure to comply with regulations. The Court held that the revocation did not deprive the complainant of their property as the regulations are a measure of control. However, the Court did find that the licence was an economic interest that constitutes "possession" in terms of Article 1 of Protocol 1 of the European Convention on Human Rights. Protocol 1 states the following:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

[160] *Bahadur v Attorney General* 1989 LRC (Const) 632 (CA). However, the Court noted that improper withdrawal may constitute an unconstitutional infringement of the enjoyment of property.

[161] See *Memphis Light, Gas* and *Water Division v Craft* 436 US 1 (1978) at 7 and 9, for access to public utility services; *Bishop v Wood* 426 US 341 (1976) at 344, for expectation of continued employment; *Mathews v Eldridge* 424 US 319 (1976) at 332, for disability benefits; *Goss v Lopez* 419 US 565 (1975) at 574, for high school education; *Wolff v McDonnell* 418 US 539 (1974) at 558, for prisoner's good time credits; *Bell v Burson* above n 103 at 539, for driver's licences; and *Goldberg v Kelly* 397 US 254 (1970) at 262-3, for welfare benefits.

United States[162] the US Supreme Court held that in certain circumstances municipal and state licences, specifically video poker licences, will not be "property". In particular, the Court stated that—

> "[*i*]*n some contexts*, we have held that individuals have constitutionally protected property interests in *state-issued licences essential to pursuing an occupation or livelihood*."[163] (Emphasis added.)

[113] Even if one is inclined to extend constitutional protection to "new property", not all government largesse can be seen as "property". Nor should it be, where the inherent nature of a right does not contain characteristics of property to justify the classification.[164] Within each category of government largesse, some rights may be regarded as property while others may not. For example, in German law, only some welfare claims are recognised as property and able to attract constitutional protection. Those welfare claims must meet three requirements to attract protection: the interest must be earned through own effort, the welfare claim must vest in the beneficiary and the claim must ensure the beneficiaries survival.[165] Another concern is that even if this Court were to push the boundaries of our notions of property, liquor licences might not be the ideal type of government largesse with which to push the boundaries, nor the ideal factual matrix within the category of "licences".

[114] Of these "public entitlements" or "participation rights", Roux warns that they are generally "by their very nature contingent on mutable government policies or programmes".[166] Badenhorst et al state that they may be "withdrawn or reduced

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[162] *Cleveland v United States* 531 US 12 (2000) at 25-6.

[163] Id at 26 fn 4. See id at 25-7 where the Court went on to say that a video poker licence in the State's hands is not "property" under 18 U.S.C. § 1341, which prohibited the use of mail in furtherance of any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretences, representations or promises.

[164] For example, purely gratuitous payments are generally not regarded as "property".

[165] See (1989) BverfGE 69, 272 (Eigenleistung) (translated in Van der Walt (2011) above n 75 at 163).

[166] Roux above n 155 at 46-16.

unilaterally, by administrative authorities".[167] The learned authors add that the withdrawal of the entitlements, thereby invoking compensation requirements, would have a depressing effect on development of welfare policies and programs, by securing the position of current beneficiaries at the expense of the public interest in policies and programmes that are adaptable according to changing circumstances.[168] They state further that in most other jurisdictions, these types of interests are not easily accepted as property for purposes of the threshold test, although nuanced acknowledgement and protection of these interests does at times occur. Welfare payments and subsidies generally would not pass the threshold test, but pension interests may under some circumstances be regarded as property.[169]

[115] It cannot be emphasised enough that our notion of what passes for protectable property must be seen through the lenses of our history and constitutional scheme. Some jurisdictions have opted for an elastic notion of "property" in order to protect interests that are otherwise open to executive or legislative abuse. Our Constitution is different. It provides us with the widest possible protection of fundamental rights and freedoms. It guarantees an impressive range of socio-economic entitlements. What is more, all laws and conduct must be consistent with the Constitution and are open to judicial scrutiny. We boast of administrative justice protections that are truly expansive and meant to police and curb executive excesses.[170] Our jurisprudence need not convert every conceivable interest, with or without commercial value, as a few other jurisdictions have done, into protectable property.

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[167] Badenhorst et al *Silberberg and Schoeman's The Law of Property* 5 ed (LexisNexis Butterworths, Durban 2006) at 540.

[168] Id at 539-40, in which it was pointed out that participation rights giving rise to claims against the State not based on contract (sometimes referred to as "new property") including welfare rights and forms of state "largesse" like licences, franchises, permits, contracts, subsidies, use of public resources and quotas have been approached with judicial caution probably because the interests are frequently contingent, being allocated by government on its own terms and policies and held by recipients subject to the "public interest".

[169] Id.

[170] Indeed, it has been said that our administrative justice system, and its "guarantee of fair process at the highest judicial level is probably matched in only one other common law jurisdiction" namely Australia. (Footnote omitted). See Creyke "The Performance of Administrative Law in Protecting Rights" in Campbell et al (eds) *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate Publishing Ltd, Cornwall 2006) at 112.

[116] Before I look closer at the liquor licences in the present dispute let me add that this case is distinguishable from foreign cases that characterise licences as property. In those instances the licences were revoked or denied. Courts tend to afford greater protection to government largesse when the interest in issue has been revoked or suspended. [171] But that is not what happened here. Shoprite can still sell table wine. It just has to do it next door.

Is a liquor licence property?

[117] Before us the respondents[172] submitted that the rights as may flow from the grant of a liquor licence under the 1989 Liquor Act do not, and should not, constitute property for the purposes of the property clause. A distinction should be drawn, it contends, between liquor licences and other forms of state grants, including regulatory licences, given the special nature of the subject of regulation, namely liquor. I agree. No useful purpose will be served by making generic findings on other forms of state grants. My immediate pre-occupation is with liquor licences and whether they pass for property protectable under section 25(1).

[118] The respondents went on to refer us to the Department of Trade and Industry's study that recorded:

> "Regulation on most kinds of consumer products is much lighter than the regulatory burden on the liquor industry. This reflects the special nature of liquor, which is one of the few addictive psychoactive drugs which is freely available to the public."[173]

[119] These observations are well in line with the manner in which this Court has looked at liquor licences as "the permission that a competent authority gives to

[171] Reich above n 106 at 744.

[172] MEC for the Economic Development, Environmental Affairs and Tourism of the Eastern Cape; the Government of the Eastern Cape Province; and the Eastern Cape Liquor Board.

[173] Department of Trade and Industry *Baseline Study of the National Liquor Act 59 of 2003*, annexure JB8 of the founding affidavit filed in this Court.

someone to do something with regard to liquor that would otherwise be unlawful".[174] And that permission "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".[175]

[120] The permission which the applicant contends it has been deprived of is a creature of statute and state largesse. The permission has at least two important and balanced objectives. The first is part of a framework which is designed to impose regulation and control over the access to and use of a dangerous substance, with a real potential to cause negative socio-economic consequences as well as having direct and indirect effects on health. On the other scale are the potential economic benefits of trading in liquor for the holders of licences and the State. Liquor licence holders are often powerful and influential companies involved in the supply side of the liquor industry. Maximising their contributions to the economy must be assessed against the negative costs of alcohol use. Regulation in this industry is used to curtail these negative side effects and can directly contribute to improving the society we live in. If a liquor licence is seen as "property" then a strong entitlement is created in the hands of the licence holder. This would tip the scales and arguably diminish the ability of the Legislature to effectively regulate an industry where regulation is of paramount importance. Whether a liquor licence should constitute "property" should never be decided in a vacuum. The form that the permission and its regulation takes is always contingent on changing norms and policy positions.[176] These norms would include where, when and what alcohol may be traded. This Court in *Lawrence* explained this in the following terms:

> "Liquor is a potentially harmful substance. It is part of the *normal environment* in which the liquor trade is conducted in South Africa, and other countries, *for selling to*

[174] *Liquor Bill* above n 4 at para 56.

[175] Id.

[176] See *Lawrence* above n 39 at paras 42-4 and 51-6.

be regulated by licences which control not only the right to sell liquor but also where, when and what liquor may be sold."[177] (Emphasis added.)

[121] Simply, the objects of the Eastern Cape Act were to effect socio-economic change and to achieve a more efficient management of the liquor industry.[178] These objectives explain the inclusion of section 71(5) in the Eastern Cape Act, a transitional provision that required licence holders, after a certain period, to sell the wine at *separate* premises. This is particularly not surprising considering that one of the leading causes of alcohol abuse is the ease of its availability in terms of location, time and cost.[179]

[122] The issue is this: an entitlement to commercial trade under a state licence does not fit comfortably within the constitutional notions of property. 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

[177] Id at para 36.

[178] The objects of the Eastern Cape Act are outlined in Chapter 1:

> "The objects of this Act are to make provision for the regulation of retail sales and micro-manufacturing of liquor in the Province, to encourage and support the liquor industry and to manage and reduce the socio-economic and other costs of excessive alcohol consumption by creating an environment in which—
>
> (a) the entry of new participants into the liquor industry is facilitated;
>
> (b) appropriate steps are taken against those selling liquor outside the administrative and regulatory framework established in terms of the Act;
>
> (c) those involved in the liquor industry may attain and maintain adequate standards of service delivery;
>
> (d) community considerations on the registration of retail premises are taken into account; and
>
> (e) the particular realities confronting the liquor industry in the Province can be addressed."

[179] Setlalentoa et al "The Social Aspects of Alcohol Misuse/Abuse in South Africa" (2010) 23 *South African Journal of Clinical Nutrition* 11 at 12.

pre-conditions.[180] In time, a licence holder may cease to be suitable to hold the licence. And they are also not freely transferable.[181]

[123] This brings me to the important consideration of vesting as part of assessing whether a public law right acquired by state regulation ought to be treated as property in the hands of its holder. The main judgment also contends that the vesting of rights and the impact of state regulation on these licences are not on their own determinative of the "property" issue.[182] I take a different view. Vesting is still seen by our courts and foreign courts as something that prompts the recognition of a right.[183] The writers, Currie and De Waal, make the point, correctly so in my view, that "[a]n important qualification of the expansive interpretation of property that has been advocated here is that for a right to constitute property it must be a vested right".[184] As we have seen, under the statutory scheme a liquor licence does not vest in its holder and is derived from and open to legitimate state regulation.

[124] Another important consideration is whether in according a liquor licence recognition as property, one is rendering its definition too wide as to make legislative regulation impracticable.[185] I have no idea how many liquor licences provinces issue cumulatively year after year. Less still do I know how many have been issued and are currently out there. Least still do I know what other categories of licences exists and whether they are aimed at commercial benefit or not. Are they all property, and do they all deserve the protection of section 25? I would have strong reservations were these questions ever to be answered in the affirmative.

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[180] See *Liquor Bill* above n 4 at para 56.

[181] See sections 113 and 114 of the 1989 Liquor Act, as well as section 25(4) of the Eastern Cape Act, that make transfer of licences subject to board approval. Specifically, section 114(2) of the 1989 Liquor Act provided for instances where the Board would not grant transfer.

[182] See main judgment at [59].

[183] See *Agri SA* above n 23 and *Transkei Public Servants Association* above n 92. For foreign law see Van der Walt (2011) above n 75 at 165 in fns 294-5, citing *Marckx v Belgium* [1979] ECHR Series A vol 31; *De Napoles Pacheco v Belgium* [1977] 15 DR 143; *X v Italy* [1977] 11 DR 114; *Müller v Austria* [1976] 3 DR 25; *X v Sweden* [1974] 2 DR 123; *X v The Netherlands* [1971] YB 14 224; and *X v United Kingdom* [1970] YB 13 892.

[184] See Currie and De Waal above n 145 at 540.

[185] *Law Society* above n 33 at para 83.

[125] The point is this: the main judgment may very well create very difficult property jurisprudence. The wider the definition of property, the tighter our understanding of deprivation and arbitrariness will have to be. Would every change in a licensing law possibly attract a constitutional challenge based on the property clause like the one now in our hands? That, it seems to me, would run afoul of the scheme of our Constitution that has placed legislative competence to regulate the sale of liquor in the provinces.[186] It would impermissibly limit the legislative competence of the provinces. Also, if a province were to terminate a class of licences, would that amount to expropriation that entitled the holders to compensation?[187]

[126] In reaching the conclusion that liquor licences may be property, the main judgment invokes the rights to human dignity, equality, freedom and to choose trade, occupation or profession freely. In that regard it holds:

> "If a natural person had been in the position of Shoprite, she would have had an easier task of convincing a court that the grocer's wine licence granted by the State enabled her to conduct a business vocation of her choice that was essential to her living a life of dignity in that there was a 'relationship between [her] work and [her] human personality as a whole'. So the correct question to ask, as noted above, is whether her interest in the business licence would qualify as property protected under section 25(1)."[188] (Footnotes omitted.)

[127] I hold differently. The objective evaluation of whether a liquor licence is property cannot be premised on a speculative claim to other fundamental rights of an individual's human dignity, occupation and freedom, particularly on the part of a substantial corporate trader. This Court in *FNB* implied that one should look at the

[186] See *Liquor Bill* above n 4 at para 80. See also Schedule 5 of the Constitution.

[187] See Reich above n 106 at 745: "But when largesse is revoked in the public interest, the holder ordinarily receives no compensation."

[188] Main judgment at [64].

objective inherent value of the right or interest to determine if it constitutes "property".[189] If the core nature of a liquor licence is permission, then subjective interests like economic and commercial value, let alone human dignity and vocation of choice and liberty are of little assistance in themselves. *FNB* made it clear that "[n]either the subjective interest of the owner in the thing owned, nor the economic value of the right of ownership . . . can determine the characterisation of the right".[190] Economic and commercial interests, whether objective or subjective, are part and parcel of these permissions. The inherent limitation in the core attribute of a liquor licence cannot be played down and supplanted by other rights in the Constitution in order to justify a finding of "property" which otherwise does not fit the objective enquiry.[191]

[128] Lastly, the main judgment posits:

> "It is no answer to Shoprite's claim to tell it to seek a remedy under PAJA, because it does not attack the exercise of administrative conduct. Its challenge must be met at the level it is directed – at the legislative level."[192]

It is so that Shoprite challenged the constitutional validity of legislation. The point I make is this. When one assesses whether a liquor licence constitutes property and whether the Constitution clamours for its protection as property, it is necessary to ascertain whether the interest or permission in issue is open to arbitrary confiscation or material alteration. Courts, as some foreign jurisdictions have done, would tend to throw the property protection wide if there were no other effective remedies. Administrative law in this country provides ample redress against arbitrary executive

[189] First National Bank sold and leased vehicles. Three of these vehicles were detained under section 114 of the Customs and Excise Act 91 of 1964. The Minister of Finance and the Commissioner of South African Revenue Services contended that First National Bank could not rely on section 25 as the vehicles were not used for driving purposes. However, this Court held that the argument conflated the legal right with a commercial interest.

[190] *FNB* above n 8 at para 56.

[191] Shoprite contends that licences, permits and quotas should be recognised as "property" if they have commercial value and have vested in the holder, or have been acquired according to statutory or regulatory requirements.

[192] Main judgment at [33].

decisions on whether to grant, renew, cancel or alter a liquor licence. A pre-requisite to these remedies is not whether a liquor licence is property or not. This, in my view, is a powerful consideration in an enquiry whether our Constitution requires us to extend the meaning of property to liquor licences.

[129] There was indeed another route open to the main judgment in reaching its decision. The enquiry into arbitrary deprivation in substance is no different from the enquiry into rationality of the impugned statute. If the impugned statute had authorised a wanton and irrational termination of the liquor licences of Shoprite in a law that was not properly related to public good, it would have been constitutionally bad. The holder of the permission would have the same substantive constitutional protection. Moreover, the approach that some courts have adopted was to place little emphasis on the threshold question of "property". An example is that of *Transkei Public Servants Association*[193] and of *Law Society*, where the Court stated that "[h]appily, in this case, given the conclusion I reach, it is unnecessary to resolve the debate whether a claim for loss of earning capacity or for loss of support constitutes 'property'".[194]

[130] In sum, a mere preference in a business model is not "property" that requires protection against arbitrary deprivation as foreseen in section 25(1) of the Constitution. I concur in the order of the main judgment subject to these reservations.

MADLANGA J (Tshiqi AJ concurring):

Introduction

[131] I have had the pleasure of reading the main judgment written by my colleague, Froneman J, and the concurrence by the Deputy Chief Justice. Like the

[193] *Transkei Public Servants Association* above n 92 at 1246J-1247A.

[194] *Law Society* above n 33 at para 84.

Deputy Chief Justice, I am thankful for the detailed discussion of the facts in the main judgment.

[132] The matters that trouble me in the main judgment are threefold:

(a) It places too much emphasis on the relevance of other fundamental rights contained in the Bill of Rights to the right to property. As a result, the potency of the right to property as a self-standing right protected as such under the Constitution is watered down.

(b) The extent of the deprivation is characterised as being so minor as to only barely make the cut. According to the main judgment, the severity of the deprivation "was not too much".[195] This finding is made despite Shoprite being wholly divested of its ability to sell table wine in a grocery store.

(c) Finally, the main judgment concludes that the deprivation was not arbitrary. To me, the facts proffered to show that the deprivation was not arbitrary are threadbare and thus unsatisfactory. That leads me to the conclusion that the deprivation was arbitrary.

[133] But for these issues, I am in agreement with the main judgment insofar as it recognises: (i) that the entitlement that one derives from holding a liquor licence like those held by Shoprite constitutes property as contemplated in section 25(1) of the Constitution; and (ii) that a deprivation of that property has occurred. I do not agree with the concurring judgment which holds that this entitlement is not property. Nor do I agree that this matter may be determined by simply testing the challenged provisions for rationality without deciding the property question.[196] Let me start with the latter issue.

[195] Main judgment at [76].

[196] Concurring judgment at [94], which then continues:

The approach of testing for rationality

[134] In *FNB*,[197] in the context of the debate whether a deprivation was arbitrary, the Court dealt with the writings of Chaskalson and Lewis[198] and Budlender.[199] The Court's summary is that the two works argued that arbitrariness meant no more than irrationality and purported to find support in *Lawrence*.[200] In rejecting this argument, Ackermann J held that *Lawrence* "provides no authority for the manner in which 'arbitrary' should be construed in the context of the property provisions of s 25 of the Constitution".[201] More importantly, *FNB* said that the test for arbitrariness in a section 25(1) enquiry is on a sliding scale, depending on the circumstances:

> "In its context 'arbitrary', as used in s 25(1), is not limited to non-rational deprivations, in the sense of there being no rational connection between means and ends. *It refers to a wider concept and a broader controlling principle that is more demanding than an enquiry into mere rationality.* At the same time it is a narrower and less intrusive concept than that of the proportionality evaluation required by the limitation provisions of s 36. This is so because the standard set in s 36 is 'reasonableness' and 'justifiability', whilst the standard set in s 25 is 'arbitrariness'. This distinction must be kept in mind when interpreting and applying the two sections.
>
> It is important in every case in which s 25(1) is in issue to have regard to the legislative context *to which* the prohibition against 'arbitrary' deprivation has to be applied; and also to the nature and extent of the deprivation. *In certain circumstances*

> "In that event, one simply asks whether the provisions pursue a legitimate government purpose, and if so, whether the statutory means resorted to are arbitrary or reveal naked preference or another illogical or irrational trait. In substance the arbitrariness enquiry here would, in process and substance, be no different from the arbitrariness enquiry under section 25(1)."

See also [129] of the concurring judgment.

[197] *FNB* above n 8.

[198] Chaskalson and Lewis "Property" in Woolman et al (eds) *Constitutional Law of South Africa* Service 2 (1998) at 31-13,14, cited id at para 47 fn 79 (note that this section has been revised, the citation is of the writing as it was cited in *FNB*).

[199] Budlender et al *Juta's New Land Law* (Juta & Co Ltd, Cape Town 1998) at 1-34 and 1-36, cited in *FNB* id.

[200] *FNB* above n 8 at para 68 referring to *Lawrence* above n 39.

[201] *FNB* id at para 69.

> *the legislative deprivation might be such that no more than a rational connection between means and ends would be required, while in others the ends would have to be more compelling to prevent the deprivation from being arbitrary.*"[202] (Emphasis added, except for "to which", which is emphasised in the original.)

The last sentence in the quote provides the sliding scale.

[135] The approach of simply testing the challenged provisions for rationality without deciding the property question goes against that of *FNB*. That, because in an instance where the interest at issue is held to constitute property and deprivation is found to have taken place, arbitrariness would not necessarily be determined at the level of rationality. One cannot adjudge this beforehand. The nature of the property right informs the deprivation enquiry.[203] In turn, the extent of the deprivation colours the level at which the arbitrariness enquiry will be pitched on the sliding scale.[204] A simple rationality approach does not admit of possible movement in accordance with the *FNB* sliding scale: it makes the enquiry static.

[136] *Law Society*,[205] which is relied upon for simply testing for rationality,[206] is not authority for this approach. There the Court assumed that the interest at issue was property.[207] It then proceeded to the next steps, namely, the questions of deprivation and arbitrariness.[208] The Court did not purport to concern itself with the simple rationality analysis outside the three-stage enquiry.[209] Likewise, *Transkei Public*

[202] Id at paras 65-6.

[203] *FNB* above n 8 at para 100(d).

[204] Id at para 100(g); see also para 54.

[205] *Law Society* above n 33.

[206] Concurring judgment at [129].

[207] *Law Society* above n 33 at para 84.

[208] Id at paras 85-6.

[209] Three in this sense: (i) whether the interest at issue is property; (ii) if it is, whether the person enjoying it has been deprived; and (iii) if the individual was deprived, whether the deprivation was arbitrary.

Servants Association, on which the concurring judgment also relies,[210] does not avail the simple rationality test approach.[211]

[137] I proceed to deal with the contested issues outlined above. As a crucial preface, let me make this point. For centuries after conquest, ours has been a painfully unequal society; the white minority not only subjugating the black majority but actively taking steps calculated to advantage themselves in diverse human endeavours and simple existence to the disadvantage of the black majority. Of particular significance was the incidence of the dispossession of the majority of their property, notably land. Needless to say, the approach of our courts to the protection of the property right must bear that context in mind. The Court's words in *FNB* warrant repetition:

> "[O]ne should never lose sight of the historical context in which the property clause came into existence. The background is one of conquest, as a consequence of which there was a taking of land in circumstances which, to this day are a source of pain and tension. . . . [T]he purpose of s 25 is not merely to protect private property but also to advance the public interest in relation to property. Thus it is necessary not only to have regard to foreign law, but also to the peculiar circumstances of our own history and the provisions of our Constitution."[212]

[138] And the context is not merely a historical one. The centuries of dispossession and disadvantage continue to have tangible effects that are yet to be addressed. So, we must be wary of overbroad protection of property interests as that may interfere with the transformative agenda permeating the Constitution. Indeed, section 25 itself may be seen as "striving for a just and equitable balance between the protection of the

[210] Concurring judgment at [129].

[211] *Transkei Public Servants Association* above n 92 at 1246J-1247H. In this case, Pickering J noted that "the meaning of 'property' in section 28 of the [interim] Constitution may well be sufficiently wide to encompass a State housing subsidy" and appears to proceed from the assumption that such an entitlement would be considered property. What he then goes on to state is that even if the entitlement is "property", section 236(5) of the interim Constitution, in expressly recognising the continuance of pension rights and remaining silent on housing subsidies, was deliberately crafted with the purpose of not protecting housing subsidies (and other similar rights) during the transitional period. From this it follows, according to the Court, that there is no protectable entitlement. It is apparent that this had nothing to do with the simple rationality analysis.

[212] *FNB* above n 8 at para 64.

existing, private property interests and the promotion of the public interest in the transformation of the current property regime".[213] Without derogating from this contextual, and indeed constitutional, imperative, where an interest is property in terms of section 25(1) of the Constitution, we should not shy away from declaring it to be so. Is the interest at issue here property?

Property

[139] The value of the right to property inheres in the right as a self-standing unit. Like any other right in the Bill of Rights, the right to property is worthy of protection as a stand-alone right. For that, it does not need to be closely linked to another right. I am not suggesting that there is no interrelatedness in the nature and content of fundamental rights. In *Makwanyane*, Chaskalson P said that the rights to life and human dignity—

> "are the source of all other rights. Other rights may be limited, and may even be withdrawn and then granted again, but their ultimate limit is to be found in the preservation of the twin rights of life and dignity. These twin rights are the essential content of all rights under the Constitution. Take them away, and all other rights cease."[214]

This is about the overarching nature of these "twin rights". It is not about detracting from the essential content of other rights and their existence as stand-alone rights. My concern is the degree to which the main judgment waters down the potency of the right to property to the point where it does little more than ride on the coat-tails of rights such as human dignity[215] and freedom of trade, occupation and profession.[216]

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[213] Van der Walt (2011) above n 75 at 33; see also Currie and De Waal *The Bill of Rights Handbook* 6 ed (Juta & Co Ltd, Cape Town 2013) at 532-4.

[214] *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 84.

[215] Section 10 of the Constitution.

[216] Section 22 of the Constitution.

[140] When this Court has previously adverted to whether a right should be recognised as property for the purposes of section 25(1), it has not found that cognisance should be given to the relationship between the property and other rights. *FNB* is one such example. In that case, ownership *simpliciter* was recognised as a protectable property interest.[217] I am not unmindful of the fact that *FNB* was concerned with corporeal objects.[218]

[141] What then is property? In *Law Society*, Moseneke DCJ aptly said that, for several reasons, this is a vexed question:

> "'Property', as used in the property clause, is a word of broad and inexact purport and yet it is not defined. The common-law and indigenous-law traditions conceptualise property and legal relationships that relate to it in different ways. Section 25(4)(b) makes it clear that property is not limited to land. It must follow that both corporeal and incorporeal property enjoy protection. For present purposes let it suffice to state that the definition of property for purposes of constitutional protection should not be too wide to make legislative regulation impracticable and not too narrow to render the protection of property of little worth."[219]

Of particular relevance for present purposes, the Court made the point that incorporeal property also enjoys protection.[220]

[142] What I consider to be an attenuated right in comparison to the interest at issue in the present matter was recently held to constitute property. In *Opperman*, this Court recognised an enrichment claim as property. That, despite an acknowledgement

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[217] *FNB* above n 8 at paras 53-4.

[218] In *FNB* above n 8 at para 51, this Court said it is easier to determine that corporeal objects are property. It stated:

> "Here it is sufficient to hold that ownership of a corporeal movable must – as must ownership of land – lie at the heart of our constitutional concept of property, both as regards the nature of the right involved as well as the object of the right and must therefore, in principle, enjoy the protection of section 25."

[219] *Law Society* above n 33 at para 83.

[220] Id.

that it amounted to no more than a personal right.[221] To my mind, an enrichment claim is somewhat tenuous and at a far greater remove from readily acceptable property rights[222] than a grocer's wine licence. An enrichment claim may only be enforced against a specific party. When brought to court it may be successfully defended, thereby being rendered completely valueless. Yet, this Court barely hesitated in recognising that this was property; it was "logical and realistic" for it to do so.[223]

[143] By comparison, the grocer's wine licence is something in hand: it grants the holder an entitlement to sell wine under certain specified circumstances. The licence may endure indefinitely. Even though it may be suspended or cancelled, that may not be done at whim.[224] There are circumscribed grounds; and they must be applied in accordance with the strictures of just administrative action as provided for in PAJA.[225] It is not without significance that, from the time they were granted, Shoprite's licences were never cancelled. And Shoprite has been trading in accordance therewith. Also, a grocer's wine licence holds objective commercial value: its very *raison d'être* is to trade in accordance with its conditions. The licence is transferable, albeit subject to that being sanctioned by the authorities.[226] As an item with objective economic value, the transfer may even be for a valuable consideration (*quid pro quo*). Indeed, the value of Shoprite itself (or that of its individual stores) as a commercial entity may well be enhanced by the fact that Shoprite holds grocer's wine licences. All these

[221] *Opperman* above n 32 at paras 61-3.

[222] Compare *FNB* above n 8 at paras 51 and 54.

[223] *Opperman* above n 32 at para 63.

[224] Circumstances under which suspensions or withdrawals of liquor licences may occur are extensively dealt with in [97] of the concurring judgment. Also, sections 9(b) and 29 read with section 28 of the Eastern Cape Act, the impugned Act, provide for the circumstances in which cancellation may take place.

[225] Above n 35.

[226] Section 113 of the 1989 Liquor Act above n 4 provides:

> "The holder of a licence (excluding a temporary liquor licence and occasional licence) may at any time make application for the transfer thereof to another person."

See also sections 114-8 of the 1989 Liquor Act, which regulate the transfer process.

point to the grocer's wine licence being property for purposes of section 25(1). If something as tenuous as a right of action constitutes property,[227] it must indeed be so.

[144] I note that the concurring judgment observes that "[i]f the core nature of a liquor licence is permission, then subjective interests like economic and commercial value, let alone human dignity and vocation of choice and liberty are of little assistance in themselves".[228] My focus is the reference to "commercial value". The quoted *dictum* is about "subjective" commercial value, which means the concurring judgment is not saying objective commercial value is of little relevance to the enquiry. Objective commercial value definitely does come into the equation when determining whether the right in issue is property.

[145] *FNB* concerned the question whether motor vehicles which First National Bank (FNB) had leased, or whose ownership it had retained upon selling them, were property.[229] An argument was advanced that, because FNB was least interested in the actual ownership of the motor vehicles, its interest in them did not qualify as property.[230] The Court took a different a view:

> "Neither the subjective interest of the owner in the thing owned, nor the economic value of the right of ownership, having regard to the other terms of the agreement, can determine the characterisation of the right. It does not matter that the owner would rather have the purchase price than the vehicle, nor that the economic value of the right of ownership might be small when the contract term draws to an end. A speculator has no less a right of ownership in goods purchased exclusively for resale merely because she has no subjective interest in them but sees them only as objects that will produce money on resale. I accordingly conclude that the right of ownership that FNB has in the vehicles in question constitutes property for purposes of s 25."[231]

[227] *Opperman* above n 32 at para 63.

[228] Concurring judgment at [127].

[229] *FNB* above n 8 at para 53, read with paras 2 and 7.

[230] Id at para 53.

[231] Id at para 56.

[146] In context, what this means – according to the argument – is: that the economic value of FNB's interest in the ownership of the vehicles may be low, does not, of necessity, translate to the interest not being property. In similar vein, Mogoeng CJ tells us in *Agri SA*:

> "In [*FNB*], Ackermann J rejected the argument that a right's lack of value also meant its lack of proper content. That proposition was, in his view, an illegitimate conflation of two distinctly different legal concepts. I agree. The argument that a lack of value, or indeterminate value, destroyed the existence of the right to ownership of minerals before the advent of the [Mineral and Petroleum Resources Development Act] is also unfounded."[232] (Footnotes omitted.)

This does not mean the objective economic value of a right can never be of relevance in deciding whether to characterise the right as property. Quite the contrary is true. In *Law Society* this Court said "[i]n many disputes, courts will readily find that a particular asset *of value* or resource is recognised and protected by law as property".[233]

[147] In sum, whatever the position may be with regard to other types of licences, the grocer's wine licence is definitely property. Happily, it is not necessary to consider, let alone decide, whether all possible types of licences constitute property under section 25(1). That is an issue for another day. Suffice it to say, quite conceivably, some types of licences may lack factors that lead to a characterisation that they are property.

[148] The concurring judgment makes certain observations and raises some questions:

> "The point is this: the main judgment may very well create very difficult property jurisprudence. The wider the definition of property, the tighter our understanding of deprivation and arbitrariness will have to be. Would every change in a licensing law possibly attract a constitutional challenge based on the property clause like the one now in our hands?

[232] *Agri SA* above n 23 at para 42.

[233] *Law Society* above n 33 at para 83 (emphasis added).

> That, it seems to me, would run afoul of the scheme of our Constitution that has placed legislative competence to regulate the sale of liquor in the provinces. It would impermissibly limit the legislative competence of the provinces. Also, if the province were to terminate a class of licences, would that amount to expropriation that entitled the holders to compensation?"[234] (Footnotes omitted.)

[149] A declaration that this single type of licence – the grocer's wine licence – is property does not, of necessity, mean all manner of licences will be held to constitute property. I thus do not see the looming spectre of difficulty in regulation. These observations apply equally to the many apparent imponderables or questions the concurring judgment poses at [124]. Also, it is not as though day in, day out provinces are legislating to discontinue various categories of licences, thus running the risks that the concurring judgment seems to see. Likewise, the termination of licences does not necessarily amount to expropriation entitling erstwhile licence holders to compensation. We saw in *Agri SA* that, in a comparable scenario, a holding that there has been an expropriation is not easy to come by. Absent that holding, its concomitant, compensation, does not arise.[235]

[150] I find it difficult to accept that a grocer's wine licence, which has all the hallmarks of property,[236] should be adjudged not to be property purely because it is a licence. I also find the indiscriminate idea that "licence" equals not being property conceptually unpalatable.[237] I see no reason why, even with licences, we should not follow the principle that says whether they are property should be determined on a case-by-case basis.[238] To adopt an *a priori*[239] position that, because of perceived difficulties, all licences cannot be property is problematic.

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[234] Concurring judgment at [125].

[235] *Agri SA* above n 23 at paras 54-72.

[236] At [143].

[237] Concurring judgment at [127].

[238] *Law Society* above n 33 at para 83.

[239] Formed or conceived beforehand.

Extent of the deprivation

[151] The main judgment correctly identifies two core aspects of the grocer's wine licence, namely: "it allowed holders to sell wine and groceries *on the same premises*";[240] and "the permission to do so was for an indefinite period".[241] These aspects of the grocer's wine licence are both abrogated by the change in regime from the 1989 Liquor Act to the Eastern Cape Act; a fact which the main judgment acknowledges.

[152] So then, how does the main judgment arrive at the conclusion that Shoprite's property right is only deprived to a limited extent? It refers to a third aspect of the right: "for persons whose choice of trade or occupation depended on trading in liquor, it provided an opportunity to do so".[242] Since Shoprite may apply for an "all kinds" licence to sell a variety of liquor at separate premises, so the argument goes, this aspect of the right is left intact.

[153] But the unique essence of the grocer's wine licence is actually destroyed by the change in regime. What sets a grocer's wine licence apart from other licences is not that it permits trading in liquor. It is the ability to sell wine next to a loaf of bread. To put it in colourful terms, holding this licence allows Shoprite to engage in the business of "selling dinner parties", whereby a shopper can buy his or her cheese, bread, dessert ingredients and wine all in one place. This licence allows Shoprite to engage in a particular business model.

[154] If the licence and all that it entitled Shoprite to engage in have been taken away, the licence has effectively been revoked. Then a total deprivation has occurred.[243] It is idle to point to Shoprite's ability to apply for an "all kinds" licence

[240] Main judgment at [74](b) (emphasis added).

[241] Id at [74](c).

[242] Id at [74](a).

[243] In *FNB* above n 8 at para 56, this Court identified that there will not be deprivation where the mere "subjective" interest of a person is diminished. However, I would not read that judgment to say that Shoprite's choice of business model – that is, selling wine next to a loaf of bread – is a subjective interest. This cannot be

as ameliorating the deprivation. This only allows Shoprite to engage in a wholly different business model on totally different premises. More importantly, the mere fact that both licences involve an entitlement to sell wine (plus other types of liquor, in the case of an "all kinds" licence) lends an appearance of similarity between them. That is, in fact, illusory.

[155] To illustrate, Shoprite was always entitled to apply for an "all kinds" licence. But so was any other person with the urge to engage in the business of running a liquor store. So, having been divested of the grocer's wine licence, Shoprite is no longer able to sell wine in a grocery store: that is lost completely. How, then, can it be said that the availability of the opportunity to apply for an "all kinds" licence – which was always there – can cure the specific deprivation? To put it bluntly, it is mistaken to suggest that the availability of an opportunity to apply for an "all kinds" licence is giving Shoprite anything, let alone anything new. Throughout, it could – upon obtaining an "all kinds" licence – have sold all types of liquor elsewhere. That is not new. What is new is the deprivation. And the opportunity to apply for an "all kinds" licence cannot cure it.

[156] Ultimately, I must conclude that not only has Shoprite been deprived of its property, the deprivation is total in nature. This has important implications for determining the standard by which arbitrariness is judged.[244]

Arbitrariness

[157] My dissonance with the main judgment's conclusion that there was "sufficient reason" for the passing of the Eastern Cape Act, and therefore the deprivation, stems from the weight which I accord to the evidence provided by the Province. While the

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so, for the very purpose of this sort of licence is to enable or facilitate the implementation of this business model. To posit this as a "subjective" interest, when it flows from the very function of the licence, would be an absurdity.

[244] See *FNB* above n 8 at para 100(d), which states that "regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property".

main judgment locates the enquiry at the lower end of the *FNB* scale (i.e. the rationality test),[245] the test should be pitched at a higher level. What is the test?

Appropriate test

[158] In a different context, I dealt with the test.[246] To recapitulate, on the standard for arbitrariness, *FNB* creates a "sliding scale".[247] At the lower end of the scale is the rationality test. It requires no more than that there should be a rational connection between the means and ends. Higher up on the scale, the ends must be compelling.[248] Both tests require that there be some proof that the ends are linked to, or justify, the means.[249] Proof is at its lowest, if the test is rationality.[250] The degree of proof required is more stringent as the applicable test gets higher on the scale.

[159] Shoprite was deprived of the essential aspect of the grocer's wine licence. Given the extent of the deprivation, which is total, and the need to protect the right to property, the standard required to evaluate whether the deprivation is arbitrary is elevated, and not in the realm of mere rationality. This suggests "sliding up" the *FNB* scale toward the higher end of the spectrum; that is, where the ends have to be more compelling.

"Legislative facts"

[160] The main judgment relies on *Lawrence*, which in turn relies on the Canadian academic Hogg, to conclude that the reasons for passing the Eastern Cape Act are "legislative facts" with which courts should not interfere readily.[251] Based on this

[245] Main judgment at [83].

[246] At [134] to [136].

[247] *FNB* above n 8 at para 66.

[248] Id at paras 65-6.

[249] Id at 65-7.

[250] Id.

[251] See main judgment at [84] and [85] citing *Lawrence* above n 39 at paras 52-4 and 67-70. The majority judgment in *Lawrence* relies on Hogg (1976) above n 124. Hogg embarks on a more detailed discussion of the concept of legislative facts in Hogg *Constitutional Law of Canada* 5 ed (Thomson Carswell, Scarborough 2007)

view, the main judgment then concludes that, on the evidence provided, the test for rationality is met, as sufficient reason for the deprivation has been shown.

[161] Hogg defines legislative facts as "facts of a more general character concerning the social or economic milieu which gave rise to the litigation".[252] Regarding the level of proof of legislative facts, he states that "the proponent of legislation need show no more than a rational basis for legislative facts that are prerequisite to the validity of the legislation".[253] In essence, he argues that the principle of judicial restraint – where courts do not stray into the terrain of the Legislature – means that judicial scrutiny of the rational basis for legislation is less strict.

[162] However, Hogg further states that the rational basis test is not appropriate in cases dealing with the Canadian Charter[254] (the equivalent of the South African Bill of Rights). For Charter cases, the standard of proving legislative facts is a "preponderance of probability", a more onerous standard.[255]

[163] The Hogg standard sets the bar too high, especially in comparison to our own jurisprudence on the adjudication of legislative facts. This Court in *Lawrence*, even though it was dealing with a matter concerning the Bill of Rights, adopted the less stringent rationality standard. Whatever the standard, *Lawrence* still requires that legislative facts must be proved by means of evidence.[256] This means the Province must put forth facts in support of the reasons asserted by it in justification of the deprivation. Legislative facts are not a magic wand that state parties may wave to absolve themselves of the evidentiary burden they bear in defending a deprivation.

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at 60.2, to which the majority judgment in *Lawrence* did not have regard (although the judgment of Sachs J does have regard to a previous edition thereof).

[252] Hogg (1976) id at 395.

[253] Hogg (2007) above n 251 at 60.2(f).

[254] Canadian Charter of Rights and Freedoms. Like our Bill of Rights, it is contained in the Canadian Constitution itself.

[255] Hogg (2007) above n 251 at 60.2(f).

[256] *Lawrence* above n 39 at para 52. Hogg says the evidence may take the form of "opinion testimony of persons expert in the relevant field of knowledge". Hogg (2007) id at 60.2(a).

[164] A close look at the Province's submissions and parliamentary discussion evinces a dearth of underlying reasons and factual bases for the passing of the Eastern Cape Act. The record does reveal some reasons,[257] but many of the justifications cited by the respondents are not substantiated on the record and do not progress beyond bald assertions. What is more, the considerations dating to the relevant time almost exclusively relate to the grave socio-economic effects due to the legacy of apartheid and the numerous unlicensed vendors in the province.[258] There is, literally, no mention of the sale of table wine in grocery stores in any documentation placed before us dating to the time when the Legislature was considering the Act. Such supposed justification as does exist is only articulated after the fact in the litigation, with no factual substantiation. Nor is there an analysis of how the means will, in fact, achieve the end.

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[257] If one looks at the transcript of the "Proceedings of the Legislature of the Province of the Eastern Cape" when considering the Eastern Cape Act (when it was still a Bill), it is apparent that the headline objective of the Act was to legalise informal and illegal traders and create greater access to the economic benefits of the liquor trade. The following statements by Members of the Provincial Legislature representing various political parties, excerpted from the transcript, are particularly illuminating:

(a) "The illegal operators were saying give us an opportunity to become legal. That has been addressed in this Bill." (I note that this statement was made by Mr De Wet, who was presenting the Bill on behalf of the relevant portfolio committee.)

(b) "I believe that the reason this Bill was introduced in the form that it was, it was trying to marry laws from the old South Africa, which were inappropriate to the situation which we faced, with the situation which was not acceptable, i.e. the sale, uncontrolled sale of liquor with no regulation. We support that one hundred percent."

(c) "What I am saying is I believe that this Bill go a long, long way to addressing the problem that the Honourable MEC is faced with and that is to bring unlicensed, illegal businesses into the net and to get control and regulation over those businesses because we are, as I said, dealing with a potentially dangerous substance."

(d) "The [New National Party] is extremely grateful that it is now going to be possible for people to be licensed where in the past they had problems. It is also good for shebeens to be properly organised and properly licensed. We hope that the identification and the monitoring would be made much easier by this Bill."

(e) "This Bill seeks to address, as you know, the difficulties that our people used to be faced with during the olden times."

(f) "One of the constraints that is going to hit us hard is once we pass the regulations and people come in for the transition, we is going to be flocked by shebeeners, that is going to be the pe[a]k once we have done everything after that. I think that I am quite happy that we will be able to meet that challenge."

[258] See id.

[165] The legislative facts, or general socio-economic realities informing the Eastern Cape Act are, on Hogg's construction, integral to the analysis of whether there is a rational basis for the Act. They would then need to be proven at the time the decision to legislate is taken, and not after. For it serves no purpose to scrape for reasons for a decision after it is made.

[166] "Evidence" of the detrimental effects of selling wine in grocery stores – which supposedly informed the passing of the Eastern Cape Act – was only advanced by the respondents in their papers before the High Court and this Court in this very litigation. Not before. If the evidence existed at the time the legislation was drafted and discussed, it would have been a matter of relative ease for the respondents not only to produce it, but also to refer to its contemporaneous existence when the Act was passed. Put simply, the reasons should have been central to the discussions at the Legislature; and evidence of this should have been proffered. The supposed ills of selling wine in a grocery store are plainly a belated *ex post facto* attempt at justification. And they are not something of which I can take judicial notice.

[167] The lack of substantiation extends to the argument that one of the purposes of the Eastern Cape Act is the simplification or "rationalisation" of the liquor licensing regime in the Eastern Cape. Brief reference was made in the record to rationalisation being one of the purposes of the 1998 Bill,[259] although it is not clear to what extent the Eastern Cape Legislature had regard to or was even aware of the document placed on record before us.[260] But, regardless of whether the Eastern Cape Legislature had rationalisation in mind, the problem is that no evidence has been placed on record before us to demonstrate the need for simplification. It was not shown that there were

[259] See above n 4.

[260] A document entitled "Memorandum on the Objects of the Liquor Bill" was placed on record before us. This document states that "[t]he Bill allows for the manufacturers, wholesalers and retailers to apply for registration to sell liquor through a *much simplified procedure* compared to that of the Liquor Act, 1989" (emphasis added). The respondents have placed no virtually evidence on record relating to the Eastern Cape Act itself. They place much reliance on documents prepared in respect of the 1998 Bill, doing little to dispel the notion that the Eastern Cape Legislature somewhat mechanically adopted large sections of that Bill without applying its own mind to the ends sought and the means being used to achieve those ends. Crucially, the information relating to the 1998 Bill hardly sheds any light on the relevant issues.

administrative or enforcement problems under the previous dispensation. Nor is it clear what the nature of the problems was, if they did exist. To simply say the discontinuance of existing licences would reduce the administrative burden and create a simpler licensing regime does not mean much in the absence of such antecedent information. Yet again, that is not something of which I can take judicial notice.

[168] Accordingly, it is hard to see a connection between the methods the respondents have imposed and the alleged ends they seek to achieve. The ends come nowhere near being compelling.[261] That is not enough, possibly not even on the basis of a mere rationality test.

Conclusion

[169] I would ultimately have held that Shoprite's grocer's wine licences constitute property for purposes of section 25(1) of the Constitution; and that Shoprite was arbitrarily deprived of this property. In the result, I would have confirmed the order and judgment of the High Court declaring section 71(2) and (5) of, and the relevant parts of the Schedule to, the Eastern Cape Act constitutionally invalid.

[261] See *FNB* above n 8 at para 66.

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