CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 12/99

EX PARTE THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

IN RE: CONSTITUTIONALITY OF THE LIQUOR BILL

Heard on: 31 August 1999

Decided on: 11 November 1999

JUDGMENT

CAMERON AJ:

Introduction

[1] The legislation before us is inchoate. Parliament has passed a Bill, but it has not received the assent of the President, who referred it to this Court for a decision on its constitutionality. This is the first time that the provisions of the 1996 Constitution ("the Constitution") allowing for such a referral have been invoked, and our decision requires consideration of what that procedure entails as well as of the questions raised concerning the Bill's constitutionality.

[2] The Liquor Bill was introduced in the National Assembly on 31 August 1998. It passed through various legislative stages in terms of section 76(1) of the Constitution before Parliament approved it on 2 November 1998. When the Bill was sent to the President for his assent, he declined to grant it. Instead, because he had reservations about its constitutionality, he referred it back to the National Assembly on 22 January

1999 for reconsideration. On 3 March 1999, the National Assembly resolved that "the House, having reconsidered the Liquor Bill [B 131B-98], returns it to the President". No amendments had been effected. On 8 March 1999, the President referred it to this Court for a decision on its constitutionality. In doing so, he invoked his power pursuant to section 84(2)(c) of the Constitution, which provides that the President is responsible for "referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality".[1]

[3] On 19 March 1999 the President of this Court issued directions, attaching the President's notice of referral, and inviting the President himself and the government of the Republic of South Africa, any political party represented in the National Assembly, any provincial delegation represented in the National Council of Provinces and any provincial government to make representations to the Court concerning the constitutionality of the Bill, and requiring any party wishing to do so to give notice of its intention, and to indicate whether it wished to lead evidence and if so the purpose and relevance of that evidence.

[4] In response, the Western Cape government indicated that it wished to be represented and to place before the Court affidavit evidence of the regulation of liquor and liquor licensing in the Western Cape, in South Africa and in comparable jurisdictions, "showing that it is not necessary to have national legislation on liquor licences for any of the purposes set out in section 44(2)".[2] The Minister of Trade and Industry wished to supply evidence of the background to and history of the legislation and "why it was necessary for Parliament to legislate on these matters in the light of the requirements of section 44(2)".

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1 Section 84 of the Constitution of the Republic of South Africa, Act 108 of 1996, sets out the powers and functions of the President. It provides in part:
"(1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.
(2) The President is responsible for—
(a) assenting to and signing Bills;
(b) referring a Bill back to the National Assembly for reconsideration of the Bill's constitutionality;
(c) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;
(d) - (k)".

2 Section 44(2) provides:
"Parliament may intervene, by passing legislation in accordance with section 76 (1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—
(a) to maintain national security;
(b) to maintain economic unity;
(c) to maintain essential national standards;
(d) to establish minimum standards required for the rendering of services; or
(e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole."

[5] Under further directions issued by the President of this Court, the Western Cape government lodged an affidavit dealing with its objection to the Bill. Thereafter, the Minister of Trade and Industry, as representative of the government of the Republic of South Africa ("the Minister"), submitted an affidavit, in response to which the government of the Western Cape submitted a replying affidavit. Both the Western Cape government and the Minister were represented at the hearing.

Presidential Referral Under Section 79

[6] Our decision requires us to consider first what the referral to this Court by the President for a decision on a Bill's constitutionality entails. The Constitution, which subjects all legislation to review for its constitutionality, and makes any law inconsistent with it invalid,[3] embodies three routes to judicial consideration of the constitutionality of legislation passed by Parliament. One is a challenge by an interested party in a competent Court under one or more provisions of the Constitution.[4] Another is an application by at least one third of the members of the National Assembly to the Constitutional Court for an order declaring all or part of an Act of Parliament unconstitutional.[5] The third is that invoked in the present case, namely referral by the President before a Bill becomes a statute.[6]

[7] The procedure the President invoked is not without parallel in comparable systems,

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3 In terms of section 2 of the Constitution, the Constitution is "the supreme law of the Republic" and "law or conduct inconsistent with it is invalid".

4 Section 38 defines standing under the Bill of Rights (Chapter 2) to seek relief; section 172 defines the powers of courts in constitutional matters.

5 Section 80 reads:

> "80. **Application by members of National Assembly to Constitutional Court.**—(1) Members of the National Assembly may apply to the Constitutional Court for an order declaring that all or part of an Act of Parliament is unconstitutional.
> (2) An application—
> (a) must be supported by at least one third of the members of the National Assembly; and
> (b) must be made within 30 days of the date on which the President assented to and signed the Act.
> (3) The Constitutional Court may order that all or part of an Act that is the subject of an application in terms of subsection (1) has no force until the Court has decided the application if—
> (a) the interests of justice require this; and
> (b) the application has a reasonable prospect of success.
> (4) If an application is unsuccessful, and did not have a reasonable prospect of success, the Constitutional Court may order the applicants to pay costs.

Provincial statutes may be challenged under the comparable provisions of section 122.

6 Comparable provisions in section 121 permit provincial Premiers to refer provincial Bills to the Constitutional Court for decisions on their constitutionality.

though in the United States,[7] the United Kingdom,[8] Australia[9], New Zealand[10] and Germany,[11] no pre-enactment judicial procedure for testing statutory or constitutional validity exists. Comparable procedures do exist in other constitutions, though none is quite like our own. In Ireland, the Constitution[12] provides a procedure for a pre-enactment reference of certain bills to the Supreme Court by the President "for a decision" whether the Bill or any specified provision is "repugnant" to the Constitution.[13] The French Constitution of 1958 provides for the compulsory referral of "organic laws" (that is, laws on the judiciary, the composition of parliament, finance and the procedure of the Conseil Constitutionnel), before they are promulgated, to the Conseil Constitutionnel[14] "which shall decide on their compatibility with the Constitution". In addition, other laws may be submitted before promulgation to the Conseil Constitutionnel by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, or sixty deputies or senators. A provision that the Conseil Constitutionnel declares unconstitutional "may neither be promulgated nor

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7 Article III of the US Constitution has been interpreted as excluding the courts from deciding abstract or hypothetical questions: Tribe *American Constitutional Law* 2 ed (The Foundation Press, Inc., 1988) at 73.

8 Dicey *An Introduction to the Study of the Law of the Constitution* 10 ed (MacMillan, 1959) at 69-70:

> "Parliament can legislate on any topic whatever which, in the judgment of Parliament, is a fit subject for legislation. There is no power which under the English Constitution, can come into rivalry with the legislative sovereignty of Parliament."

A Bill is finally passed once the Royal Assent has been given. The sovereign right of veto has not been exercised since the reign of Queen Anne: Bradley and Ewing *Constitutional and Administrative Law* (Longman, 1993) at 201.

The new Human Rights Act, 1988 creates a non-judicial vetting procedure for determining compliance with the European Convention on Human Rights and Fundamental Freedoms.

9 In *Osborne v The Commonwealth and Another* (1911) 12 CLR 321 at 355, the High Court of Australia held that it "can have no cognizance of proposed laws" (concurring judgment of O'Connor J), while in *In Re the Judiciary and In Re the Navigation Act* (1921) 29 CLR 257, the Court refused to render an advisory opinion on the ground that it is a non-judicial function. See generally Lane *Lane's Commentary on the Australian Constitution* (The Law Book Co Ltd, 1986).

10 See generally Joseph *Constitutional and Administrative Law in New Zealand* (The Law Book Co Ltd, 1993).

11 Section 93(1)[2] and [2a] of the German Basic Law. See Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 2ed (Duke University Press, 1997) at 13-14, and Currie *The Constitution of the Federal Republic of Germany* (The University of Chicago Press, 1994) at 168 and especially 337.

12 Constitution of Ireland, 1937, article 26.

13 Kelly *The Irish Constitution* 3ed (Butterworths, 1994) at 216.

14 This institution, entrusted with constitutional interpretation, is not strictly a court of law, but operates like a Constitutional Court: Bell *French Constitutional Law* (Oxford University Press, 1992) at 41.

applied". The French pre-promulgation procedure has a different focus and effect to that of South Africa, since no French law may after promulgation be challenged before the Conseil Constitutionnel for its constitutionality, although certain challenges may be brought before the Conseil d'Etat.[15]

[8] In Canada, the Supreme Court Act imposes an obligation on the Supreme Court to give advisory opinions on the constitutionality of a federal law or proposed federal law.[16] According to Hogg —

> "Sometimes questions of law are referred in advance of the drafting of the legislation; sometimes draft legislation is referred before it is enacted; sometimes a statute is referred shortly after its enactment; often a statute is referred after several private proceedings challenging its constitutionality promise a prolonged period of uncertainty as the litigation slowly works its way up the provincial or federal court system. The reference procedure enables an early resolution of the constitutional doubt."[17]

[9] In India, similarly to South Africa, the President may in respect of Bills withhold assent, and return them to Parliament for reconsideration in whole or part, together with recommendations. If the Bill is passed again with or without amendments, and presented to the President, the President must assent to it. However, the Indian Constitution empowers the President to consult the Supreme Court for its "opinion" about a question of law or fact "of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it".[18] In *In Re The Kerala Education Bill, 1957*,[19] Das CJ stated that:

> "It is for the President to determine what questions should be referred and if he does not entertain any serious doubt on the other provisions it is not for any party to say that doubts arise also out of them and we cannot go beyond the reference and discuss those problems."

[10] The procedure the President must follow when referring a Bill to this Court is set out in section 79.[20] In terms of section 79(1) the President must either assent to and sign a Bill passed by Parliament, or, if he has reservations about its constitutionality, refer it

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15 Id.

16 Hogg *Constitutional Law of Canada* 3ed (Carswell, 1992) at 216.

17 Id at 219.

18 Article 143 of the Constitution of India, 1950.

19 (1959) SCR 995 at 1018.

20 Sections 121 and 122 provide in parallel for similar referrals and challenges by respectively provincial Premiers and members of provincial legislatures.

back to the National Assembly for reconsideration. Section 79(4) then provides:

> "If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either —
> (a) assent to and sign the Bill; or
> (b) refer it to the Constitutional Court for a decision on its constitutionality."[21]

[11] Three related questions require clarification in the light of the President's invocation of this procedure:
(a) Is the Court required to consider only the reservations the President has expressed, or can and should it direct its attention more widely?
(b) Should the Court in determining the Bill's "constitutionality" examine its every provision so as to certify conclusively that in every part it accords with the Constitution?
(c) Does the Court's finding regarding the Bill's constitutionality or otherwise preclude or restrict later constitutional adjudication regarding its provisions once enacted?

[12] Section 79(5) requires a decision from this Court as to whether "the Bill is constitutional". In terms of section 167(4)(b), only the Constitutional Court may decide on the constitutionality of any parliamentary Bill, but may do so only in the circumstances anticipated in section 79.[22] The general powers of the courts in dealing with constitutional matters are set out in section 172.[23] That section requires that a Court

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[21] Section 79 reads:

> "79. **Assent to Bills.**—(1) The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.
> (2) The joint rules and orders must provide for the procedure for the reconsideration of a Bill by the National Assembly and the participation of the National Council of Provinces in the process.
> (3) The National Council of Provinces must participate in the reconsideration of a Bill that the President has referred back to the National Assembly if—
> (a) the President's reservations about the constitutionality of the Bill relate to a procedural matter that involves the Council; or
> (b) section 74 (1), (2) or (3) (b) or 76 was applicable in the passing of the Bill.
> (4) If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either—
> (a) assent to and sign the Bill; or
> (b) refer it to the Constitutional Court for a decision on its constitutionality.
> (5) If the Constitutional Court decides that the Bill is constitutional, the President must assent to and sign it."

[22] Section 167(4)(b) refers also to the comparable power under section 121 in regard to provincial Bills.

[23] Section 172(1) provides:
"When deciding a constitutional matter within its power, a court —
(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to

when deciding a constitutional matter within its power "must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency". Since the Bill has not yet been enacted, it is clearly not a "law" as envisaged by section 172(1). Moreover, since the Bill as yet lacks legal force, the remedy section 172 envisages — a declaration of invalidity — is plainly inappropriate. It follows that the provisions of section 172 are not directly helpful in guiding the Court as to its role in the section 79 referral procedure.

[13] The terms of section 79 contrast with those of section 80, which empowers members of the National Assembly to seek an order that "all or part" of an Act of Parliament is unconstitutional. The contrasting wording of section 79 may seem to suggest that this Court is obliged to audit the whole of a Bill so as to determine its constitutionality comprehensively and conclusively. But this impression is countered by the fact that section 79 clearly envisages that the President's "reservations" must be specified when he refers a Bill back to Parliament. Section 79(3)(a) requires that the National Council of Provinces participate in the reconsideration of the Bill if the President's reservations are of a specific kind — namely if they relate to "a procedural matter that involves the Council"; while section 79(4) requires the President to assent to and sign the Bill if after reconsideration it "fully accommodates" his reservations. Both provisions entail that the President must itemise his reservations in relation to a Bill.

[14] It is moreover clear that the President is empowered to refer a matter to this Court in terms of section 79 only if his reservations concerning the constitutionality of the Bill are not fully accommodated by Parliament. If the President has no reservations concerning the constitutionality of the Bill, or if his reservations have been fully accommodated by Parliament, the referral would be incompetent. In the circumstances, the presidential power is limited under section 79(4)(b) to the power to refer a Bill to the Constitutional Court "for a decision on its constitutionality" with respect to his reservations. Section 79(5) must thus be read as subject to a comparable limitation, empowering the Court to make a decision regarding the Bill's constitutionality only in relation to the President's reservations.

[15] This makes it clear, in answer to the first question posed in para 11 above, that the Court considers only the President's reservations.[24] Whether it may ever be appropriate for the Court upon a presidential referral to consider other provisions which are

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the extent of its inconsistency; and

(b) may make any order that is just and equitable, including —

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[24] See *In re the Kerala Education Bill, 1957*, note 19 above.

manifestly unconstitutional, but which are not included in the President's reservations, need not be decided now.

[16] By corollary (as Mr Wallis, who appeared with Mr Govindsamy for the Minister, submitted) section 79 does not entail a "mini-certification" process. The specificity required of the President in spelling out his reservations plainly negatives the notion that this Court's function is to determine, once and for all, whether a Bill accords in its entirety with the Constitution. What section 79 entails is that in deciding on the constitutionality of the Bill this Court must in the first instance consider the reservations the President specified when he invoked the section 79 procedure. This contrasts with the function the interim Constitution[25] required this Court to fulfil at the time of the adoption of the 1996 Constitution. There its task was to render a "final and binding" decision on whether "all" the provisions of the 1996 Constitution conformed with the Constitutional Principles enumerated in the interim Constitution.[26] The answer to the second question posed in para 11 above is therefore No.

[17] However, Mr Wallis also submitted that the President could invoke section 79 only where his reservations about a Bill went to its constitutionality "as a whole". Mr Wallis accordingly contended that this Court, in deciding on a Bill's constitutionality, should confine itself to questions which would result, were the Bill to be enacted, in the whole of the legislation being struck down as unconstitutional. This seems to me for two reasons to be mistaken. First, if correct, it places a fetter on the President's powers of referral under section 79 which the provision in my view does not entail. The condition for the invocation of section 79 is that the President must have "reservations about the constitutionality" of a Bill. The provision does not state that the reservations must relate to the Bill's constitutionality "as a whole", and to read it as if it did would in my view unduly attenuate the duty resting upon the President in exercising power under the Constitution to scrutinise the constitutionality of legislation placed before him for assent and signature. Section 79 seems to me clearly to empower the President to refer a Bill even if his reservations relate to only a single provision in it. If this Court were to hold that any portion of the Bill relating to the President's reservations is unconstitutional, it must follow that the whole Bill cannot be said to be "constitutional" under section 79(5).

[18] Second and equally important, the argument entails that this Court would be obliged to declare a Bill "constitutional" in terms of section 79(5) even if it concluded that material provisions in it were unconstitutional, provided only that these did not vitiate the Bill as a whole. That cannot be correct. What the President refers to this Court under

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[25] Constitution of the Republic of South Africa Act 200 of 1993 ("the interim Constitution").

[26] Section 71(2) and (3); *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at paras 17-18.

section 79 is legislation in nascent form. Given that the powers accorded by section 172(1) are inapplicable, in effect this Court's decision on the Bill's constitutionality constitutes a finding on the President's reservations. That decision, without being able to be or purporting to be comprehensive, must clearly encompass any provisions the Court scrutinises in fulfilment of its remit and finds unconstitutional. Section 79(5) obliges the President to sign the Bill only if this Court decides that the Bill "is constitutional". If it withholds such a finding — whether because the legislation is unconstitutional as whole, or only in part — the President may not sign the Bill.

[19] There is however more to section 79 than only the President's reservations. The provision envisages a series of steps, initiated by the President, in which Parliament is itself an active participant. The President can refer a Bill to this Court only after Parliament has unavailingly reconsidered it in the light of his reservations. The attitude of the National Assembly (or, where appropriate, Parliament) to the Bill's constitutionality is therefore also a material factor in this Court's determination, and it is for this reason that this Court's rules permit all political parties represented in Parliament as of right to make written submissions relevant to the determination of the Bill's constitutionality. It follows that in deciding on the Bill's constitutionality the Court must consider the reservations of the President as well as any submissions relevant to them by any party represented in Parliament.

[20] The referral procedure in my view requires this Court to give a decision in terms of section 79(5) relating to the President's reservations, and the submissions regarding those reservations made by parties represented in the National Assembly, and thereby to decide on a Bill's constitutionality. However, regarding the third question posed in paragraph 11 above, even if this Court does decide that the Bill is constitutional, supervening constitutional challenges after it has been enacted are not excluded, save to the extent that this Court has in deciding the questions the President placed before it in the section 79 proceedings already determined them. In this regard, the well-established principle that a Court of final appeal will not depart from its previous decisions unless they are shown to have been clearly wrong has obvious relevance.[27]

The President's Referral

[21] The President stated the basis of his referral thus:

> "The long title of the Bill summarises the objectives of the Bill as follows:
>
> > 'To maintain economic unity and essential national standards in the liquor trade and industry; to regulate the manufacture, distribution and sale of liquor on a uniform basis; to facilitate the entry and empowerment of new entrants into the liquor trade;

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[27] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of The Republic of South Africa, 1996* 1997(2) SA 97 (CC); 1997(1) BCLR 1 (CC) at para 8: "The sound jurisprudential basis for the policy that a Court should adhere to its previous decisions unless they are shown to be clearly wrong is no less valid here than is generally the case. . ."

and to address and reduce the economic and social costs of excessive alcohol consumption; and to provide for matters connected therewith.'

I have reservations about the Constitutionality of the Bill to the extent that the Bill deals with the registration for the manufacture, wholesale distribution and retail sale of liquor. The relevant provisions which make it clear that the Bill intends to establish a framework for the registration of the manufacture, wholesale distribution and retail sale of liquor are *inter alia* clauses 26; 27(a), (b), (c) and (d); 29; 30; 32; 33; 34 and 35. There are other provisions which relate generally to the process of registration or to the sale of liquor. To the extent that they apply to the registration for the manufacture, wholesale distribution and retail sale of liquor they are similarly subject to my reservation as set out below.

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Part A of Schedule 5 of the Constitution, 1996 lists the functional areas of exclusive provincial legislative competence. The fifth item thereof is 'liquor licences'. The implication of the inclusion of an item, or more properly, a functional area in Schedule 5 is that Parliament may, in terms of section 44(2) of the Constitution, 1996 only 'intervene by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary -

(a) ...
(b) to maintain economic unity;
(c) to maintain essential national standards;
(d) to establish minimum standards required for the rendering of services; or
(e) to prevent unreasonable action taken by a province which is prejudicial to the interest of another province or to the country as a whole.'

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If the legislation is not so necessary then Parliament may not enact legislation dealing with matters falling within a functional area listed in Schedule 5. The question as to whether this legislation is "**necessary**" within the meaning of this section and for the purpose set out in section 44(2)(b) - (e) is a question I am unable to answer with certainty even though I am satisfied that the purposes the legislation seeks to achieve are commendable. Whether the particular requirements set out in section 44(2) have been met has proved difficult to determine relying as they do on an assessment of legal, factual and policy considerations and in respect of which there are no constitutional or jurisprudential guidelines.

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The implementation of this legislation without a clear indication of its constitutionality may be chaotic and could lead, not only to a legislative vacuum if the framework should be set aside, but also to uncertainty in respect of any actions already taken thereunder including any registrations duly granted. I am accordingly referring this matter to the Constitutional Court for a decision on its constitutionality.

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In referring this matter to the Constitutional Court I am acting in my capacity as Head of State in terms of section 84(2)(c). I am accordingly taking the liberty of serving copies of this notice of referral on the Government, who will be represented by the Minister of Trade and Industry, on the Speaker of the National Assembly, on the Chairperson of the National Council of Provinces and on the Government of the Province of the Western Cape on account of its intention, duly communicated to me, to make representations contesting the constitutionality of the Bill. I am however placing the matter before you to consider how these and other interested parties may join these proceedings when the court duly considers the constitutionality of the Bill."

The Procedural Challenge

[22] The Western Cape government challenges the manner in which Parliament adopted the Liquor Bill. As can be seen from the terms of the President's referral, the issue he had in mind was whether the Bill was constitutionally justified under section 44(2). Questions regarding the Bill's constitutionality were first raised, by the Western Cape government, in early 1998. It is clear that from the outset the constitutional issue present in the minds of those dealing with the Bill was not whether it set up a system of liquor licences — for they seem to have accepted that it did — but whether there was justification under the Constitution's "override" provisions for Parliament to intervene in this area of exclusive provincial competence. The measure was introduced into Parliament and dealt with as a "Bill affecting provinces" in terms of section 76 read with section 44(1)(b)(ii) and section 44(2) of the Constitution. Submissions on the question whether the invocation of the "override" was justified were advanced on behalf of the Western Cape government during the legislative process. The President referred the Bill back to Parliament on 22 January 1999 on the basis not that there was any specific provision raising constitutional questions, but that the regulatory framework the Bill sought to introduce "deals with liquor licensing in the provinces which the Bill is entitled to do only if it is necessary" in terms of section 44(2). When the National Assembly reconsidered the Bill, the Minister of Trade and Industry defended the measure on the basis of the "national legislature's legitimate right to intervene in order to preserve economic unity and to establish national standards". The President subsequently referred it to this Court on the identical basis. Indeed, in his notice in response to the directions of the President of this Court intimating that he wished to submit evidence, the Minister himself alludes only to the "override" issue. The founding affidavit of the Western Cape government accordingly alludes solely to the competency question.

[23] Only in the Minister's answering affidavit was the contention advanced for the first time that it was incorrect to characterise the Liquor Bill as a liquor licensing measure, that the matters it regulated fell in the first place within the national legislative competence, and that to the extent that it dealt with liquor licences this was incidental to its pursuit of national competencies. It was in response to this new contention that the Western Cape government in its written argument raised the manner in which the Bill passed through Parliament, averring that if the Bill was not legislation with regard to a functional area listed in Part A of schedule 5 of the Constitution, it was invalid since it was enacted in accordance with the procedure prescribed by section 76(1). Although the procedural issue was not encompassed by the President's reservations, we are prepared to assume that the issue is relevant to those reservations.

[24] Chapter 4 of the Constitution, which establishes and regulates Parliament, specifies how statutes must be enacted by Parliament. The relevant provisions comprise

the enactment of all Bills,[28] Bills amending the Constitution,[29] ordinary Bills not affecting provinces,[30] ordinary Bills affecting provinces[31] and money Bills.[32] In terms of section 76(4)(a), a Bill must be dealt with in accordance with the procedure in sub-section (1) amongst others if it provides for legislation "envisaged in section 44(2)".

[25] There are three principal differences between the procedure stipulated in section 75 for ordinary Bills not affecting provinces and that in section 76. First, the latter gives more weight to the position of the National Council of Provinces. This occurs chiefly through the invocation of the Mediation Committee.[33] If one House rejects a Bill passed by the other, or if one House refuses to accept a Bill as amended by the other, the legislation must be referred to the Mediation Committee, which consists of nine members of the National Assembly and one delegate from each provincial delegation in the NCOP. Second, if the NCOP raises objections to a version of the Bill approved by the Mediation Committee in circumstances where the Bill was introduced in the National Assembly, the Bill lapses unless the National Assembly passes it again with a two-thirds majority. Third, when the NCOP votes on a question under section 75, the provisions of section 65 — in terms of which each province has a single vote in the NCOP "cast on behalf of the province by the head of its delegation",[34] and in terms of which questions before the NCOP are "agreed when at least five provinces vote in favour of the question"[35] — do not apply. Instead, in terms of section 75(2), each delegate in a provincial delegation has one vote and the question is decided by a majority of the votes cast (the presiding delegate having a casting vote), subject to a quorum of one third of the delegates.

[26] It would be formalistic in the extreme to hold a Bill invalid on the ground that those steering it through Parliament erred in good faith in assuming that it was required to be dealt with under the section 76 procedure, when the only consequence of their error was to give the NCOP more weight, and to make passage of the Bill by the National Assembly in the event of inter-cameral disputes more difficult. It is hard to see how a challenge based on the first two differences between the relevant parliamentary procedures can invalidate the enactment of a statute. The third is however of import,

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28 Section 73.

29 Section 74.

30 Section 75.

31 Section 76.

32 Section 77.

33 Section 78.

34 Section 65(1)(a).

35 Section 65(1)(b).

since whether a provincial delegation votes corporately through its head of delegation, as prescribed by section 65, or individually by each member casting a vote, as prescribed by section 75(2), may in defined circumstances be determinative as to whether the NCOP passes a Bill.

[27] However, it is in my view unnecessary to decide this question, since the contention of Mr Trengove (who appeared with Mr Breitenbach on behalf of the Western Cape government) that if the Bill was not legislation of the kind envisaged in section 44(2) then it was invalid since it should have been enacted by the section 75(1) procedure, seems to me to leave out of account the provisions of section 76(3). This sub-section requires that a Bill must be dealt with under the procedure established by either section 76(1) or section 76(2) amongst others, "if it falls within a functional area listed in Schedule 4". It must be borne in mind, moreover, that section 76 is headed "Ordinary Bills affecting provinces". This is in my view a strong textual indication that section 76(3) must be understood as requiring that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 be dealt with under section 76.

[28] Whatever the proper characterisation of the Bill — a question to which I return below[36] — it can hardly be doubted that if it does not seek to trench on the provinces' exclusive legislative competence in respect of "liquor licences", thereby requiring justification under section 44(2), a large number of its provisions must be characterised as falling "within a functional area listed in Schedule 4", more particularly the concurrent national and provincial legislative competences in regard to "trade" and "industrial promotion".

[29] Once a Bill "falls within a functional area listed in Schedule 4", it must be dealt with not in terms of section 75, but by either the section 76(1) or the section 76(2) procedure (the differences between the latter two relate only to where the Bill is introduced). The procedural point argued on behalf of the Western Cape government therefore has no merit.

The Challenge to the Constitutionality of the Liquor Bill

[30] The Bill before us is the product of a process stretching back to 1994, when the development of policy in respect of the liquor industry became a subject of the regular meetings between the national Minister of Trade and Industry and the Members of the Executive Committees responsible for economic affairs, trade and industry in each of the provinces (known as "Min-MEC" meetings). In 1996, the Department of Trade and Industry, in collaboration with provincial departments charged with economic affairs,

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[36] See para 39 below.

carried out an analysis of existing liquor legislation[37] and researched the state of the liquor industry. In July 1997, the national government published a Liquor Policy Document and a draft Bill.[38] The stated objects of the draft Bill's provisions were to address the regulation of the production, distribution and sale of liquor through restructuring the liquor industry and to control the economic and social costs of excessive alcohol consumption. Submissions were called for, and over the next year more than 350 were received. Public hearings and workshops on the policy and the draft Bill were held both nationally and provincially. The Bill was introduced into Parliament on 31 August 1998 and, as set out earlier, submitted to the President for his assent and signature which resulted in the present adjudication.

[31] In his affidavit the Minister of Trade and Industry asserts that the objectives the Bill seeks to attain include —
(a) erasing the history of the use of liquor as an instrument of control over most of the population as part of the policy of apartheid;
(b) making the liquor industry more accessible to historically disadvantaged groups.
It is evident, and relevant to a proper understanding of these proceedings, that liquor licensing has a shameful history in this country's racial past. The manufacture, distribution, sale and use of liquor after the Union of South Africa came into being in 1910 was regulated through the Liquor Act, 30 of 1928 and Native (Urban Areas) Act, 21 of 1923 (for Africans). These statutes together prohibited the supply and delivery to or the possession of liquor by blacks (Africans, coloureds and Indians).[39] Blacks were

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37 Wine and Spirit Control Act, 47 of 1970; Liquor Act, 27 of 1989; Liquor Products Act, 60 of 1989.

38 *Government Gazette* 18135, GN 1025, 11 July 1997.

39 In terms of section 94 of Act 30 of 1928:
"Save as is otherwise specially provided by this Act, no person shall supply or deliver any liquor to any native, and no native shall obtain or be in possession of, any liquor: Provided that save in any area proclaimed by the Governor General as an area to which the proviso shall not apply, a native may on a written order dated and signed by his *bona fide* employer, and setting forth in legible characters such employer's full name and address, obtain the delivery of liquor for conveyance to such employer, if such employer is not a person to whom it is unlawful to supply liquor."
This was to be read with section 19(1) of the Natives (Urban Areas) Act, 21 of 1923.

Section 95 provided:
"Save as is otherwise provided by this Act-
(a) in the Provinces of the Transvaal and Orange Free State no person shall sell or supply or deliver any liquor to any Asiatic or coloured person, and no Asiatic or coloured person shall obtain or be in possession of liquor; and
(b) in the province of Natal no Asiatic shall be supplied with or obtain liquor save for consumption on premises licenced under this Act for the sale thereof, or be in possession of liquor off such premises:
Provided that save in any area proclaimed by the Governor-General as an area to which the proviso shall not apply, an Asiatic or coloured person may, on a written order dated and signed

allowed to be supplied or to be in possession of liquor only for "medical purposes";[40] for "sacramental purposes";[41] or if an exemption was granted.[42] Umqombothi or "homebrew",[43] derived from sorghum, was alone treated differently.[44] Under the authorisation of a magistrate, and in an area declared as lawful for the production, brewing, sale and consumption of umqombothi, the statute did not apply.[45] The availability of liquor, especially umqombothi for Africans, was largely determined by area of residence.[46] Thus liquor acted as a means of social control since it was an offence for a black person to be in possession of liquor outside the designated areas. What is more, it is evident from the scheme of the legislation that blacks were precluded from manufacturing liquor apart from umqombothi. The latter was to be produced in stated quantities, in certain instances only, and solely for household use. The possession of liquor by blacks contrary to these provisions was an offence.[47] The period between the

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by his *bona fide* employer and setting forth in legible characters such employers full name and address, obtain the delivery of liquor for conveyance to such employer, if such employer is not a person to whom it is unlawful to supply liquor."

40 Sections 97 and 98 of the Liquor Act 30 of 1928 required a written order of a duly qualified medical practitioner, stating that the black person specified was in a condition of dangerous illness and as a consequence needed to be administered with liquor, or was suffering from an illness that necessitated the administration of liquor as means of restoring health.

41 Section 99 of Act 30 of 1928 required certification by a magistrate that the black person was a minister of religion and *bona fide* required the liquor for sacramental purposes.

42 Section 101 of Act 30 of 1928 provided that a minister, a commissioned public officer or a magistrate could issue a black applicant with an annually renewable letter of exemption, entitling him to buy stated quantities of liquor subject to stated conditions. Magistrates were required to satisfy themselves that applicants were living in accordance with "White standards": see Horrell M (ed) *Laws Affecting Race Relations* (Pietermaritzburg 1978) at 134.

43 Referred to in the legislation first by the opprobrious term "kaffir beer", and later as "Bantu beer".

44 Section 32 of the Native (Urban Areas) Act 21 of 1923 provided:
"Save as is provided in paragraph (a) of section 134 of Act 30 of 1928, no person shall introduce into a location, Native village or Native hostel, any liquor and no person shall be in possession of any liquor in within these places, unless such liquor:-
(a) is for medical purposes, supported by written order of a duly qualified medical practitioner, specifying this purpose by the person specified;
(b) is in the opinion of the officer in charge of the location etc., for sacramental purposes;
(c) is kaffir beer."
The possession of umqombothi was made lawful under sections 33, 34 and 35 of Act 21 of 1923.

45 Sections 124 and 134 of the Liquor Act 30 of 1928.

46 Sections 125and 126 of the Liquor Act 30 of 1928.

47 In terms of Chapter XVII Part B of the Liquor Act 30 of 1928 (particularly sections 161(c)and (d); 164(b) and (c) and 166(l), (m) and (p)), read with section 25 of the Natives (Urban Areas) Act 21 of 1923.

early 1930s and late 1950s was characterized by harassment and invasion of privacy by police enforcing these provisions. It has been recorded that in 1957, no fewer than 16,8 per cent of convictions of Africans for all offences were for statutory liquor offences such as the illegal possession of liquor and unauthorised beer gatherings.[48] In 1960 the Malan Commission of Inquiry (into the General Distribution and Selling Prices of Alcoholic Liquor) stated in its report that, although they ran the risk of being arrested, Black people could obtain liquor as they wanted through illicit channels. But because the trade was illegal, they had to pay high prices, and the liquor often reached them in adulterated form. The commission concluded that "the application of the Liquor Act is a question of impossibility in our present era."[49] The commission also made recommendations for changes in the law. Various amendments were consequently passed, easing some of the restrictions.[50]

[32] It is against the background of this history of overt racism in the control of the manufacturing, distribution and sale of liquor that the Minister contends that the provisions of the Bill constitute a permissible exercise by Parliament of its legislative powers.

[33] The Bill is divided into seven chapters: Objects and Application; National and Provincial Structures and Functions; Registration; Terms and Conditions Applicable to Sale of Liquor; Law Enforcement and Judicial Proceedings; Regulations; and General Provisions. It creates a "national and uniform administrative and regulatory framework" for the liquor industry[51] through the establishment, on the one hand, of a National Liquor Authority[52], whose task is to approve "registration" for the manufacture and wholesale distribution of liquor[53], and whose decisions are subject to the National Liquor Appeal

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48 Horrell M (ed) *Laws Affecting Race Relations* (Pietermaritzburg 1978) at 136.

49 Ibid.

50 Restrictions on the purchase of liquor for off-consumption by coloured and Indian persons were removed; coloured and Indian persons were allowed to purchase liquor for on-consumption in any licensed premises which admitted them but they were to be served separately from whites; Africans were allowed to purchase liquor from holders of off-consumption licences; subject to various conditions Africans were permitted to sell liquor in African areas to any African for on- or off-consumption; Indians and coloureds were permitted to hold licences for the sale of liquor from premises in their group areas or in areas predominantly occupied by persons of their racial group: Horrell above note 48 at 138.

51 Section 2(a).

52 Section 9.

53 Section 27(a) and (b).

Tribunal,[54] and, on the other, of provincial liquor authorities,[55] which consider "registration" for retail liquor sale and liquor sales at special events,[56] and against whose decisions appeal lies to provincial panels of appeal.[57] Within its sphere of application,[58] the Bill prohibits on pain of criminal penalty[59] the manufacture, distribution or sale of liquor unless the manufacturer, distributor or seller is registered.[60] The Bill creates a panoply of inspection, entry and enforcement powers together with attendant offences and criminal penalties.[61]

[34] First, the Bill divides economic activity within the liquor industry into three categories: production (which it terms "manufacturing"), distribution, and retail sales. This division, referred to in the evidence before us as the "three-tier registration system", entails two consequences foundational to the structures the Bill seeks to erect. First, an application for registration may be made in respect of only one of the three categories. Multiple registration is explicitly excluded,[62] and, subject to transitional arrangements,[63] no person registered in one category may, except for liquor sales at special events, hold a controlling interest[64] in another person registered in a different category.[65] The Minister indicates in his affidavit that these provisions are directed at addressing the concentration of economic power in the manufacturing sector in the hands of a limited number of participants, and the inter-relationships between manufacturers (including distribution depots), wholesalers, hauliers and retailers, by limiting "the excessive vertical integration" in the industry and thus at opening opportunities for new entrants to the industry, particularly "those drawn from historically disadvantaged groups".

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54 Section 17.

55 Section 14.

56 Section 27(c) and (d).

57 Section 17(2).

58 Section 3(1).

59 Section 76(1)(b).

60 Section 26.

61 Chapter 5.

62 Section 27.

63 Section 89.

64 Sections 1(vii), 30(11) and 43.

65 Section 73(2).

[35] Second, the Bill divides responsibility for these tiers between national and provincial government by effecting a division between manufacture and distribution of liquor on the one hand and retail sale, on the other. The Bill treats manufacture and distribution of liquor as national issues, to be dealt with by the national liquor authority and appeal tribunal, whose members are appointed by the Minister. Retail sales (including sales of liquor at special events) are treated as provincial issues, and are to be dealt with by provincial liquor authorities and provincial panels of appeal. For the establishment of the latter, the Bill imposes an obligation upon the provincial legislature of each province to pass legislation.[66] The national liquor authority is charged with considering whether the statutorily prescribed requirements for registration as a wholesaler or distributor have been met, and with considering the "merits" of an application, and determining the terms and conditions applicable to the registration that conform with prescribed criteria, norms and standards pertaining, inter alia, to limiting vertical integration, encouraging diversity of ownership and facilitating the entry of new participants into the industry.[67] Provision is made for objections to applications for registration.[68] The provincial liquor authorities are obliged to consider applications for retail and special event registrations.[69] The public must be enabled to lodge objections.[70]

[36] The Western Cape government launches two main attacks on the constitutionality of the Bill. These are directed on the one hand against the exclusion of provincial governments from any role in the licensing of liquor manufacturers and distributors; and, on the other, against the extent of national intervention the Bill permits in the provinces' powers to regulate retail licensing. The Province contends that it is evident from the detail and sweep of the Bill that its main aim is comprehensively to regulate the activities of persons involved in the manufacture, wholesale distribution and retail sale of liquor, and consequently that the Bill's system of "registration" regarding all three tiers of the industry falls squarely within the exclusive functional area of "liquor licences" in Schedule 5A. The limited and strictly enumerated powers the Bill confers on provincial organs of state, which the Bill obliges the provinces to establish, do not detract from this.

[37] The province's complaint is in essence that the Bill exhaustively regulates the activities of persons involved in the manufacture, wholesale distribution and retail sale

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66 Sections 14(1) and 17(2).

67 Section 29.

68 Section 29(4).

69 Section 30.

70 Section 30(5).

of liquor; and that even in the retail sphere the structures the Bill seeks to create reduce the provinces, in an area in which they would (subject to section 44(2)) have exclusive legislative and executive competence, to the role of funders and administrators. The province asserts that the Bill thereby intrudes into its area of exclusive legislative competence.

[38] The Minister for the first time in his affidavit disputes the province's characterisation of the Bill as a liquor licensing measure. Instead, he asserts, the Bill is directed at trade, economic and competition issues on the one hand and health and social welfare issues on the other. He emphasises the national importance of having a properly structured and regulated liquor industry: "The fact that one aspect of the mechanism for implementing the Government's national policies in this regard is a system of registration of participants in the liquor industry does not", he contends, "mean that it constitutes an impermissible trespass upon the legislative powers of provincial legislatures."

[39] The terms of the President's referral, and the conflicting contentions of the Province and of the Minister, require this Court to consider the ambit of national and provincial powers conferred by the Constitution and their interrelation where, as here, the national legislature is said to encroach on an exclusive provincial competence. That requires a determination of the scope of the exclusive provincial legislative competence within the functional area of "liquor licences", which in turn requires consideration of the national and provincial context against which that exclusive competence is afforded. Whether the Bill, or parts of it, should properly be characterised as a liquor licensing measure must also be considered.

[40] The first provision of the Constitution constitutes the Republic of South Africa as "one, sovereign, democratic state".[71] The unitarian emphasis of this provision is however not absolute, since it must be read in conjunction with the further provisions of the Constitution, which show that governmental power is not located in national entities alone. That appears particularly from section 40(1), in terms of which "government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated", and from section 43, in terms of which the legislative authority is vested in Parliament for the national sphere,[72] in the provincial legislatures for the provincial sphere[73] and in municipal councils for the local sphere.[74] Section 40

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71 Section 1.

72 Section 43(a).

73 Section 43(b).

74 Section 43(c).

is part of Chapter 3. This introduced a "new philosophy"[75] to the Constitution, namely that of cooperative government and its attendant obligations. In terms of that philosophy, all spheres of government are obliged in terms of section 40(2) to observe and adhere to the principles of cooperative government set out in Chapter 3 of the Constitution.[76]

[41] Governmental power is thus at source distributed between the national, provincial and local spheres of government, each of which is subject to the Constitution, and each of which is subordinated to the constitutional obligation to respect the requirements of cooperative governance.[77] The latter include the duty, imposed equally on each sphere of government, "not [to] assume any power or function except those conferred on them

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75 Note 26 above at para 469.

76 These are set out in section 41, which reads:

"(1)All spheres of government and all organs of state within each sphere must—

(a) preserve the peace, national unity and the indivisibility of the Republic;
(b) secure the well-being of the people of the Republic;
(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
(d) be loyal to the Constitution, the Republic and its people;
(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
(f) not assume any power or function except those conferred on them in terms of the Constitution;
(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
(h) co-operate with one another in mutual trust and good faith by—
(i) fostering friendly relations;
(ii) assisting and supporting one another;
(iii) informing one another of, and consulting one another on, matters of common interest;
(iv) co-ordinating their actions and legislation with one another;
(v) adhering to agreed procedures; and
(vi) avoiding legal proceedings against one another.

(2) An Act of Parliament must—

(a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

(3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.
(4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved."

77 See the judgment of Ngcobo J in *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development of the Republic of South Africa and Another* (as yet unreported) at paras 12 and 24-30.

in terms of the Constitution."[78] The succeeding provisions of the Constitution must be read and understood in this light. These include particularly the chapters setting out the distribution of legislative power between the various spheres of government (Chapters 4 (Parliament), 6 (Provinces) and 7 (Local Government)), and Schedules 4 and 5, which itemise the functional areas respectively of concurrent national and provincial legislative competence, and of exclusive provincial competence. They include also section 43, which determines the location of the legislative authority of the Republic, and section 44(4). The former provision accords Parliament legislative authority "as set out in section 44".[79] Section 44(4) in turn provides that —

> "When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution."

[42] In terms of section 44(1)(a), the national legislative authority as vested in Parliament confers on the National Assembly the power inter alia —

> "(ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5".

Sections 44(2) and 44(3) provide:

> "(2) Parliament may intervene, by passing legislation in accordance with section 76 (1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—
>
> (a) to maintain national security;
>
> (b) to maintain economic unity;
>
> (c) to maintain essential national standards;
>
> (d) to establish minimum standards required for the rendering of services; or
>
> (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.
>
> (3) Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4."

[43] The provision vesting the provincial legislatures with legislative competence is also of significance. In terms of section 104(1), the legislative authority of a province is

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[78] Section 41(1)(f). In the first *Certification Judgment* (above note 26) this Court observed that the principles of cooperative government set out in section 41 "are largely of a general kind which are sensible and might in any event be inferred without these provisions".

[79] Section 43 reads in full:
"In the Republic, the legislative authority—
(a) of the national sphere of government is vested in Parliament, as set out in section 44;
(b) of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104; and
(c) of the local sphere of government is vested in the Municipal Councils, as set out in section 156."

vested in its provincial legislature, "and confers on the provincial legislature the power" amongst others[80] to pass legislation for its province with regard to —

"(i) any matter within a functional area listed in Schedule 4;
(ii) any matter within a functional area listed in Schedule 5."

[44] Section 104(4) provides in parallel terms to section 44(3) that provincial legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning a Schedule 4 matter is for all purposes Schedule 4 legislation. Determining the place of section 44(3) in the constitutional scheme, and in particular its relationship to the exclusive provincial legislative competences in Schedule 5, is not free from difficulty. No argument concerning it was directed to us. On one approach, section 44(3) authorises an enlarged scope of encroachment on the exclusive competences by permitting national intrusion into Schedule 5 where this is reasonably necessary for, or incidental to the effective exercise of a Schedule 4 power. On another approach, section 44(3) is not directed to the Schedule 5 competences at all, but is designed to specify the ambit of national legislation covered by section 146, which regulates conflicts between national and provincial legislation falling within a functional area listed in Schedule 4. The express allusion in section 44(3) to Schedule 4 legislation may provide support for this approach. But since (as will appear) our decision in this case does not require a determination of this issue, no more need be said about it.

[45] The provinces' concurrent and exclusive legislative powers are set out in Schedules 4 and 5:

Schedule 4
FUNCTIONAL AREAS OF CONCURRENT NATIONAL AND PROVINCIAL LEGISLATIVE COMPETENCE

PART A

Administration of indigenous forests
Agriculture
Airports other than international and national airports
Animal control and diseases
Casinos, racing, gambling and wagering, excluding lotteries and sports pools
Consumer protection
Cultural matters
Disaster management
Education at all levels, excluding tertiary education
Environment
Health services

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80 As this Court pointed out in the first *Certification Judgment* (above, note 26 at para 256), the provinces also enjoy powers in respect of the adoption of provincial constitutions making provision for provincial legislative and executive structures and procedures, and a traditional monarch; the summonsing of persons to report to or give evidence before the provincial legislature; the imposition of provincial taxes; the establishment, monitoring and promotion of the development of local authorities; and the spending power in respect of money in the provincial revenue fund.

Housing
Indigenous law and customary law, subject to Chapter 12 of the Constitution
Industrial promotion
Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence
Media services directly controlled or provided by the provincial government, subject to section 192
Nature conservation, excluding national parks, national botanical gardens and marine resources
Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence
Pollution control
Population development
Property transfer fees
Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5
Public transport
Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law
Regional planning and development
Road traffic regulation
Soil conservation
Tourism
Trade
Traditional leadership, subject to Chapter 12 of the Constitution
Urban and rural development
Vehicle licensing
Welfare services

PART B

The following local government matters to the extent set out in section 155 (6) (a) and (7):
Air pollution
Building regulations
Child care facilities
Electricity and gas reticulation
Firefighting services
Local tourism
Municipal airports
Municipal planning
Municipal health services
Municipal public transport
Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law
Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto
Stormwater management systems in built-up areas
Trading regulations
Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems

Schedule 5
FUNCTIONAL AREAS OF EXCLUSIVE PROVINCIAL LEGISLATIVE COMPETENCE

PART A

Abattoirs
Ambulance services
Archives other than national archives
Libraries other than national libraries
Liquor licences
Museums other than national museums
Provincial planning
Provincial cultural matters
Provincial recreation and amenities
Provincial sport
Provincial roads and traffic
Veterinary services, excluding regulation of the profession

PART B

The following local government matters to the extent set out for provinces in section 155 (6) (a) and (7):
Beaches and amusement facilities
Billboards and the display of advertisements in public places
Cemeteries, funeral parlours and crematoria
Cleansing
Control of public nuisances
Control of undertakings that sell liquor to the public
Facilities for the accommodation, care and burial of animals
Fencing and fences
Licensing of dogs
Licensing and control of undertakings that sell food to the public
Local amenities
Local sport facilities
Markets
Municipal abattoirs
Municipal parks and recreation
Municipal roads
Noise pollution
Pounds
Public places
Refuse removal, refuse dumps and solid waste disposal
Street trading
Street lighting
Traffic and parking

[46] By contrast with Schedule 5, the Constitution contains no express itemisation of the exclusive competences of the national legislature. These may be gleaned from individual provisions requiring or authorising "national legislation" regarding specific matters.[81] They may also be derived by converse inference from the fact that specified concurrent and exclusive legislative competences are conferred upon the provinces, read

[81] Instances include various matters relating to the judiciary and the courts (Chapter 8), state institutions supporting democracy (Chapter 9), public administration (Chapter 10), national security (which in terms of section 198(d) "is subject to the authority of Parliament and the national executive"), certain financial and revenue matters (Chapter 13), and the approval or tabling of international agreements (section 231).

together with the residual power of the national Parliament, in terms of section 44(1)(a)(ii), to pass legislation with regard to "any matter". This is subject only to the exclusive competences of Schedule 5 which are in turn subordinated to the "override" provision in section 44(2). An obvious instance of exclusive national legislative competence to which the Constitution makes no express allusion is foreign affairs.

[47] The list of exclusive competences in Schedule 5 must therefore be given meaning within the context of the constitutional scheme that accords Parliament extensive power encompassing "any matter" excluding only the provincial exclusive competences. The wide ambit of the functional competences concurrently accorded the national legislature by Schedule 4 creates the potential for overlap, not merely with the provinces' concurrent legislative powers in Schedule 4, but with their exclusive competences set out in Schedule 5. Examples of concurrent Schedule 4 competences which could overlap with Schedule 5 competences include "trade" and "liquor licences"; "environment" and "provincial planning"; "cultural matters" and "provincial cultural matters" as well as "libraries other than national libraries"; and "road traffic regulation" and "provincial roads and traffic."

[48] Whereas the Constitution makes provision for conflicts between national and provincial legislation falling within a functional area in Schedule 4,[82] and between national legislation and a provincial constitution,[83] the sole provision made for conflicts between national legislation and provincial legislation within the exclusive provincial terrain of Schedule 5 is in section 147(2), which provides that national legislation referred to in section 44(2) prevails over Schedule 5 provincial legislation. This suggests that the Constitution contemplates that Schedule 5 competences must be interpreted so as to be distinct from Schedule 4 competences, and that conflict will ordinarily arise between Schedule 5 provincial legislation and national legislation only where the national legislature is entitled to intervene under section 44(2).

[49] As pointed out in the first *Certification Judgment*, the introduction into the 1996 Constitution of a category of exclusive powers gave the provinces "more powers"[84] than they had enjoyed under the interim Constitution. This Court found that Parliament's power of intervention in the field of these exclusive powers was "defined and limited" by section 44(2): "Outside that limit the exclusive provincial power remains intact and beyond the legislative competence of Parliament."[85] This Court also held that, if regard is had to the nature of the exclusive competences in Schedule 5 and the requirements of

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82 Section 146.

83 Section 147(1).

84 Above note 26 at para 335.

85 Para 257.

section 44(2), "the occasion for intervention by Parliament is likely to be limited".[86]

[50] It follows that, in order to give effect to the constitutional scheme, which allows for exclusivity subject to the intervention justifiable under section 44(2), and possibly to incidental intrusion only under section 44(3),[87] the Schedule 4 functional competences should be interpreted as being distinct from, and as excluding, Schedule 5 competences. That the division could never have been contemplated as being absolute is a point to which I return in due course.

[51] The constitution-makers' allocation of powers to the national and provincial spheres appears to have proceeded from a functional vision of what was appropriate to each sphere, and accordingly the competences itemised in Schedules 4 and 5 are referred to as being in respect of "functional areas". The ambit of the provinces' exclusive powers must in my view be determined in the light of that vision. It is significant that section 104(1)(b) confers power on each province to pass legislation "for its province" within a "functional area". It is thus clear from the outset that the Schedule 5 competences must be interpreted as conferring power on each province to legislate in the exclusive domain only "for its province". From the provisions of section 44(2) it is evident that the national government is entrusted with overriding powers where necessary to maintain national security, economic unity and essential national standards, to establish minimum standards required for the rendering of services, and to prevent unreasonable action by provinces which is prejudicial to the interests of another province or to the country as a whole. From section 146 it is evident that national legislation within the concurrent terrain of Schedule 4 that applies uniformly to the country takes precedence over provincial legislation in the circumstances contemplated in section 44(2), as well as when it —

> (a) deals with a matter that cannot be regulated effectively by provincial legislation;
> (b) provides necessary uniformity by establishing norms and standards, frameworks or national policy;
> (c) is necessary for the protection of the common market in respect of the mobility of goods, services, capital and labour, for the promotion of economic activities across provincial boundaries, the promotion of equal opportunity or equal access to government services, or the protection of the environment.

[52] From this it is evident that where a matter requires regulation inter-provincially, as opposed to intra-provincially, the Constitution ensures that national government has been accorded the necessary power, whether exclusively or concurrently under Schedule 4, or through the powers of intervention accorded by section 44(2). The corollary is that where provinces are accorded exclusive powers these should be interpreted as applying

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86 Id.

87 See para 44 above.

primarily to matters which may appropriately be regulated intra-provincially.

[53] It is in the light of this vision of the allocation of provincial and national legislative powers that the inclusion of the functional area "liquor licences" in Schedule 5A must in my view be given meaning. That backdrop includes the express concurrency of national and provincial legislative power in respect of the functional area of "trade" and "industrial promotion" created by Schedule 4.

[54] According to the New Shorter Oxford Dictionary, "trade" in its ordinary signification means the "[b]uying and selling or exchange of commodities for profit, *spec.* between nations; commerce, trading, orig. conducted by passage or travel between trading parties".[88] Nothing in Schedule 4 suggests that the term should be restricted in any way, and the Western Cape government did not contend that Parliament's concurrent competence in regard to "trade" should be limited to cross-border or inter-provincial trade. It follows that in its ordinary signification, the concurrent national legislative power with regard to "trade" includes the power not only to legislate intra-provincially in respect of the liquor trade, but to do so at all three levels of manufacturing, distribution and sale.

[55] The concurrent legislative competence in regard to "industrial promotion" should in my view be given a similarly full meaning as conferring on the national legislature and the provinces the power to initiate, advance and encourage all branches of trade and manufacture.[89] But the exclusive provincial competence to legislate in respect of "liquor licences" must also be given meaningful content, and, as suggested earlier, the constitutional scheme requires that this be done by defining its ambit in a way that leaves it ordinarily distinct and separate from the potentially overlapping concurrent competences set out in Schedule 4.

[56] As Mr Trengove, relying on dictionary definitions and the judgment of Innes J in *Fick v Woolcott and Ohlsson's Cape Breweries Ltd*[90] correctly submitted, a liquor licence is the permission that a competent authority gives to someone to do something with regard to liquor that would otherwise be unlawful. The activity in question, as emerges from the judgment of Innes J, is usually the sale of liquor at specified premises. It also seems to me that the term "liquor licences" in its natural signification encompasses not

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88 Clarendon Press, 1993.

89 The New Shorter Oxford Dictionary includes among the meanings of "industry" : "Systematic work or labour; habitual employment in useful work. Now *esp.* work in manufacturing and production; trade and manufacture collectively"; "[a]n application of skill, cleverness, or craft" and "[a] particular form or branch of productive labour".

90 1911 AD 214 at 229-230.

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.

[57] The Western Cape government contended that liquor licences are never an end in themselves, but control and regulate the production, distribution and sale of liquor in pursuit "of yet further social, economic and financial objectives". Accordingly, the Province contended, the authors of the Constitution must have intended the term "liquor licences" in Schedule 5A to encompass all legislative means and ends appurtenant to the liquor trade at all levels of production, manufacture and sale, and that these were intended to be reserved, outside the circumstances envisaged by section 44(2), for the exclusive competence of the provinces. This submission cannot in my view be accepted. In the first place, the field of "liquor licences" is narrower than the liquor trade. The Schedule does not refer simply to "liquor" or the "liquor trade" or the "liquor industry". Instead it uses the phrase "liquor licences". There is a range of legislation in South Africa regulating the liquor trade. Production, marketing, export and import of wine and spirits is regulated in terms of two important statutes, the Wine and Spirit Control Act, 47 of 1970 and the Liquor Products Act, 60 of 1989. These are primarily concerned with aspects of the liquor trade and industry, and not with liquor licensing itself. Legislation concerning the production of liquor products, including quality control, marketing and import and export of such products would fall within the concurrent competence of trade and/or industrial promotion, rather than within the exclusive competence of liquor licences.

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

[59] For his part, Mr Wallis contended that the term "liquor licences" must be understood to apply only to the retail sale of liquor. But the basis of his submission that the history of liquor licensing legislation in South Africa shows that the area of application of liquor licences was not the whole field of production, distribution and sale of liquor, but only the narrower field of the supply of liquor to the public or consumers, cannot be sustained. This is apparent from the provisions of the earlier legislation, which plainly encompass also the production of liquor.[91] I would in any event have grave

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[91] Section 15 of the Wine and Spirit Control Act, 47 of 1970 regulates the production, sale and disposal of wine. (The Wine and Spirit Control Amendment Act, 25 of 1998, which commenced on 30 June 1999, provides for the lapse of the 1970 Act after a 'transitional period'.) Section 20 of the Liquor Act 27 of

reservations about undertaking a task of constitutional interpretation as though it depended on the prior meaning our legislation or case law attributed to any particular term.

[60] Even within the retail tier of the liquor trade, Mr Wallis sought to diminish the area the Bill occupied within the notional common terrain by contending that the province still had legislative leeway within which to exercise its exclusive competence. In so far as the Bill infringed the provinces' exclusive competence in regard to licensing of retail liquor sales, Mr Wallis contended in reliance on a number of Canadian cases that its "pith and substance" lay in its radical restructuring of the liquor industry through the creation of the three-tier system, which enabled a variety of trade and other issues falling within Parliament's exclusive or concurrent competence to be addressed. Against this background, Mr Wallis contended that the Bill's system of registration was "purely incidental" to the means the Bill chose to address other, competent, issues and that its infringement, if any, on the area of "liquor licences" was accordingly permissible under the Constitution. Mr Wallis finally contended that the Minister had in any event established that the legislation was "necessary" for a number of purposes under section 44(2).

[61] It is not necessary for the purposes of this judgment to consider the utility or applicability of the Canadian "pith and substance" cases to the development of an indigenous South African jurisprudence regarding national and provincial legislative competences. It is sufficient to say that although our Constitution creates exclusive provincial legislative competences, the separation of the functional areas in Schedules 4 and 5 can never be absolute:

> "Whenever a legislature's authority is limited some rule must be adopted to address the possibility that a [single] law may touch upon subject matter [both] within and outside legislative competence."[92]

[62] That Schedule 4 legislation may impact on a Schedule 5 functional area finds recognition on one reading of section 44(3). Whatever its true reading[93] this provision

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1989 deals with the kind of licences that may be granted for the sale of liquor. These include brewers' licences (section 20(b)(ii); sections 79-82); sorghum beer brewers' licences (section 20 (b)(vi); sections 95-97); and producers' licences (section 20(b)(ix); sections 101-104). Section 10 of the Liquor Products Act 60 of 1989 (read with section 27 (1), which grants certain powers to the Minister regarding the production of a liquor product), deals with "[a]uthorizations regarding certain alcoholic products". It provides that the Minister may grant authority, by notice in the Gazette, to a person for the production and sale of alcoholic products.

92 P Craig and M Walters "The Courts, Devolution and Judicial Review" (1999) *Public Law* 274 at 299.

93 See para 44 above.

was not designed to undermine the Schedule 5 competences. They retain their full meaning and effect, except where encroachment by national legislation would in fact be "reasonably necessary for, or incidental to" the effective exercise of a Schedule 4 power. Since however no national legislative scheme can ever be entirely water-tight in respecting the excluded provincial competences, and since the possibility of overlaps is inevitable, it will on occasion be necessary to determine the main substance of legislation, and hence to ascertain in what field of competence its substance falls; and, this having been done, what it incidentally accomplishes. This entails that a Court determining compliance by a legislative scheme with the competences enumerated in Schedules 4 and 5 must at some stage determine the character of the legislation. It seems apparent that the substance of a particular piece of legislation may not be capable of a single characterization only, and that a single statute may have more than one substantial character. Different parts of the legislation may thus require different assessment in regard to a disputed question of legislative competence.

[63] In *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995*[94], this Court had to determine whether a provincial Bill fell within the legislative competence granted the provinces in Schedule 6 of the interim Constitution. Chaskalson P rejected the argument that the "purpose" of legislation was irrelevant to the constitutionality inquiry:

> "It may be relevant to show that although the legislation purports to deal with a matter within Schedule 6 its true purpose and effect is to achieve a different goal which falls outside the functional areas listed in Schedule 6. In such a case a Court would hold that the province has exceeded its legislative competence.[95] It is necessary, therefore, to consider whether the substance of the legislation, which depends not only on its form but also on its purpose and effect, is within the legislative competence of the KwaZulu-Natal provincial legislature."[96]

[64] The question therefore is whether the substance of the Liquor Bill, which depends not only on its form but also on its purpose and effect, is within the legislative competence of Parliament. The Bill's objects are set out in section 2 thus:

> "The objects of this Act are to maintain economic unity and essential national standards in the liquor trade and industry, to encourage and support the liquor industry and to manage and reduce the socio-economic and other costs of excessive alcohol consumption by —
>
> (a) establishing a national and uniform administrative and regulatory framework within which the liquor industry can conduct its business;

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94 1996 (4) SA 653 (CC); 1996 (7) BCLR 903 (CC).

95 Referring to *Attorney-General for Alberta v Attorney-General for Canada* [1939] AC 117 (PC) and *Ladore and others v Bennett and Others* [1939] AC 468 (PC) at 482-3 ([1939] 3 All ER 98 at 105B-D).

96 At para 19.

(b) creating an environment in which —
(i) the entry of new participants into the liquor industry is facilitated;
(ii) appropriate steps are taken against those selling liquor outside the administrative and regulatory framework established in terms of this Act;
(iii) those involved in the liquor industry may attain and maintain adequate standards of service delivery;
(iv) community considerations on the registration of retail premises are taken into account; and
(v) the particular realities confronting the liquor industry can be addressed; and
(c) promoting a spirit of co-operation and shared responsibility within all spheres of government, and among other interested persons in their dealings with consumers of liquor and in their attempt to address the socio-economic costs and health and other related problems associated with excessive alcohol consumption."

[65] The Bill seeks to attain these objects, amongst others, through the establishment of a National Liquor Advisory Committee, drawn from a broad spectrum of persons in the public and private sectors, including all sectors of the liquor industry and a wide range of the functional areas of government. This Committee is to advise the Minister on various matters. These include "the facilitation of the advancement, upliftment and economic empowerment of persons or groups or categories of persons disadvantaged by unfair discrimination", "the consumption of alcohol amongst the youth"; and "the problems that excessive alcohol consumption has on public health and family and social life".[97]

[66] As described earlier, the Bill also prohibits vertical cross-holdings within the liquor industry. The specific means it employs is the establishment of a national system of registration under a National Liquor Authority. In terms of the registration system, no person may be registered in more than one of the three tiers. The attainment of this objective is, according to the Minister's affidavit, one of the prime reasons for the Bill's enactment, and the Bill's national system of registration is essential to it. The Minister underscores the necessity for these measures by alluding to the history of racism in the structure and control of the liquor trade, in regard to which the National Liquor Advisory Committee is empowered to advise him.

[67] The Bill seeks to create the "national and uniform administrative and regulatory framework", referred to in section 2(a), through uniform licensing conditions at national level for manufacturers and distributors.[98] It also seeks to attain this goal by requiring

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97 Section 8(a).

98 Section 29.

that provincial legislatures pass legislation to establish provincial liquor authorities[99] which will consider and approve applications for retail and special event licences,[100] and by prescribing the application procedure for retail registration in great detail.[101]

[68] The question is whether the substance of this legislation falls within the excluded field of "liquor licences", in which case the justifications itemised in section 44(2) will have to be shown; or whether it falls within a permitted competence of Parliament even without such justification. In answering this question, as indicated above,[102] it does not seem to me that the objective should be to subject the Bill to a uniform analysis directed at yielding a single characterization.

[69] The true substance of the Bill is in my view directed at three objectives. These are: (a) the prohibition on cross-holdings between the three tiers involved in the liquor trade, namely producers, distributors and retailers; (b) the establishment of uniform conditions, in a single system, for the national registration of liquor manufacturers and distributors; and, in a further attempt at establishing national uniformity within the liquor trade, (c) the prescription of detailed mechanisms to provincial legislatures for the establishment of retail licensing mechanisms.

[70] Regarding (a): In my view the Bill's prohibition of cross-holdings falls within the national legislature's competence to regulate trade. On any approach, the vertical and horizontal regulation of the liquor trade, and the promotion of racial equity within the trade, are legislative ends which fall within the functional competence Schedule 4 accords the national Parliament under the headings of trade and industrial promotion. I did not understand counsel for the Western Cape government to contest this. The Bill, however, attains this objective by employing a specific means, namely a system of registration which is in all material respects identical to a licensing system. In addition, the Bill accords to national government regulatory functions in regard to liquor licensing in the production and distribution sphere. That the ends the national legislature so seeks to attain fall within its power does not automatically entail that the means it has chosen, namely a system of liquor licensing, are competent. For that conclusion to be reached, the national government must show that the means is "necessary" for one of the purposes specified in section 44(2), or, on one reading of section 44(3),[103] that they are reasonably

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99 Section 14.

100 Section 16.

101 Section 30.

102 See para 62 above.

103 Para 44 above.

necessary for, or incidental to the effective exercise of a Schedule 4 power.

[71] Regarding (b) (the national system of registration for producers and wholesalers): Persuasive justification for understanding "liquor licences" more narrowly than the reading advanced by the Western Cape government appears, as indicated earlier, from the scheme of the Constitution. These suggest that the primary purport of the exclusive competences, including "liquor licences", lies in activities that take place within or can be regulated in a manner that has a direct effect upon the inhabitants of the province alone. In relation to "liquor licences", it is obvious that the retail sale of liquor will, except for a probably negligible minority of sales that are effected across provincial borders, occur solely within the province. The primary and most obvious signification of the exclusive competence therefore seems to me to lie in the licensing of retail sale of liquor.

[72] As far as the Bill's "three-tier" structure is concerned, the same considerations suggest that manufacturing or production of liquor was not intended to be the primary field of "liquor licences". The manufacturing and wholesale trades in liquor have a national and also international dimension. Manufacturers and wholesalers ordinarily trade across the nation, and some trade both nationally and internationally. Little, if any, liquor production is directed to an intra-provincial market only. On the contrary, in large measure, the production of liquor — whether brewing of beer (which on the evidence before us occurs largely in the northern provinces), or viticulture and wine production (which occurs "overwhelmingly" within the Western Cape), or the production of vodka, cane spirit and gin (which occurs "mostly" in KwaZulu-Natal) — is necessarily directed at an extra-provincial or international market.

[73] The same considerations in my view apply in general to the distribution of liquor, where the scale of distribution is likely, in almost all cases, to be inter- as opposed to intra-provincial. The regulation and control of liquor distribution, on this approach, therefore falls outside the primary signification of the exclusive competence. If production and distribution of liquor were to be regulated by each province, manufacturers and distributors would require licences from each province for the purpose of conducting national trading, and possibly a national licence for export.

[74] These considerations point to the conclusion that the provincial exclusive power in relation to "liquor licences" was in the first instance not intended to encompass manufacturing and distribution of liquor. The exclusive competences in Schedule 5 all point to intra-provincial activities and concerns only, and exclude those with a national dimension. Of the twelve exclusive competences itemised in Schedule 5A, nine contain express terms confining their ambit to provincial or non-national issues. This obviously signifies that "liquor licences", too, must mean intra-provincial liquor licences.

[75] But it is unnecessary to conclude that the competence in regard to "liquor licences"

does not extend to intra-provincial production and distribution activities since the national government has in my view in any event shown that, if the exclusive provincial legislative competence in respect of "liquor licences" extends to licensing production and distribution, its interest in maintaining economic unity authorises it to intervene in these areas under section 44(2). "Economic unity" as envisaged in section 44(2) must be understood in the context of our Constitution, which calls for a system of co-operative government, in which provinces are involved largely in the delivery of services and have concurrent legislative authority in everyday matters such as health, housing and primary and secondary education. They are entitled to an equitable share of the national revenue, but may not levy any of the primary taxes, and may not impose any tax which may "materially and unreasonably" prejudice national economic policies, economic activities across provincial boundaries, or the national mobility of goods, services, capital or labour.[104] Our constitutional structure does not contemplate that provinces will compete with each other. It is one in which there is to be a single economy and in which all levels of government are to co-operate with one another. In the context of trade, economic unity must in my view therefore mean the oneness, as opposed to the fragmentation, of the national economy with regard to the regulation of inter-provincial, as opposed to intra-provincial, trade. In that context it seems to follow that economic unity must contemplate at least the power to require a single regulatory system for the conduct of trades which are conducted at a national (as opposed to an intra-provincial) level.

[76] Given the history of the liquor trade, the need for vertical and horizontal regulation, the need for racial equity, and the need to avoid the possibility of multiple regulatory systems affecting the manufacturing and wholesale trades in different parts of the country, in my view the "economic unity" requirement of section 44(2) has been satisfied. Indeed, many of the considerations mentioned earlier in relation to the primary signification of the term "liquor licences" suggest the conclusion that manufacture and distribution of liquor require national, as opposed to provincial, regulation.

[77] The Minister's affidavit states in this regard that duplicated or varying provincial licensing requirements would be "unduly burdensome" for manufacturers and that it was therefore "economically imperative that control over the activities of manufacturers should take place at national level". He states that major industries, including the liquor industry "as a single integrated industry" should not have to "run the risk of fragmentation arising out of a variety of differing regulatory regimes being imposed upon their operations in different provinces", including what he described as the deleterious effects of "cross-border arbitrage" between competing provinces. He avers that "[w]ithout a national system of regulation and a national standard to which wholesalers will have to adhere the results would be chaotic": "The spectre arises of a single business operation having to be separately licensed on differing terms and conditions in different parts of

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104 Section 228(2)(a).

South Africa."

[78] For the reasons given earlier, the Constitution entrusts the legislative regulation of just such concerns to the national Parliament, and I am of the view that the Minister has shown, at least in regard to manufacturing and distribution of liquor, that the maintenance of economic unity necessitates for the purposes of section 44(2)(b) the national legislature's intervention in requiring a national system of registration in these two areas. The manufacturing and wholesale distribution of liquor (national and international sales) are important industries, which provide employment for a substantial number of persons. They also generate foreign income. That these trades require control is obvious, and the most effective way of doing so is through a national regulatory system. This enables the government to regulate the trade vertically and horizontally, to set common standards for all traders concerned, and enables traders to conduct their activities with a single licence, according to a single regulatory system. The Western Cape government's denial of the Minister's averment that the production and distribution tiers necessitate a national approach can thus not be sustained.

[79] The provisions of section 30, however, require different consideration. They deal with the award of retail licences, and do so by prescribing in some detail to the provincial legislatures what structures should be set up, and how those structures should go about considering and awarding liquor licences. I will accept in the Minister's favour, as contended by Mr Wallis, that the provincial liquor boards are entrusted with considerable leeway in applying what the Bill calls "community considerations"[105] on the registration of retail premises. Nevertheless, on the analysis advanced above, the licensing competence in respect of retail sales of liquor falls squarely within the exclusive provincial legislative power afforded by Schedule 5. Section 30 and its attendant apparatus can therefore be justified only if it is established that they are "necessary" under section 44(2), or, on one reading of section 44(3), that they are reasonably necessary for, or incidental to the justified substance of the Bill.

[80] While the Minister's evidence in my view shows that the national interest necessitated legislating a unified and comprehensive national system of registration for the manufacture and distribution of liquor, it failed to do so in respect of its retail sale. There, he averred only that "consistency of approach" is "important". This may be true. But importance does not amount to necessity, and the desirability from the national government's point of view of consistency in this field cannot warrant national legislative intrusion into the exclusive provincial competence, and no other sufficient grounds for such an intrusion were advanced.

[81] It was not suggested by the Minister, nor raised in argument by Mr Wallis on his

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105 Section 2(b)(iv).

behalf, that the intrusion into the exclusive provincial competence of "liquor licences" was permissible in terms of section 44(3). Nor was this issue raised by the President in his referral to this Court. In the circumstances it is not necessary to deal with this question. If section 44(3) applies to national legislative intrusions into the exclusive provincial competences,[106] I am inclined to the view that the phrase "reasonably necessary for, or incidental to" should be interpreted as meaning "reasonably necessary for and reasonably incidental to". Whatever meaning is to be assigned to this formulation, and I prefer to express no opinion on it, the scale of the intrusion the Bill envisages upon the provinces' exclusive competence in regard to retail liquor licences cannot be justified.

[82] The deponent on behalf of the Western Cape government emphasised the "positive features of provincial differentiation", and contended that the Constitution envisaged that the provincial system of government with its attendant exclusive legislative powers would lead, over time, to "differences between provinces' approaches to the matters within their legislative and executive competence". The overall constitutional scheme, as indicated earlier, in my view provides warrant for this view in the field of retail liquor sales. The national government has accordingly not shown that the retail structures sought to be erected by the Bill are reasonably necessary for or incidental to the national system created for producers (manufacturers) and distributors.

[83] The same considerations seem to me to apply to the Bill's provisions regarding micro-manufacturers[107] and manufacturers of sorghum beer,[108] who are permitted to sell the liquor produced by them "directly to the public for consumption on and off the registered premises, as prescribed".[109] In effect, these provisions confer national permission for retail sales in circumstances where it does not seem to me that the national government has made a case under section 44(2) for intervening in the provinces' exclusive legislative competence. The provisions of section 46(2) also require scrutiny. These permit a manufacturer to sell the liquor produced "directly to the public for consumption on and off the registered premises, subject to the terms and conditions that the relevant authority may determine". To the extent that this exempts wine farms, for instance, from the national prohibition on producers holding retail licences, it lies within the competence of national government. But in so far as this provision precludes provinces from also requiring provincial licences for what is in effect retail selling, it too lies beyond the competence of the national legislature.

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106 See para 44 above.

107 Section 49, read with section 27(a)(ii) and sub-sections 1(xx) and (xxviii) (permitting the registration of "micro-manufacturers" for the manufacture of liquor "that does not exceed the prescribed volume").

108 Section 50, read with subsections 1(xxxix) and 1(2)(c).

109 Section 49(1)(b) and section 50(1)(b).

[84] The provisions of section 44(2) have also not been satisfied in regard to the national regulation of micro-manufacturers of liquor, whose businesses may be essentially provincial in character.

[85] This is not to say that in the absence of provincial legislation a national scheme providing for minimum standards in the field of retail sales, to operate in default of provincial provisions in this regard, would not be competent as being "necessary" within section 44(2). It was common cause that none of the provinces had in the exercise of their exclusive competence enacted any legislation in the field of "liquor licences". If Parliament deems it necessary to repeal the existing liquor legislation, including the Liquor Act of 1989, in the exercise of its national competence, the resulting void, if not filled by the provinces, may well entitle Parliament to provide by way of legislation for such minimum standards and procedures. It is at present however unnecessary to consider that question.

[86] The Province also objected to the Bill in as much as it directs provincial legislatures to pass legislation in a specified form to create provincial liquor authorities to deal with retail liquor licensing.[110] This was not included in the President's reservations, and it is therefore not necessary to deal with it.

[87] To summarise: I conclude that if the exclusive provincial legislative competence regarding "liquor licences" in Schedule 5 applies to all liquor licences, the national government has made out a case in terms of section 44(2) justifying its intervention in creating a national system of registration for manufacturers and wholesale distributors of liquor and in prohibiting cross-holdings between the three tiers in the liquor trade. No case has however been made out in regard to retail sales of liquor, whether by retailers or by manufacturers, nor for micro-manufacturers whose operations are essentially provincial. The Minister has to this extent failed to establish that Parliament had the competence to enact the Liquor Bill and it is therefore unconstitutional.

Costs

[88] Neither of the parties represented before this Court asked for costs. No order is therefore necessary.

Conclusion and Order

[89] The decision of this Court is that to the extent indicated in this judgment the Liquor Bill [B 131B-98] is unconstitutional.

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110 Especially section 14.

Chaskalson P, Langa DP, Ackermann, Goldstone, Madala, Mokgoro, Ngcobo, O'Regan, Sachs and Yacoob JJ concur in the judgment of Cameron AJ.

For the Government of the Western Cape:	W Trengove SC, A Breitenbach Instructed by De Klerk & Van Gend.
For the Minister of Trade and Industry:	MJD Wallis SC, M Govindsamy Instructed by Cheadle, Thompson and Haysom.