

Powers over liquor matters

A case study of provincial and local powers over liquor retail

The demarcation of local government powers vis-à-vis other spheres of government is fast becoming a critical area of research and intergovernmental dialogue. It is expected that municipalities will start asserting their institutional integrity.

This article presents a case study of the demarcation of local government powers in the regulation of the liquor retail industry. The research was made possible by the Western Cape Local Government Association and the City of Cape Town.

The Constitutional Court's *Liquor Bill* judgment (*In re: Constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (CC)) provided clarity on national versus provincial powers regarding liquor retail.

However, another important issue is the division between provincial and local powers. Schedule 5A of the Constitution lists *liquor licences* as a provincial competency. Schedule 5B of the Constitution lists the *control of undertakings that sell liquor to the public* as a local government competency.

This overlap raises two issues: firstly, what is the difference between liquor licences (as a provincial competency) and the control of undertakings that sell liquor to the public (as a local government competency)?

Secondly, to what extent can provinces still exert influence over municipal lawmaking on the control of undertakings that sell liquor to the public?

key points

- Municipalities must promote social and economic development.
- Municipalities decide where liquor may be sold.

Liquor licences

The competency *liquor licences* is concerned with retail sale. According to the Constitutional Court in the above *Liquor Bill* judgment, it encompasses:

- the grant or refusal of permission to sell liquor at specified premises;
- the power to impose conditions pertinent to that permission; and
- the collection of revenue that might arise from or be attached to its grant.

It is submitted that the background to the provincial competency is the need to achieve provincial uniformity in three areas, namely:

- a fair, equitable and flourishing liquor retail market;
- health and basic safety; and
- security and reducing socio-economic costs of alcohol consumption.

A fair, equitable and flourishing liquor retail market includes matters such as protecting free market principles (e.g. retailers should have no substantial interests in wholesale distributing companies), promoting the entry of new participants, stimulating regional and provincial retail industries (e.g. the wine industry), rules for the content of advertising, employment issues in

the retail industry, promoting the business skills of retailers etc.

The issue of *health and basic safety and security* includes what types of liquor may be sold, the suitability of premises, hygiene issues, the suitability of the applicant (avoiding situations in which unsuitable candidates go ‘shopping’ at different municipalities), etc.

Reducing *socio-economic costs* of alcohol consumption has to do with matters such as addressing alcohol abuse, preventing the sale of liquor to minors, combating drunk driving, preventing the sale of liquor to drunk persons, promoting general social responsibility in the retail industry, etc.

Control of undertakings that sell liquor to the public

A more complex issue is the delimitation of the above provincial competency and the municipal competency, *control of undertakings that sell liquor to the public*. The mere fact that the Constitution includes the two competencies in two different lists indicates that, despite the obvious overlap, there is a difference between them.

Delimitation of competencies can never be absolute. Overlap is inevitable and the resulting tension must be resolved within the framework of cooperative government. However, this does not mean that delimitation of competencies is unnecessary. Cooperative government is based on respect for institutional status and on the duty to refrain from assuming powers or functions, except those conferred in terms of the Constitution.

A certain degree of clarity on functions and powers is necessary before negotiations to resolve the above tension can be useful.

Defining local government’s role

The definition of local government’s role, as enunciated in the constitutional competency

control of undertakings that sell liquor to the public, comprises two elements: firstly, *the undertakings that sell liquor to the public* and secondly, the *control* of such undertakings.

The first element reveals an overlap with the abovementioned definition of the retail sale of liquor. The undertakings include bars, taverns, bottle stores, restaurants, grocery stores, micro-breweries and wine estates.

What, then, does the Constitution want local government to ‘control’, if it is not the possession of a liquor licence? In view of the fact that the Constitution refers to “the undertakings” that sell liquor, it is suggested that the control measures must relate to *the act of selling liquor to the public*.

Municipalities must promote social and economic development and they must promote a safe and healthy environment (Ss 152(1)(c), (d) Constitution). In other words, the development of communities and the protection of the environment in which they live are primary concerns for local government.

It is submitted that the Schedule 5B competency sees to the ‘public order’ effects of liquor outlets. Local government’s perspective in regulating the liquor industry is: *the impact that the act of selling liquor has on the community around a liquor outlet*.

What are public order effects?

What are the public order effects that the Constitution wants local government to control? It is submitted that they involve *where* and *when* liquor should be sold to the public.

Municipalities decide *where* liquor may be sold mainly by zoning properties for such a purpose. Local government, as the institutional *locus* of community interests, can articulate the interests of residents and is best placed to have regard to issues such as traffic noise, other noise pollution, development of the area, social considerations pertaining to the community concerned, children’s safety, the vicinity of places of worship,

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old-age homes and child-care facilities, and particularly communities' views on these matters.

Municipalities also decide *when* liquor may be sold: they decide the opening hours of liquor outlets and decide on which days of the week liquor may be sold. In this regard, it is contended that the current practice, whereby provincial Liquor Boards prescribe in a liquor licence when the licensee can sell liquor, lies outside the provincial competency *liquor licences*.

Provincial competency to regulate municipal lawmaking

Local government does not exclusively hold the competency to legislate on the control of liquor outlets. Provincial governments can also legislate on these matters, though only “to the extent set out for provinces in sections 155(6) (a) and 155(7)” (heading Schedule 5B).

This means that the provincial government has two areas of competency with regard to the liquor industry. The first is the *full* competency on liquor licences (as defined above). The second is the *limited* competency to legislate on the control of liquor outlets by local government.

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Sources of provincial power on local government matters

If local government is to live up to the constitutional promise of ‘developmental local government,’ it must be allowed to govern at its own initiative without undue interference from central and/or provincial governments. At the same time, the imperative of coherent governance requires provincial oversight and regulation.

As stated above, there are two provisions in the Constitution that provide a basis for provincial lawmaking on local government matters. Section 155(6) (a) confers the power on provincial governments to:

by legislative or other measures... provide for the monitoring and support of local government in the province.

Section 155(7) states that provincial governments:

have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1).

It is suggested that the provincial power to *monitor* can be used as a means to obtain information from local government on the exercise of its powers to control liquor outlets and as a means to prescribe ways and procedures to provide information.

This information can then be used in the context of provincial support and provincial supervision of local government.

Although the power to *support* is substantial, it is clear that it comes into play only in the event of (threatening) decline or degeneration of local government performance. When there is no need to address or prevent such degeneration or decline, the power to support cannot be construed as providing the provincial government with any say in the content of municipal law on the control of liquor outlets.

The powers to *regulate* conferred by section 155(7) are significant, though also limited. It is suggested that the provincial power to regulate Schedule 5B matters provides the province with a say in the content of municipal law on the control of liquor outlets.

However, this provincial say is limited to setting a framework. It is not open to provincial governments to regulate the detail of municipal law on the control of liquor outlets. The framework must be understood as setting the outer boundaries, providing minimum standards while leaving intact a substantial degree of municipal discretion to make policy decisions on the issue for the locality.

In sum, sections 155(6) (a) and 155(7) give provinces the power to provide a framework

within which local government must exercise its powers to control liquor outlets. These provincial powers do not extend to the detail of municipal law on control of liquor outlets. They permit the provincial government to set standards and establish minimum requirements, coupled with monitoring procedures.

Some practical examples

What does this mean for current developments in liquor retail? Particular reference will be made to recent policy developments in the Western Cape, which provide a useful illustration of some of the issues that create debate.

Opening hours

It was suggested above that the constitutional division of powers implies that for a province to decide on the opening hours of a liquor outlet is not in keeping with the Constitution. The Constitution wants local government to control the times when a particular undertaking sells liquor. However, sections 155(6)(a) and 155(7) of the Constitution allow provincial government to determine a framework for the exercise of this power. This could include categories of outlets linked to maximum hours of trade, as well as other general principles for opening hours, monitoring procedures etc. Provincial government could set a standard for days on which liquor outlets are open (e.g. relating to Sundays and public holidays).

Examples of provincial mishaps

It seems that provincial departments are not appreciating the new constitutional dispensation and its consequences for provincial and local government powers. An analysis of the recently promulgated *Proposed Liquor Policy for the Western Cape* (hereafter the Provincial Liquor Policy) reveals a lack of understanding of local government powers.

Firstly, the policy seems to follow the right course when it says that “liquor trading days and

hours in an area of jurisdiction of a municipality will not be imposed by the provincial liquor legislation” (at p. 77). However, it states further that provincial legislation will authorise *appointed* municipalities to set liquor trading days and hours by by-law. As shown above, the Constitution has already authorised *all* municipalities to set liquor trading days and hours. The provincial government exceeds the limits of sections 155(6)(a) and 155(7) when it prevents municipalities from exercising their constitutional competency by not ‘appointing’ them.

Secondly, municipal by-laws that set the liquor trading days and hours are “subject to the approval process by the Minister responsible for economic development” (p. 77). It is not open for the provincial government to require a provincial approval of municipal by-laws. These by-laws are enacted within a

competency that the Constitution has reserved for local government, namely *control of undertakings that sell liquor to the public*. Sections 155(6)(a) and 155(7) of the Constitution do not permit this kind of ‘regulation’ of a local government competency either. Other proposals that the Provincial Liquor Policy makes, such as the Minister setting closed days and maximum hours of trade, are permissible (p. 148).

Thirdly, the Provincial Liquor Policy states that the provincial Liquor Board will have the right to impose restricted trading hours *despite* the municipal by-law “should the location or circumstances warrant this” (p. 78/150). If this became law, it would clearly go beyond the parameters of the Constitution. There would be no point in a constitutional competency to legislate on a particular topic, if that legislation can be ignored in a provincial procedure.

Another proposal that does not bode well for local government makes provision for the approval of a licence when the land use requirements are not met. The policy asserts that, under certain conditions, the outlet “will be deemed to meet the land use planning requirements set by the municipality for the

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premises” (p. 20). It is submitted that this proposal goes beyond what is constitutionally permitted. Municipal planning is a local government competency. To allow provincial government to unilaterally make the decision on whether or not municipal planning requirements are (deemed to be) met is not in keeping with the constitutional division of powers and functions.

In short

This article argues that the Constitution instructs provincial and local government to arrive at an approach where provincial government is responsible, through liquor licensing, for regulating the liquor retail market in general, for securing health and basic safety, and for reducing the socio-economic costs of alcohol use, while local government’s developmental mandate requires municipalities to regulate the ‘public

order’ effects of liquor sales (subject to provincial standards). The latter comes down to determining *when* and *where* liquor may be sold.

The division of responsibilities between provincial and national government cannot be absolute and problems arising from the inevitable overlap need to be solved within the framework of co-operative government. Examples from the *Western Cape Provincial Liquor Policy* reveal that the changes in the constitutional design of local government have not yet fully dawned on policy makers in this area. In order for the policy to meet constitutional muster, it needs revision where it encroaches on local government’s institutional integrity.

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