



CONSTITUTIONAL COURT OF SOUTH AFRICA

Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others

CCT 216/14

Date of hearing: 12 March 2015

Date of judgment: 30 June 2015

MEDIA SUMMARY

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

Today the Constitutional Court handed down judgment in confirmation proceedings concerning whether grocer's wine licences allowing wine to be sold in grocery stores constitute property under section 25 of the Constitution. The constitutional validity of certain provisions of the Eastern Cape Liquor Act relating to the abolition of these licences depended on the determination of this issue.

The Eastern Cape Liquor Board granted the applicant, Shoprite Checkers (Pty) Ltd, grocer's wine licences between 1989 and 2003, under the Liquor Act of 1989. The licensing regime changed in 2004, when the Eastern Cape Liquor Act came into force. This Act provides that, from its date of operation, grocer's wine licences in the Eastern Cape would be valid only until 2014. However, licence holders could also apply for a registration to sell all kinds of liquor on separate premises five years after the date of commencement of the Eastern Cape Liquor Act.

Shoprite challenged the constitutional validity of these provisions in the High Court. It argued that grocer's wine licences are property under the Constitution and that the provisions of the Eastern Cape Liquor Act violated its constitutional right not to be arbitrarily deprived of property. The respondents argued the opposite. The High Court found that the grocer's wine licences constituted property under the Constitution. It held

that the impugned provisions of the Act arbitrarily deprived Shoprite of this property and found these provisions to be constitutionally invalid.

The High Court decision came before this Court for confirmation, Shoprite persisted in its arguments raised before the High Court, as did the respondents.

The main judgment, written by Froneman J (Cameron J, Nkabinde J and Jappie AJ concurring), held that the grocer's wine licence constitutes property. The judgment held that our conception of property must be derived from the Constitution. It must embrace constitutional entitlements beyond the original ambit of private common law property in order to ensure that the property clause does not become an obstacle to transformation, but central to its achievement. The judgment further found that the right to sell liquor bears many of the traditional hallmarks of property. However, the deprivation of this property by the new regime was not total as Shoprite had the opportunity to convert that right to a registration under the Eastern Cape Liquor Act to sell all kinds of liquor, albeit not on the same premises as a grocery business. Finally, the main judgment held that because the change in regulatory regime brought about by the Eastern Cape Liquor Act did not extinguish any other fundamental rights of holders of grocer's wine licences or fundamental constitutional values, rationality would be sufficient reason to avoid a finding of arbitrariness. It held that it was rational to change the regulatory regime of liquor sales to provide for simplification in the licensing system and courts should not easily interfere with the choices made by legislatures. Therefore, the main judgment held that the declaration of constitutional invalidity should not be confirmed as there was no arbitrary deprivation of property.

A concurring judgment written by Moseneke DCJ (Mogoeng CJ, Khampepe J, Molemela AJ and Theron AJ concurring) supported the main judgment's conclusion that this Court should not confirm the High Court's order of constitutional invalidity because the impugned provisions of the Eastern Cape Act are not inconsistent with the Constitution. Moseneke DCJ disagreed with the main judgment's characterisation of the grocer's wine licence as "property" for the purposes of section 25 of the Constitution. He held that this characterisation was unnecessary as the same outcome may be arrived at without deciding this difficult and fluid question. However, if one must decide this question, Moseneke DCJ would part ways with the main judgment and hold that a liquor licence is not property. A licence is a bare permission to do something that would otherwise be unlawful. It is normally issued to overcome a statutory prohibition. Further, licences are subject to administrative withdrawal and change. They are never absolute, often conditional and frequently time-bound. Thus, they do not vest in their holder. Even so, their grant and termination may not always be arbitrary or unlawful because they are adequately protected by the requirements of administrative justice. The Constitution has given the provincial legislature the competence to regulate the sale of liquor. Defining a liquor licence as property may very well impede legislative regulation and make it impracticable.

In a dissenting judgment, Madlanga J (Tshiqi AJ concurring) concluded that Shoprite was arbitrarily deprived of its property. Madlanga J concurred with the main judgment's

finding that Shoprite's grocer's wine licences constitute property, but found that the main judgment gave insufficient value to the property right as a self-standing concept worthy of protection under our law. He also held that the extent of Shoprite's deprivation was total, as it is now wholly divested of the unique essence of the grocer's wine licence. The ability to apply for a broader licence does not alleviate the deprivation as this option was, regardless, always available to Shoprite. Ultimately, Madlanga J concluded that the respondents had shown virtually no evidence on record in justification of this total deprivation and that, accordingly, the deprivation was arbitrary.

The overall effect of the three judgments is that the order of constitutional invalidity of the impugned provisions was not confirmed and the respondents' appeal on certain preliminary issues was dismissed. For the sake of clarity, a majority – the main judgment and that of Madlanga J – held that grocer's wine licences are property under section 25 of the Constitution and that Shoprite was deprived of this property in terms of the provisions of the Eastern Cape Liquor Act. Moseneke DCJ agreed with the main judgment that the order of constitutional invalidity should not be confirmed, and also held that the provisions of the Eastern Cape Liquor Act are not arbitrary. Thus, on the question of arbitrariness, the majority finding was that the deprivation was not arbitrary.