

SUBMISSION BY THE LAW SOCIETY OF SOUTH AFRICA ON THE DRAFT LIQUOR AMENDMENT BILL, 2016

1. INTRODUCTION

- 1.1 The Law Society of South Africa (LSSA) represents more than 24 000 practising attorneys and almost 6 000 candidate attorneys countrywide. It is the umbrella body of the attorneys' profession in South Africa and its constituent members are the Black Lawyers Association (BLA), the National Association of Democratic Lawyers (NADEL) and the four statutory provincial law societies, namely the Cape Law Society (CLS), the KwaZulu-Natal Law Society (KSNLS), the Law Society of the Northern Provinces (LSNP) and the Law Society of the Free State (LSFS).
- 1.2 The LSSA has considered the proposed amendments contained in the Draft Liquor Amendment Bill, 2016 (the Bill) which proposes amendments to the existing Liquor Act 59 of 2003 (the Act) and hereby makes the following submissions and recommendations.

2. CONSTITUTIONALITY OF THE DRAFT LIQUOR AMENDMENT BILL, 2016

- 2.1 The Act is, according to Constitutional Court¹, only able to regulate the manufacturing and distribution of liquor in South Africa. In particular, the Constitutional Court found, in relation to the Liquor Bill [B 131B-98]:

"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."

- 2.2 On the same day that the Bill was published, the Minister of Trade and Industry published his final National Liquor Policy for public information. It is evident that much of the contents of the final National Liquor Policy has been included in the Bill and are intended to be implemented by way of the Bill amending the current legislation.
- 2.3 From the outset, it is to be noted that, contrary to the ruling of the Constitutional Court, both the final National Liquor Policy and the Bill will, in the LSSA's view, fail a constitutional test on account of the purported attempt by the Department of Trade and Industry to impose provisions which are clearly within the preserve of

¹ Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill (CCT12/99) [1999] ZACC 15

Provinces in terms of their sole and exclusive jurisdiction to determine legislation applicable to the retail sale of liquor in South Africa.

- 2.4 Accordingly, should the Bill in its current format be promulgated to introduce the content as part of the Liquor Act 59 of 2003, it is submitted that such content will be unconstitutional if any attempt is made to impose any provisions relating to the retail sale of liquor.

3. FLAWED PUBLIC CONSULTATION

- 3.1 The LSSA is of the view that insufficient time has been afforded to file proper comments. We have also been advised that many stakeholders share this view, some of whom have requested an extension of the deadline. It has also come to the attention of the LSSA that consultations for public participation have already been arranged to take place as early as from November 2016, thereby also not allowing sufficient time for comment. The proposed amendments have far reaching consequences for the liquor industry as a whole, as will be pointed out herein.
- 3.2 On 20 May 2015 the Department of Trade and Industry published the National Liquor Policy Review, a discussion document for public consultation, and invited comments. It is clear from the final National Liquor Policy that very little attention was paid to the comments of role players and/or stakeholders, comments filed by the LSSA.
- 3.3 Important issues that were raised by stakeholders and/or role players were not addressed and have now been included in the Draft Liquor Amendment Bill without addressing the problems raised in this regard.
- 3.4 Kindly compare the contents of **paragraph 1.6.6 of the National Liquor Policy Review** document to the contents of paragraphs 1.6.8 of the Final Liquor Policy and section 7 of the Draft Amendment Bill. Paragraph 1.6.6 of the Liquor Policy Review document prohibits liquor premises to be located within 500m *"from schools, places of worship, recreation facilities, rehabilitation or treatment centers, residential areas and public institutions"*. It also prohibits liquor licenses to *"be issued to petrol service stations, premises attached to petrol service stations, premises near public transport and areas not classified for entertainment or zoned by municipalities for purposes of trading in liquor"*. If a license *"is already issued it should be terminated within a period of two years"*. **Paragraph 1.6.8 of the Final Liquor Policy** reads almost identical but it now includes a provision that *"premises already licensed within the 500m radius and premises within high density locations will have to comply with the Norms and Standards issued from time to time providing for amongst others, the issue of trading hours, noise, nuisance and pollution"*. It also states that *"in this regard, licensing authorities within their discretion may impose tighter trading conditions and trading hours of the outlets which should not coincide with lessons during school hours"*. If this is compared with **Section 7 of the Draft Amendment Bill** it reads that *"the manufacturing, distribution or retail sale of liquor in either rural or urban community is prohibited on any location that is less than five hundred meters*

away from schools, place of worship, recreational facilities, rehabilitation or treatment centers, residential areas, public institutions and other like amenities” and “where such application is already registered, or in areas with the highest population density, the registrants shall comply with norms and standards as approved by the National Liquor Policy Council from time to time; comply with any registration conditions as imposed by the National Liquor Regulator”. Furthermore penalties will be added if registrants and/or license holders do not comply.

- 3.5 It serves absolutely no purpose to comment if the Department of Trade and Industry or the Cabinet does not take into consideration the comments they received. If the Department of Trade and Industry did take into consideration the comments raised, the Department would have realised the implications should the Bill become law.
- 3.6 The above is illustrated by reference to the provisions of Section 7 of the Bill:
- 3.6.1 It is proposed to insert Section 13A, which states that the National Liquor Regulator (NLR) shall ensure that no application is granted for areas not classified for purposes of liquor trading, premises attached to petrol stations or premises near public transport facilities.
- 3.6.2 This proposed amendment is only applicable to those instances where the NLR is considering Manufacturing and Distribution applications which are in line with the existing legislation.
- 3.6.3 It makes economic sense for manufacturers and distributors of liquor to be in close proximity to transport facilities. In particular, railway facilities in South Africa are utilized as public transport facilities and utilised for the transport of persons and goods. Industrial zoned areas in particular are mostly sited in proximity to such facility for the transport of manufactured goods. What rationale can exist for manufacturers or distributors to be prohibited from siting their business near such a facility?
- 3.6.4 The use of the terminology “near” is vague and will in all probability simply result in litigation – which it appears Government wants to avoid.
- 3.6.5 The reference to “classified” is a foreign term. The accepted terminology is the word “zoned”. The amendment to the Regulations already comprehensively deals with this provision and there is no need to include this in the Act.
- 3.6.6 It is then proposed to prohibit trading in liquor within a certain radius of certain amenities as detailed - but noting that the list as such does not exclude “other like amenities”.
- 3.6.7 If one excludes the Constitutional challenge which is referred to later in this commentary for the purposes of examining the effect of this proposed change, the resultant causal effect is set out.

- 3.6.8 Virtually all retail liquor stores, hotels, guest houses and restaurants in South Africa will close for the simple reason that almost all such business premises are within 500m from schools, places of worship, recreational facilities, rehabilitation or treatment centers, residential areas and public institutions and other like amenities. Sporting clubs, being recreational amenities, will not be able to be licensed. All tavern operators will be required to close their businesses.
- 3.6.9 Almost all smaller towns in South Africa will become “dry” areas regarding the sale of liquor.
- 3.6.10 The effect hereof is 100% contrary to the Liquor Policy to uplift previously disadvantaged people as they will be the people that will be affected the most severely.
- 3.6.11 There will be no liquor outlets in any shopping mall or business centres that are situated within a residential area.
- 3.6.12 There will be no place for existing license holders and/or registrants to relocate to, especially in smaller towns and in townships, which means effectively that they will shut their doors while being financially destroyed.
- 3.6.13 The tourism and hospitality industry in the country will be decimated.
- 3.6.14 What will the position be if a church or school, etc. opens its doors within the prescribed 500m from an existing registrant? Does this mean that the registrant must now relocate? Churches and private schools are mushrooming all over the country, establishing their facilities in business areas close to where people work.
- 3.6.15 What possible prejudice can a Manufacturing or Distribution facility cause to any of the amenities reflected, as such registrants are not permitted to sell liquor to persons not licensed/registered in terms of the applicable liquor laws of South Africa?
- 3.7 It is clear that it cannot be argued by the Department of Trade and Industry (or Cabinet after receipt of this commentary) that it did take into consideration the comments received in respect of the Liquor Policy document that was published.

4. COMMENTS ON CLAUSES OF DRAFT BILL

- 4.1 There are also the following issues that need to be addressed, namely:

4.1.1 Section 1:

The section is amended by the insertion of the definition of a “*place of worship*”. It is defined as “*meaning a specially designed structure or consecrated space where in individuals or a group of people come to perform acts of devotion or religious services*”.

The definition is problematic in several respects. It will become of importance because, in terms of the new section 13A hereunder, the manufacture, distribution or retail sale of liquor is prohibited within 500 meters from a place of worship. This not only applies to new applicants but also to existing licensees who will have to comply with norms and standards as approved by the National Liquor Policy Council from time to time, as well as conditions imposed by the National Liquor Regulator. As the definition stands now, it is not clear whether it applies to occasional religious services or to regular services. Where “individuals” perform “acts of devotion” in their homes or elsewhere will it make the homes or other places, places of worship. More on this hereunder, when we deal with section 13A.

4.1.2 Advertisement of Liquor:

The reference to person in Clause 2(a)(1) should be amended to read “Registered Person to retain jurisdictional competency limited to manufacturers and distributors”.

The reference to public platforms is not capable of definition as three (3) such forms are quoted, but are referenced by the potential for other “public platforms” to be considered as such platforms.

In addition, the Minister will exceed jurisdiction in trying to implement Clause 2(5).

The purported desire to restrict liquor advertising should form part of the Department of Health’s portfolio.

A person may not advertise in a false or misleading manner, in a way which misrepresents the age of persons participating in the adverts, in a manner to target or attract persons under the age of 21 years (the new age limit) or if the content appeals to persons under the age of 21.

How is a National Liquor Regulator able or qualified to ascertain whether content will be judged to appeal to a 20 year old, but not to a 21 year old?

The advertisement of liquor is further prohibited “in public platforms” in the following (but not limited to) forms:

- Billboards less than 100 meters from junctions, street corners or traffic circles;
- Distribution of pamphlets containing liquor adverts;

- Radio and television advertising except in prescribed time slots;
- Adverts must reflect the harmful effect of liquor abuse.

In addition, the Minister may after consultation prescribe more restrictions. This is unacceptable as it gives the Minister the power to restrict advertising severely or to ban it completely. These restrictions, especially the one relating to pamphlets, will seriously hamper new entrants to the liquor trade. How will the public even know that a new licensee is open for business? The result is that the established licensees will be protected from legitimate competition.

4.1.3 Sale of Liquor to Minors:

The sale of liquor to minors is substituted by “persons under the age of twenty one (21)”. The persons referred to are defined in the current legislation so as to include trusts and legal entities.

It is therefore unsuitable to refer to persons with reference to the definition including trusts and legal entities.

Accordingly the word ‘*persons*’ is required to be amended to read “natural persons”.

Furthermore, *natural persons* as referred to are required to be restricted to restricted categories reflected in the current legislation.

Any reference to prescribe or refer to persons under the age of twenty one regarding specifically the retail sale of liquor, falls to be determined by the provisions applicable in each Province.

There is in fact no need for any age referral as Manufacturers and Distributors are only able to sell to other licensed persons or entities.

The sale or supply of liquor to persons under the age of 21 is prohibited - the only exception being in respect of liquor supplied for sacramental purposes.

A person must take reasonable measures to determine the age of the person he supplies liquor to.

A person under 21 must not falsely claim to be of age, nor may any other person falsely claim that another is of age when he or she is not.

Legally, a 20 year old is no longer a minor as minority ends on attaining the age of 18. The person allowed to marry without parental consent, to vote and to enter into contracts unassisted. The age limit set is an arbitrary one and is irrational. These provisions will be very difficult to enforce. It is common cause that, despite the 18 year age limit having been in force for many years, underage drinking is rife and that the authorities are unable to enforce the law. There is no reason to suppose that enforcement agencies will have more success by arbitrarily raising the drinking age thereby expecting adult university students and working class men and women to abstain from alcohol. The prohibition will simply be ignored and the authorities will be unable to do anything about it - this in turn will lead to further disrespect for the law which is currently an "epidemic" in South Africa.

4.1.4 Broad Based Black Economic Empowerment:

As presented, it is questionable whether the proposed amendment is constitutional. If in fact it is upheld by the Constitutional Court that the Minister is authorised to prescribe the level of compliance to be met by a registrant regarding BBBEE, it will certainly be found to be unconstitutional should a registrant, having invested in the manufacturing or distribution of liquor, face the suspension or revocation of its Registration Certificate on account of the failure to meet the level of compliance. Effectively, in many instances, a shareholder selling such shares to realise a capital profit by way of normal business transaction can potentially place an entire business operation at financial risk.

The irony of the proposed amendment is that overseas based manufacturers are not required to comply, save to the extent that an empowered distributor will be required to distribute their products, whereas the local manufacturing industry will be impacted upon and negatively affected.

The Minister is given the power to prescribe "the level of Broad Based Black Economic Empowerment to be met by registrants".

This is a drastic change and if enforced strictly could put many registrants out of business. What is of extreme importance is that it was found by the Constitutional Court that liquor licences qualify as property under Section 25 of the Constitution of the Republic of South Africa, 1996, thereby rendering the proposed provisions regarding the suspension and/or revocation of a licence, should a certain level of compliance not be met, unconstitutional as it will amount to the arbitrary and unfair deprivation of property in our opinion. The same argument regarding the nature of liquor

licences, as found by the Constitutional Court, is relevant regarding the prohibition of licensed premises within 500m of certain premises, and the possible revocation thereof in light of this fact.

The Minister “shall” further prescribe “guidelines for combatting socio-economic harms caused by liquor abuse”. This gives the Minister wide ranging powers and we can only speculate what those guidelines will be. They could be anything from product warning labels to further taxation.

Failure to comply with the above will result in “the suspension or revocation of the registration certificate”.

4.1.5 Section 13A:

No application may be granted for:

- areas not classified for trading in liquor (We believe that this refers to zoning);
- premises attached to petrol service stations (If it is in a separate building on the forecourt, is it still attached?); and
- premises near public transport facilities (This is extremely vague. It may refer to train or bus stations but could equally refer to a railway line or a bus route).

“The manufacturing, distribution or retail sale of liquor in either rural or urban community (is there any other?), is prohibited on any location that is less than 500 metres away from schools, places of worship, recreational facilities (cinema’s?), rehabilitation or treatment centers, residential areas, public institutions, and other alike amenities. These places are poorly described and not defined anywhere. For example, what is considered to be a public institution? Also, what constitutes a residential area? Many shopping centres have a residential component above the shopping area. Will there be no liquor sold in those shopping centres?

Sub-section 3 quoted verbatim reflects ambiguous use of language:

“Where such application (sic) is already registered or in areas with the highest population density (sic), the registrants shall-

- a. *Comply with norms and standards as approved by the National Liquor Policy Council from time to time;*

b. *Comply with any registration conditions as imposed by the National Liquor regulator”.*

It is presumed that existing licensees will be allowed to continue trading, but that the above bodies may impose restrictions upon them to prevent harm to the listed institutions etc. If existing licensees are to be exempted from the blanket ban on this basis, then the legislator should have said so.

A transgression of the above provisions will be visited by a “penalty” (or fine?), suspension, revocation or all three.

4.1.6 Proposal to refuse applications in certain areas:

It is proposed that no application is to be granted in respect of certain areas or premises. Accordingly, no member of the public may purchase liquor from any person granted a Registration Certificate in terms of national legislation.

Accordingly any person who does not hold a Registration Certificate, either in terms of national or provisional legislation, is unable to purchase liquor from Registered Persons and therefore there can be no impact serving to exclude any of the three areas or premises referred to.

4.1.7 Section 34(a) in Liquor Act 59 of 2003:

The reference to *retailer* creates confusion as a *retailer* is referred to as a person selling liquor in terms of provincial legislation.

Accordingly, the word *retailer* should be substituted with the word *person*. Alternatively, the word *retailer* should be replaced by the words *unlicensed person*.

4.1.8 Functions of the National Liquor Regulator:

The function to monitor and oversee the liquor trade in the Republic, the activities of the Provincial Liquor Boards and Municipalities and report to the Minister annually can only be exercised with reference to limitations placed on account of the Constitutional Court ruling.

In effect, concerning Provincial Liquor Boards and the retail sale of liquor in the Republic, the National Liquor Regulator’s powers will be extremely limited.

4.1.9 Section 32A:

This section introduces an internal review process which provides for hearing of objections against the decisions of the Minister, inspectors or designated inspectors. The purpose is to avoid the high cost of litigation. Only after the above internal review process has been completed may an objector who is not satisfied approach a court. As the most important decisions will henceforth be made not by the Minister, but by the National Liquor Regulator, it is not understood why this provision does not also relate to decisions by that body.

4.1.10 Section 34:

The following additional offences are added to the list:

- Manufacture, distribute, sell, supply or possess any counterfeit goods, liquor or methylated spirits;
- Distribute liquor to an unlicensed person (This is just a correction of a previous omission in the Act);
- Engage in fronting as defined in the BBBEE Act.

4.1.11 Section 34A:

This is probably the most controversial provision of the Bill.

A manufacturer or distributor who distributes (sic) liquor to a retailer who does not have a liquor licence shall be jointly and severally liable (with whom?) for:

- a. Any harm or unlawful conduct caused wholly or partly as a consequence of the supply of liquor to the unlicensed retailer;
- b. Death of, or injury to any natural person; or
- c. Any loss of or physical damage to any property, irrespective of whether it is movable or immovable.

Sub-section (2) is ambiguous. It reads:

“The manufacturer or distributor who distributes liquor to an unlicensed (sic) contemplated in subsection 1 above, irrespective of whether the harm resulted from negligence on the part of the manufacturer or distributor, as the case may be.” (sic)

An unlicensed retailer who sells liquor to any person, will be liable for any harm whether it resulted from his negligence or not.

A manufacturer, or distributor and an unlicensed retailer are guilty of an offence where the liquor product found in the unlicensed premises “is linked to the manufacturer or distributor.”

It is understood what the legislator is attempting to do here, which relates to the intention to cut off the sale of liquor to illegal traders at source. It is doubtful, however, that the above provisions will withstand scrutiny by our courts. It appears that the legislator seeks to hold a person liable for damages despite the fact that there is no causal connection between the actions of that person and the actual harm caused.

The members of the Liquor Affairs Committee of the Law Society of South Africa, who are involved in the reality of the workings of the liquor trade, are aware that while a minority of manufacturers and distributors may sell liquor to unlicensed operators, the vast majority operate in accordance with current legislation.

The provisions envisaged are not applicable to retailers, which is potentially where the “illegal” sales take place. This aspect falls to be addressed by amendments to Provincial legislation.

4.1.12 Section 39A:

The section deals with the establishment and powers of the National Liquor Regulator. That body is inter alia given the power to “monitor and oversee the liquor trade in the Republic, the activities of the provincial liquor board and municipalities.....” The Constitution does not allow this, as each tier of Government has exclusive rights and duties relating to liquor.

5. CONCLUSION

- 5.1 It is clear from the contents of the Draft Liquor Amendment Bill that it attempts to address some of the issues as raised in the Final National Liquor Policy, but unfortunately the result of these amendments will not achieve the desired outcome.
- 5.2 The real issue is to educate not only those who consume liquor, but also the liquor traders and those responsible for the enforcement of the provisions of the Act, which includes the SA Police Services, liquor inspectors, liquor boards, etc. Those responsible for the enforcement of the liquor laws do not have the necessary knowledge of the liquor laws to enforce it properly.
- 5.3 If the National Liquor Act and the Provincial Liquor Acts are enforced properly, no person will be able to sell liquor illegally, simply because such a person will not be able to buy liquor to resell, because a manufacturer or

a distributor may only sell liquor to a retailer and a retailer may only sell liquor to somebody for consumption and not for resale. Despite the fact that the maximum penalty for this is 5 years' imprisonment or a maximum fine of R1 000 000,00 there are still people selling liquor illegally, notwithstanding national and provincial legislation being in operation since 2004.

- 5.4 It is clear that the intended amendments of the National Liquor Act will have far-reaching consequences for the whole of the liquor industry and therefore proper consultation with all major role- players and/or stakeholders must take place.
- 5.5 Provisions contained in this regard appear to attempt to encroach upon the exclusive jurisdiction of provinces to determine legislative provisions pertaining to the retail sale of liquor in the applicable province.
- 5.6 The Law Society of South Africa again repeats its offer to engage the decision makers regarding input relating to the drafting of liquor legislation applicable to South Africa with a view that such legislation is in accordance with the Constitution and provides adequate protection and control relating to the regulation of liquor as a harmful product.