



THE FREE MARKET FOUNDATION

of Southern Africa

progress through freedom

COMMENTS ON THE AMENDED LIQUOR BILL 2003

Introductory remarks:

An overview of the bill gives the impression that the Parliamentary Portfolio Committee on Trade and Industry made a serious effort to address the concerns that were raised during the public hearings on the bill. However, problem areas remain that require detailed comment. If these remaining problems are addressed the resultant liquor legislation will result in a robust liquor industry that will be conducive to job creation and the empowerment of players within the industry.

Context in which these comments are made

1. **The comments are based on evidence that:**
 - 1.1 **Economic freedom** results in the greatest and most rapid economic growth and leads to sustained improvement in all the other measures of human welfare.
 - 1.2 Governments wishing to bring about improvements in the material and non-material welfare of the people, should aim to create an enabling environment that is consistent with the principles of economic freedom.
2. **In order to create an enabling environment for the rapid economic development of the country, the government should:**
 - 2.1 Remove **unnecessary** regulatory and legislative **barriers to entry** into business.
 - 2.2 Set objective requirements in legislation and regulations.
 - 2.3 Eliminate the granting of discretionary powers to officials to ensure that all firms receive equal treatment before the law.
 - 2.4 Recognise that emerging businesses are primary **job creators** in certain sectors of the economy.
 - 2.5 Endeavour to broaden and avoid reducing consumer choice so as to increase the range of options available to the consumer.
 - 2.6 Leave the final decisions regarding the suitability of any enterprise to consumers voting with their rands.

3. Chapter 2

Section 7 - Delivery, storage and display of liquor

- (1) **A registered manufacturer or micro-manufacturer must store liquor only in a separate place or portion of a manufacturing facility designated for that purpose in the regulations or conditions of registration.**

Liquor, as with any other product, will always be stored on the premises where the manufacturing takes place, with the manufacturer taking into account the best storing conditions and which would know best where precisely the liquor should be stored. The

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legislation should therefore not set compulsory requirements regarding the place of storage.

It is proposed that this clause be scrapped altogether.

4. Chapter 2

Section 13 - Prohibition of drunk and disorderly behaviour

This issue is dealt with by common law, which affords adequate remedy and it is not necessary to have provisions in liquor policy that the courts can handle

It is proposed that this section be scrapped altogether.

5. Chapter 3

Section 16 - Qualifications for registration

Any person may be registered in terms of this Chapter, except a person who –

(b) has been convicted within the preceding three years of any contravention of any law governing the manufacture, distribution or sale of liquor

This is a disabling clause for the thousands of black informal traders who were marginalised by apartheid policies and who continue to this day to be prosecuted. It is to be borne in mind that the shebeen operators sell products that are available over the counter. Their convictions have made criminals out of decent people who earn an honest living.

It is proposed that Section 16 (b) be scrapped altogether

6. Chapter 3

Section 17(1) The Minister may register a qualified person as -

(a) a manufacturer of liquor, with or without the authority to distribute liquor;

This clause ensures that the Minister is invested with discretionary powers to prohibit a manufacturer from distributing liquor. It is well documented that when public officials enjoy discretionary powers there is a danger of corruption and abuse of that power. The public official can virtually decide who is or is not going to be authorised to distribute. At a time when the government has declared an all-out war against corruption and crime, it should be a principle ingrained in public policy that policymakers should ensure that no legislation incorporates discretionary powers. An application process for registration or licensing must spell out in explicit terms objective criteria which are universally applicable and which if complied with would ensure automatic approval of the application. This is consistent with the rule of law as opposed to the rule of man

It is also important to consider the fact that businesses enter into various arrangements and diversify for reasons that have to do with enhancing value for the stakeholders who include not only the direct investors but also those who invest their labour in the business. At the end of the day companies will compete on the basis of good value for money *vis-à-vis* consumers. Every strategic arrangement that businesses contemplate is based on satisfying consumers. If it makes sense for businesses to be involved at manufacturing, distribution or retail level that should be left entirely to the discretion of the business and they should not be at the mercy of the minister.

Assuming that one of the motivations behind this clause relates to empowerment, it should be borne in mind that whilst the majority of black businesses in the liquor trade tend to be at the retail shebeen level, they are accumulating capital. With some of the more ambitious aspiring

to operate at the distribution and manufacturing level, there should not be any encumbrances to their moving up to the higher rungs within the industry. They should find the policy environment very flexible and that it allows a variety of arrangements that they may wish to enter into.

It is therefore proposed that this subsection be completely scrapped

7. Chapter 3

Section 19 (2) - The Minister must consider, and may refuse any registration on the grounds of any of the following criteria:

(b) The character and fitness of the applicant

To be in a position to judge a person's character implies a long term and intimate relationship with the person. It requires that one be able to observe how a person deals with various challenges such as being provoked; whether a person is of a patient disposition; prone to violence, or whatever. To illustrate a point, there are many cases where it turns out that a person of respectable standing in a community turns out to be a paedophile! What are the chances of a Minister or a public official being in the position of assessing a person's character? None. Regarding fitness, what sort of fitness is being contemplated? Medical, physical or moral? Even if all aspects of fitness are considered in totality or singly it would still present many problems. The character and fitness of an applicant should not be a basis for refusing registration

It is proposed that Section 19 (2) (b) be scrapped altogether

8. Chapter 3

Section 19 (3) The Minister must consider, and may propose conditions on registration to the extent necessary to remedy any shortcoming in the application relative to the following criteria:

(a) The extent of any other financial interests that the applicant has in the liquor industry

(b) The commitments made by the applicant in terms of black economic empowerment

The liquor industry should be treated like any other industry where the extent of financial interests are of no relevance whatsoever when processing an application for registration. On the contrary, extensive financial interests on the part of the applicant should be seen as a vote of confidence in the industry, especially at a time when the government is seriously encouraging investment in the country. Commitments related to black economic empowerment should not be the basis for favouring or prejudicing applications. The liquor industry embarked on empowerment initiatives long before the policy of black economic empowerment was conceived. A deregulated and flexible policy environment will make it possible for businesses to consider the most innovative initiatives and arrangements that will be calculated to serve empowerment concerns.

It is proposed that Sections 19 (3) (a) and (b) be scrapped

9. Chapter 3

Section 30 - Review of Minister's decisions

(1) Any person may apply to the High Court for a review of a decision of the Minister in terms of this Chapter

The term “review” does not carry any legal weight in terms of challenging the Minister’s decision. Where a Minister has made a decision contrary to the applicant’s wish, the applicant should be able to contest and challenge the decision.

It is proposed that the term “review” should be substituted by “right of appeal.”

10. Chapter 4

Section 35 - Entry without warrant

(1) An inspector who does not have a warrant may –

(a) enter and inspect any premises with the consent of the owner or person apparently in control of the land or those premises;

The days of law enforcement officers entering and inspecting premises without a warrant belong to the ignominious apartheid era. Even though there is provision regarding the consent of the owner or person apparently in control of the land or premises,” this provision creates an environment in which abuse, extortion and corruption can take place. No-one and certainly no inspectors as contemplated in the bill should be allowed to enter and inspect premises without a warrant, even if there is the consent of the owner or person apparently in control.

This section should be changed to require an inspector to produce a warrant before they enter and/or inspect any premises.

11. Chapter 6

Section 46 - Composition of Council (National Liquor Policy Council)

It makes sense that representatives from all sectors of the industry should be considered when constituting the National Liquor Policy Council as they have a wealth of knowledge regarding the industry and therefore would know best what would or would not be detrimental to the industry. The government advocates very vehemently that there should be partnership between the government and the private sector, thus it makes sense that this principle should be reflected in the composition of the NLPC, giving practical effect to what the President firmly believes in.

Representatives from all sectors of the industry should be on the National Liquor Policy Council extending beyond an advisory role.

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15 July 2003