Media release

Victory for the constitutional right to be consulted on alcohol trading within communities!!!

Response to the judgement in the Johannesburg High Court on 1 November 2017 in the Gauteng Shebeen License Regulations case

The Yeoville Bellevue Ratepayers Association (YBRA) and the Southern African Alcohol Policy Alliance (SAAPA) welcome the ruling made by Justice Matojane in the Johannesburg High Court today, 1 November 2017, in favour of the YBRA, represented by Maurice Smithers and one other applicant, Melusi Emmanuel Ncala, who together challenged the validity of the Gauteng Shebeen License Regulations of 2013. The judge ruled that the Regulations are in direct conflict with the stated purpose of the Gauteng Liquor Act No 2 of 2003 and are therefore invalid. The ruling is a victory for democracy and for the right of ordinary community members to have a say in the development and implementation of alcohol policy, especially in situations where they are directly affected, ie in their own neighbourhoods.

The application was brought before the court on grounds that the rights of ordinary community members were being infringed upon by the exclusion of requirements that applicants for liquor licenses should advertise their intentions to the public. This is a requirement of all other liquor licenses and the applicants did not believe that there were compelling reasons for Shebeen License applicants to enjoy special privileges in this regard.

The application was brought in 2013 and was finalised today in favour of the applicants. The court found that the Regulations were *ultra vires*, that the MEC for Economic Development had two years in which to rectify the situation, and that the applicants were awarded costs (ie the first two respondents – the Gauteng Department of Economic Development (GDED) and the Gauteng Liquor Board (GLB) must pay all costs, including those of the applicants).

The implications of the ruling are that the Shebeen Permits under which the affected liquor outlets have been operating since 2004 remain in force until new Regulations are in place. This means that liquor outlets will not be forced to stop operating, nor will they face legal action for not having licenses. We are happy that this is the case because the intention of the action was not to disadvantage individual liquor traders, but to challenge the taking away of the rights of the broader community through the passing of irregular legislation. However, the extensive harm that is caused by the use and abuse of alcohol in our communities requires all distributors and traders to operate strictly within existing municipal, provincial and national regulations in the interests of the health and safety of the general public.

The YBRA and SAAPA would encourage all Shebeen Permit operators to prepare themselves for the likelihood that new legislation ***will*** require them to advertise their applications for a Shebeen License or that they will have to apply for one of the existing licenses allowed for in the Gauteng Liquor Act. There might also be more compliance conditions attached to a Shebeen License, eg not creating a

disturbance for people in the vicinity of their outlet. It will therefore be in their interests to operate in a way which does not infringe on the rights of the communities in which they are situated. In so doing, they will improve their chances of getting a license when new regulations have finally been passed. We would encourage them to reach out to the people around them and ask for their advice on how they can operate in a more respectful way, in a way which protects the health and safety of the community and which is in line with the principles of *ubuntu*.

We would also urge the national Department of Small Business Development and other relevant government agencies to work together to create a greater diversity of economic opportunities for entrepreneurs in disadvantaged areas of our country. Many liquor traders have gone the route of selling liquor, often illegally, because they have no alternative way of making a living. This, and the high rate of unemployment, is an indictment of our government and the corporate sector, for failing to build an inclusive economy 23 years into democracy.

It is incumbent on government, and on society as a whole, to ensure that there ***are*** alternatives, that entry into a range of businesses at the informal and formal level is made easier and more attractive, and that new entrepreneurs are giving a proper helping hand with their endeavours until they can make it on their own. It was the apartheid government that forced the black community into the illegal liquor trade by denying them access to ***all*** economic opportunities, not just the selling of alcohol. Our new democracy must not continue to make the liquor trade the default option for so many people.

The YBRA wishes to thank all those who have supported this case over the years and, in particular, Werksmans Attorneys and their advocate who worked for so long *pro bono*, for the good of the people.

SAAPA, which gave its support to the campaign early on, also welcomes this victory for the right of ordinary people to have a voice in what is decided on matters which directly affect them. SAAPA is a regional body comprising civil society structures from eight Southern African countries, all of whom are striving for a louder voice for civil society in liquor-related policy issues. In this, SAAPA does not stand alone. There are other similar alliances in other African regions, all working with the Global Alcohol Policy Alliance (GAPA), an international body with partners across the world.

SAAPA is already working with various government departments in South Africa to build a national consensus on liquor policy. We are also very willing to work with the MEC for the Gauteng Department of Economic Development, the Gauteng Liquor Board and other departments in the Gauteng Provincial Government, as well as with municipalities across the province who have a material interest in the drafting and implementation of liquor policy, given the impact of alcohol on the lives of the people in their towns and cities and the implications of liquor policy for their own bylaws, eg those affecting land use management, zoning, public disturbance and others. We urge the MEC to facilitate the development of the policy to include ordinary citizens and in line with best practise and evidence as advocated by the World Health Organisation.

We have included below a background to the case for the benefit of those members of the media who may not have been aware of the case. We invite you to contact us if you have any further questions of clarity or of fact. We can, if required, send you a copy of the judgement. We encourage the media to cover the story, given the significance of the ruling to communities across the length and breadth of Gauteng and, indeed, the country.

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Background to the case

In 2004, in line with the Gauteng Liquor Act, 2003, the Gauteng Department of Economic Development (GDED) embarked on a process of finding a way of bringing illegal liquor outlets, known as shebeens *(from the Gaelic (Irish) word for illicit whisky or illegal liquor seller),* into the liquor trading regulatory environment. The first step in this process was to invite all existing shebeen operators in Gauteng to apply, with no conditions attached, for a Shebeen Permit.

Permit holders would be protected from prosecution for trading without a liquor license for a period of 18 months. They were encouraged to apply within that period for one of the many types of liquor licenses listed in the Gauteng Liquor Act, 2013. Over 12 000 Permits were issued.

However, by the end of the 18 months, very few had applied for one of the existing liquor license options. Rather than once again expose the traders to prosecution and to give themselves more time to find a long-term solution, the GDED extended the validity of the Shebeen Permits a number of times between then and the promulgation of the Shebeen License Regulations of 2013. In terms of those Regulations, all Permit holders (and only those with Permits – ie any shebeens that had opened ***after*** the expiry of the Permit application period in 2003 would not qualify), could apply for a Shebeen License. This would then give them the same protection as the holders of any of the other license options already included in the Gauteng Liquor Act.

In 2012, the GDED and the Gauteng Liquor Board invited public comment on the draft Shebeen License Regulations of 2012. Those interested could submit written comments and/or participate in public hearings. The GDED then drafted a final version for consideration by the Gauteng Legislature. In March 2013, the Shebeen License Regulations were approved and all holders of Shebeen Permits were invited to apply, on a region by region basis, for a Shebeen License.

The YBRA had, in 2012, submitted written objections to aspects of the draft Regulations and had also attended a public hearing in Alexandra in which some of those objections were aired publicly.

The YBRA was opposed to a number of aspects of the draft Regulations, including the minimal conditions with which applicants would have to comply in order to qualify for a license. However, the key issue troubling the YBRA was the fact that the Regulations did not require applicants to advertise the fact that they had applied for a Shebeen License.

The Gauteng Liquor (as well as the national Liquor Act and other provincial liquor acts) all require that an applicant for a liquor license is obliged to advertise their intentions by publishing the details in the Government Gazette, in two newspapers distributed in the area where the liquor outlet was to be established, and by posting a notice on the premises where the liquor outlet was to be established.

The aim of these requirements is to inform interested parties, especially those living or working in the vicinity of the proposed premises, to comment on or object to an application. This is a specific condition applying to liquor and not to other products because of the potentially damaging impact that the sale and consumption of alcohol can have on the immediate environment in which the license is to be operated. This is not unique to South Africa. Similar requirements apply in other countries in the world as well.

It is important to note that these requirements are not imposed for moral reasons, but as a means of protecting the health and safety of community members and to minimise the exposure of underage youth to alcohol.

When the YBRA asked the representatives of the GDED and the Gauteng Liquor Board present at the hearing why the requirements to advertise were not in the Regulations, their reply was that 'there is no need to inform people of the existence of these outlets because they have been there since 2004'. This, in the view of the YBRA, missed the point of advertising the liquor license applications. It is not to let people know that the outlet is there. It is to an opportunity for the public to participate in the process of deciding whether a license should be awarded or not.

That right had already been taken away by the illegal operating of shebeens prior to 2004 (ie shebeen operators had never canvassed the opinion of people in the vicinity of the shebeens before they started selling) and again in 2004 when the community was not consulted on whether Shebeen Permits should be given to those illegal outlets. The new Regulations offered an opportunity for the situation to be corrected. However, without the right to comment or object, community members who might have suffered the problems caused by badly-run shebeens over the previous nine years would once again be denied a voice. This is not to imply that all shebeens were or are run badly. But it is a fact that many operate in ways that have a very negative impact on the lives of people living and working around them, which is why the community needs the right to lodge objections.

This issue of the exclusion of the need to advertise was also raised in the written submission by the YBRA.

When the Regulations were approved in 2013, there was still no requirement for Shebeen License applicants to advertise their intentions.

The YBRA engaged with the acting Chief Director responsible for liquor licensing in the GDED on whether the situation could still be corrected. However, we were not successful. The Department then published notices to the effect that Shebeen Permit holders could now begin to apply for Shebeen Licenses on a region by region basis.

The YBRA then approached legal firm Werksmans for assistance with engaging the GDED and the GLB on the matter. Our hope was that they would be willing to sit down with the YBRA and other interested community representatives to resolve the situation. We wanted to avoid going to court if at all possible.

However, the response was less then helpful. The respondents claimed that they had conducted the public consultations properly, had addressed some of the concerns raised by the public, and were satisfied with the validity and appropriateness of the Regulations. They did not, however, directly address the merits of the issues we raised. A second letter was sent and there was an equally unhelpful response. We therefore had no choice but to take the legal route.

Papers were served on the GDED, the Gauteng Liquor Board and the national Department of Trade and Industry (the dti) as the national body responsible for liquor regulation. The dti indicated that

they would not oppose legal action, but simply observe the proceedings and abide by the outcome. The GDED and the GLB said they would oppose.

Once it was obvious that the legal process was going to take a while and that there was a possibility that there would be a finding against them, the MEC for Economic Development issued a Government Gazette suspending the Shebeen License process and indicating that all Shebeen Permits would remain in force until the outcome of the case was known.

During the course of the legal process, a number of liquor trader associations and other interested parties (19 in all) applied to join the case as respondents. The YBRA did not object to this as we believed that it was the right of all to have their interests represented.

During the drawn-out legal process, public statements were made to the effect that the YBRA was trying to curtail the right of liquor operators to trade and that we were opposed to the transformation of the liquor industry which has been closed to black operators by the apartheid government (see Spotong online magazine in particular). Nothing could be further from the truth.

Our impression was that the GDED was trying to make it as easy and affordable as possible for applicants to qualify for a Shebeen License. That's why the application costs and the license costs were drastically reduced and the compliance requirements kept to a minimum, and that's why the requirement to advertise was excluded.

While the YBRA is sympathetic to the plight of communities most affected by the high unemployment rate and a history of poverty and deprivation (Yeoville Bellevue is one such community), our primary concern was that the rights of ordinary community members could not be sacrificed in order to find an easy solution to the problem of shebeens operating without licenses. In addition, we questioned whether it was fair and legally proper that shebeens should be treated differently to applicants for other licenses for whom the costs and compliance requirements were much higher.

That the court found so unambiguously in our favour is testament to the correctness of our position.