




## Chapter 5

# The Endorsement of the Majority Religion Through Legislation – A Constitutional Analysis

## *S v Lawrence, S v Negal and S v Solberg*<sup>1</sup>

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“The constraints on the exercise of freedom of religion can be imposed in subtle ways and that the choice of Christian holy days for particular legislative purposes may be perceived to elevate Christian beliefs above others; and that as a result adherents of other religions may be made to feel that the state accords less value to their beliefs than it does to Christianity. . . [T]he requirements of the Constitution require more of the legislature than that it refrain from coercion. It requires in addition that the legislature refrain from favouring one religion over others. Fairness and even-handedness in relation to diverse religions is a necessary component of freedom of religion” (*Lawrence* par 93, 128).

## **Abstract**

This chapter explores the constitutional implications of legislatively endorsing a majority religion through the lens of the landmark case *S v Lawrence, S v Negal and S v Solberg*. The case represents the first time that South Africa's Constitutional Court examined the right to freedom of religion under section 14 of the Interim Constitution, establishing a crucial precedent regarding the state's relationship with religion in a pluralistic society. The dispute centred on whether the prohibition of alcohol sales on "closed days" (Sundays, Good Friday and Christmas Day) under the Liquor Act 27 of 1989 unconstitutionally favoured Christianity over minority religions. While the majority judgment delivered by Chaskalson P concluded that there was no infringement on religious freedom, the minority judgments by O'Regan J and Sachs J articulated a more nuanced understanding of religious freedom and equality, reasoning that the legislation impermissibly endorsed Christianity and failed to maintain state neutrality. The chapter demonstrates how these minority judgments, despite not prevailing in *Lawrence*, substantially influenced subsequent jurisprudence and legislation. The minority position was later vindicated in *Gold Circle (Pty) Ltd v Premier, Province of KZN*, where similar Christian-favouring provisions prohibiting horse racing on specific religious days were declared unconstitutional. Furthermore, the legislature effectively endorsed the minority approach by repealing the contested provisions in the new Liquor Act 59 of 2003 and implementing the KwaZulu-Natal Horse Racing and Betting Control Regulations, which removed restrictions tied to Christian holidays. *Lawrence* thus serves as a landmark case not merely for being the first to address religious freedom under the Constitution but for establishing foundational principles regarding state neutrality in religious matters. The case articulated that freedom of religion requires the legislature to act even-handedly towards diverse religions, to refrain from endorsing one religion over others and to acknowledge that even subtle legislative preferences for a majority religion may constitute an infringement of constitutional rights. The impact of these principles extends beyond the immediate case, forming

the bedrock of South Africa's constitutional approach to religious freedom and equality in a diverse, post-apartheid society.

## 5.1 Introduction

This chapter considers legislation that endorsed the Christian religion and that has also been brought before the courts to determine the constitutionality of such legislation. The main focus of this chapter is the *Lawrence* case, as it was the first case to be brought before the Constitutional Court to determine the constitutionality of the legislation which portrayed a Christian character and solely favoured the Christian religion. The chapter then considers the endorsement of the principles that arose from the *Lawrence* case, as discussed below, with specific reference to the judgment in the case of *Gold Circle (Pty) Ltd v Premier, Province of KZN*,<sup>2</sup> and *Gold Circle (Pty) Ltd v Premier, Province of KZN*.<sup>3</sup>

In *Lawrence*, the three appellants were convicted in the Magistrates' Court for failure to comply with certain provisions of the Liquor Act (hereafter the Old Liquor Act)<sup>4</sup> that prohibited the sale of certain alcohol, or prohibited the sale of alcohol on certain days and times.<sup>5</sup> The appellants then unsuccessfully appealed to the previously named Cape of Good Hope Provincial Division of the Supreme Court, now the Western Cape High Court of South Africa, against its decision on the basis that the applicable provisions of the Old Liquor Act infringed the constitutionally guaranteed rights to economic activity guaranteed by section 26 of the Interim Constitution<sup>6</sup> and the right to freedom of religion, belief and opinion guaranteed by section 14 of the Interim Constitution.<sup>7</sup> The matter then came before the Constitutional Court to determine whether the applicable provisions of the Old Liquor Act infringed the appellant's rights guaranteed under sections 14 and 26 of the Interim Constitution.

For purposes of this chapter, the infringement on the right to economic activity guaranteed by section 26 of the Interim Constitution will not be discussed and, therefore, the matters involving the two appellants, namely Ms Lawrence and Mr Negal, will be excluded from this chapter, as their matters were exclusively based on the Interim Constitution's section 26

right. Rather, this chapter focuses on the right to freedom of religion guaranteed by section 14 of the Interim Constitution and, therefore, the focus will be on the matter involving Ms Solberg, although Ms Solberg had also claimed infringement of her right to economic activity guaranteed by section 26 of the Interim Constitution. The *Lawrence* case is also the first case that considered section 14 of the Interim Constitution.

Section 14 of the Interim Constitution provided as follows:

- “(1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.
- (2) Without derogating from the generality of subsection (1), religious observances may be conducted at state or state-aided institutions under rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary.
- (3) Nothing in this Chapter shall preclude legislation recognising-
  - (a) a system of personal and family law adhered to by persons professing a particular religion; and
  - (b) the validity of marriages concluded under a system of religious law subject to specified procedures.”

Ms Solberg was convicted, amongst others, for not complying with section 90(1) of the Old Liquor Act. Section 90(1) of the Old Liquor Act read as follows:

- “The holder of a grocer’s wine licence may, notwithstanding any law to the contrary—
- (a) on any day, excluding a closed day and Saturday, sell or deliver his or her liquor between 08:00 and 20:00;

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- (b) on any Saturday, excluding a closed day, sell or deliver his or her liquor between 08:00 and 17:00.”

When the *Lawrence* case was brought before the Constitutional Court, Christmas Day, Good Friday and Sunday were considered “closed days” under the Old Liquor Act.<sup>8</sup> All of the mentioned closed days relate to the Christian religion and are also considered Christian holy days. The Christian religion is the majority religion in South Africa. Section 90(1) of the Old Liquor Act applied to all persons in South Africa, whether they adhered to the precepts of Christianity or not. Furthermore, it is evident that the definition of closed days in section 90(1) of the Old Liquor Act has a Christian character.

Section 90(1) of the Old Liquor Act, therefore, prohibited the sale of alcohol on closed days and Ms Solberg sold wine at a 7-Eleven store on a Sunday.<sup>9</sup> In the Constitutional Court, Ms Solberg alleged that section 90(1) of the Old Liquor Act infringed on her right to economic activity guaranteed by section 26 of the Interim Constitution and on her right to freedom of religion guaranteed by section 14 of the Interim Constitution.<sup>10</sup> As mentioned above, this chapter focuses on the infringement of section 14 of the Interim Constitution.

Ms Solberg alleged that the right to freedom of religion of persons observing minority religions in South Africa, guaranteed by section 14 of the Interim Constitution, had been infringed by the prohibition of the sale of alcohol on closed days. This is because a belief or observance from the majority religion was forced on persons observing a minority religion. Ms Solberg specifically alleged that:

“the purpose of prohibiting wine selling by grocers on ‘closed day[s]’ was ‘to induce submission to a sectarian Christian conception of the proper observance of the Christian sabbath and Christian holidays or, perhaps, to compel the observance of the Christian sabbath and Christian holidays’. This, so the argument went, ‘coerced individuals to affirm or acquiesce in a specific practice solely for a sectarian Christian purpose’ and was

inconsistent with the freedom of religion of those persons who do not hold such beliefs and do not wish to adhere to them. In support of this contention it was argued that the history of the legislation showed that closed days were introduced into the Liquor Act for a religious purpose. Sunday, Good Friday and Christmas Day, which are the only days presently covered by the definition of 'closed day' in section 2 of the Act, are all of particular significance to the Christian religion."<sup>11</sup>

This chapter, therefore, considers whether legislation that applies to all persons of South Africa, irrespective of their personal religious beliefs has the potential to infringe the right to freedom of religion of persons who observe one of the minority religions in South Africa, rather than the Christian religion.

Chaskalson P, for the majority, held that section 90(1) of the Old Liquor Act did not infringe the right to freedom of religion, guaranteed by section 14 of the Interim Constitution, as Ms Solberg failed to prove that section 90(1) of the Old Liquor Act did indeed infringe on her right, or any other person's right, and that the prohibition against the sale of alcohol on closed days as provided by section 90(1) of the Old Liquor Act did not "serve any other religious" purpose.<sup>12</sup> Chaskalson P further indicated that Sunday is regarded as the most "convenient" day of rest and for purposes of the definition of closed days under section 90(1) of the Old Liquor Act, there is no religious significance.<sup>13</sup>

O'Regan J disagreed with the majority judgment in the *Lawrence* case and held that there had in fact been an unconstitutional infringement of Ms Solberg's section 14 right to freedom of religion.<sup>14</sup> Sachs J concurred with O'Regan J that Ms Solberg's right to freedom of religion had been infringed. However, Sachs J concluded that such infringement was not unconstitutional, concurring with the decision of Chaskalson P.<sup>15</sup> The judgment of O'Regan J and Sachs J is discussed in more detail below. Despite the judgment and the conclusion of the majority of the Constitutional Court in the *Lawrence*

case, a majority of the Constitutional Court judges concurred that section 90(1) of the Old Liquor Act in fact had a Christian character and favoured the Christian religion; thereby infringing the right to freedom of religion of persons observing minority religions in South Africa.

## **5.2 Significant aspects**

### **5.2.1 Judgment by O'Regan J**

O'Regan J held that section 90(1) of the Old Liquor Act has a Christian character. She disagreed with Chaskalson P, who held that Sunday is regarded as the most "convenient" day of rest, irrespective of the definition of closed days under section 90(1) of the Old Liquor Act. O'Regan J, provided an analysis of the definition of closed days under section 90(1) of the Old Liquor Act, holding that:

"many Christian denominations consider, as a central tenet of their religion, that Sundays should be observed as a day of rest and religious observance. It is true that both Good Friday and Christmas Day are days which have been declared as public holidays. However they are only two of twelve statutorily recognised public holidays. And they are the two days of the twelve which have a direct foundation in the practice and observance of Christianity. It seems an unavoidable conclusion, that these two days together with Sundays were selected to comprise the definition of closed day because of their religious significance for Christians. If the purpose had been to provide for days of rest, the days selected would have been all days recognised as public holidays. It is true that both Good Friday and Christmas Day are days which have been declared as public holidays. However they are only two of twelve statutorily recognised public holidays. And they are the two days of the twelve which have a direct foundation in the practice and observance of Christianity. It seems an unavoidable conclusion, that these two days together with Sundays were selected to comprise

the definition of closed day because of their religious significance for Christians.”<sup>16</sup>

O’Regan J disagreed with the judgment of the majority of the Court in the *Lawrence* case. When the legislature chose Good Friday, Christmas Day and Sunday as closed days under the Old Liquor Act, the legislature provided for legislated preference for Christianity over the minority religions in South Africa.<sup>17</sup> O’Regan further stated that the definition of closed days under section 90(1) of the Old Liquor Act resulted in legislation affirming the Christian religion over the minority religions of South Africa, specifically stating that: “[t]he inevitable effect of choosing these days was to give a legislative endorsement to Christianity, but not to other religions.”<sup>18</sup>

O’Regan J, however, agreed with Chaskalson P that the right to freedom of religion guaranteed under section 14 of the Interim Constitution can be limited if the infringement is not substantial.<sup>19</sup> She also acknowledged that all persons in the country are protected by the religious freedom guaranteed in section 14 of the Interim Constitution and that religion plays an important role amongst South Africans.<sup>20</sup> O’Regan was confident that the legislature, through section 90(1) of the Old Liquor Act, had intended to favour the Christian religion over the minority religions of South Africa and that the legislature, therefore, did not promote section 14 of the Interim Constitution as the latter section requires the legislature to act “even-handedly in relation to religion and not prefer one to the exclusion of others”.<sup>21</sup> O’Regan J stresses that the freedom of religion clause requires the legislature to understand the importance of not forcing “religious beliefs”, not “favouring” one religion over another and to act with “[f]airness and even-handedness in relation to diverse religions”.<sup>22</sup> This was clearly not the case in the matter of Ms Solberg, in the *Lawrence* case, when read with section 90(1) of the Old Liquor Act. O’Regan J ultimately held that section 90(1) of the Old Liquor Act infringed on Ms Solberg’s right to freedom of religion guaranteed under the Interim Constitution.<sup>23</sup>



O'Regan J then looked at the limitations clause, found in section 33 of the Interim Constitution, to determine whether the infringement on the right to freedom of religion was reasonable and justifiable. Section 33 of the Interim Constitution provided as follows:

- “(1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation—
  - (a) shall be permissible only to the extent that it is—
    - (i) reasonable; and
    - (ii) justifiable in an open and democratic society based on freedom and equality; and
  - (b) shall not negate the essential content of the right in question, and provided further that any limitation to—
    - (aa) a right entrenched in section 10, 11, 12, 14 (1), 21, 25 or 30 (1) (d) or (e) or (2); or
    - (bb) a right entrenched in sections 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity, shall, in addition to being reasonable as required in paragraph (a) (i), also be necessary.
- (2) Save as provided for in subsection (1) or any other provision of this Constitution, no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter.
- (3) The entrenchment of the rights in terms of this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter.

- (4) This Chapter shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7 (1).
- (5)(a) The provisions of a law in force at the commencement of this Constitution promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain of full force and effect until repealed or amended by the legislature.
- (b) If a proposed enactment amending or repealing a law referred to in paragraph (a) deals with a matter in respect of which the National Manpower Commission, referred to in section 2A of the Labour Relations Act, 1956 (Act 28 of 1956), or any other similar body which may replace the Commission, is competent in terms of a law then in force to consider and make recommendations, such proposed enactment shall not be introduced in Parliament unless the said Commission or such other body has been given an opportunity to consider the proposed enactment and to make recommendations with regard thereto.”

O'Regan J referred to *S v Makwanyane*<sup>24</sup> and stipulated that, in order to determine the infringement in the matter regarding Ms Solberg, the Constitutional Court had to consider the “purpose and effect” of the Old Liquor Act and whether that purpose and effect was more important than the “infringement caused”.<sup>25</sup> With minimal evidence put forward by the state regarding the purpose and effect of section 90(1) of the Old Liquor Act, O'Regan held that she could not grasp what the purpose of the latter section was and, therefore, concluded that one of the purposes, although it could not be the main purpose, of section 90(1) of the Old Liquor Act was to reduce the “consumption” of alcohol by prohibiting the sale of alcohol on closed days or public holidays with a Christian character.<sup>26</sup> There was no prohibition of the sale of alcohol on other public holidays

and, therefore, the purpose of section 90(1) of the Old Liquor Act, could not be accepted by O'Regan J.<sup>27</sup> O'Regan J concluded that although the infringement of section 14 of the Interim Constitution in the matter of Ms Solberg is not significant or “egregious”, the purpose of section 90(1) of the Old Liquor Act is not more important than the infringement that arises.<sup>28</sup>

For these reasons, O'Regan J, for the minority in *Lawrence*, ultimately held that section 90(1) of the Old Liquor Act, as far as it prohibits the sale of alcohol on closed days, was unconstitutional.<sup>29</sup> O'Regan J further held that the legislature is seen to “endorse” the Christian religion through the definition of closed days in section 90(1) of the Old Liquor Act. O'Regan J, therefore, found that the right to freedom of religion was infringed by section 90(1) of the Old Liquor Act regarding persons observing minority religions in South Africa, and that such limitation was not reasonable and justifiable under the limitations clause of the Interim Constitution.<sup>30</sup>

### **5.2.2 Judgment by Sachs J**

Sachs J concurred with O'Regan J that the prohibition of the sale of alcohol on closed days in terms of the Old Liquor Act infringed the right to freedom of religion of persons observing minority religions in South Africa. He further held that the legislature thereby favours the Christian religion through the definition of closed days in terms of the Old Liquor Act. In this regard, he specifically provided that

“the identification of Sundays, Good Friday and Christmas Day as closed days for purposes of selling liquor, does involve an endorsement by the state of the Christian religion in a manner that is problematic in terms of section 14 and that the objective of section 14 is to keep the state away from favouring or disfavouring any particular world-view, so that even if politicians as politicians need not be neutral on these questions, legislators as legislative drafters must. . . I come to the following conclusion: the inescapable message sent out by the particular choice of these closed days is that

despite the enactment of section 14, the state still shows special solicitude to Christian opinion or, to put it more accurately, to the views of certain Christians, and thereby infringes section 14. As I have stated above, it is the conjunction of Good Friday and Christmas Day with Sunday that manifests a state endorsement of Christianity as a religion requiring special observance and meriting more respect than other religions. Implicit in this is the assumption that Christians occupy central positions in the political kingdom, while non-Christians live on the periphery.”<sup>31</sup>

Although Sachs J concurred with O’Regan J that the right to freedom of religion of persons observing minority religions in South Africa had been infringed by the Old Liquor Act, such infringement, in Sachs J’s judgment, was not unconstitutional. Therefore, Sachs J concurred with Chaskalson P’s majority judgment. In this regard, Sachs J held that:

“[t]he result is that I agree with O’Regan J that the provisions relating to closed days involve a breach of section 14. Since, however, I am of the opinion that such infringement is sanctioned by section 33, I concur with Chaskalson P in his conclusion that the provisions in question are not unconstitutional.”<sup>32</sup>

## **5.3 Impact of the case**

### **5.3.1 New Liquor Act**

The majority judgment in the *Lawrence* case, prima facie, appears to be discriminatory and, therefore, remains problematic. Apart from the infringement of the religious freedom of persons observing minority religions, other unfavourable consequences arise. In this regard, Sachs J pointed out that “any endorsement by the state today of Christianity as a privileged religion not only disturbs the general principle of impartiality in relation to matters of belief and opinion, but also serves to activate

memories of painful past discrimination and disadvantage based on religious affiliation”.<sup>33</sup> Although Chaskalson P’s majority judgment held that section 90(1) of the Old Liquor Act did not bear a religious character and did not infringe the right to freedom of religion guaranteed by the Interim Constitution, the legislature through the Liquor Act (hereafter the New Liquor Act)<sup>34</sup> seems to adopt the approach favoured by O’Regan J and Sachs J in their judgments in the *Lawrence* case.

The New Liquor Act, therefore, resolved the conflict of the decisions put forward by the minority and the majority of the Constitutional Court in the *Lawrence* case. The New Liquor Act, in this regard, repealed the Old Liquor Act in its entirety. The New Liquor Act does not prohibit the sale of alcohol by liquor licence holders on what was considered closed days under the Old Liquor Act and, therefore, the New Liquor Act promotes the right to freedom of religion of all those persons in South Africa irrespective of their religious beliefs. The New Liquor Act does not unfairly promote the interests of persons observing the majority religion against those persons observing minority religions.

### 5.3.2 Gold Circle

*Gold Circle* was initially brought before the Durban High Court in the form of a *rule nisi*. Jappie J decided the matter regarding the interim order<sup>35</sup> and Southwood AJ decided the matter regarding the final order in the *Gold Circle* case.<sup>36</sup> The facts of the *Gold Circle* case were similar to the facts of the *Lawrence* case, as both cases dealt with legislation that was based on a Christian character and that favoured the Christian religion. In this regard, the legislation applied to all persons irrespective of their religious beliefs and the legislation defined “closed days” in accordance with Christian holy days, which had resulted in the infringement on the rights of persons observing minority religions in South Africa. The only difference is that the *Lawrence* case dealt with legislation prohibiting the sale of alcohol on closed days, whereas the *Gold circle* case dealt with legislation prohibiting horse racing on certain days .<sup>37</sup> Southwood AJ also extensively considered the *Lawrence* case,

including the minority and the majority judgments. Southwood AJ applied the judgment of the minority in the *Lawrence* case, specifically the reasoning of O'Regan and Sachs J in respect of the infringement of section 14 of the Interim Constitution. Section 14 of the Interim Constitution was reiterated under section 15 of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

Regulation 4(3) of the Horse Racing and Betting Control Consolidation Ordinance (hereafter the KZN Horse Racing and Betting Ordinance)<sup>38</sup> provided that “[n]o races shall be held on any Sunday, Good Friday, Ascension Day or Christmas Day, provided that the Minister may, from time to time determine that races be held on a specific Sunday”.

Just as Christmas Day, Good Friday and Sunday were considered “closed days” under the Old Liquor Act, so too was Sunday, Good Friday, Ascension Day and Christmas Day were considered “race days” under the KZN Horse Racing and Betting Ordinance.<sup>39</sup> The applicants in the *Gold Circle* case sought a *rule nisi* declaring regulation 4(3) of the KZN Horse Racing and Betting Ordinance unconstitutional as it infringed on the right to freedom of religion and the right to equality of those persons observing minority religions. Section 9 of the Constitution prohibits discrimination on the ground of, amongst others, religion and section 15(1) of the Constitution provides that: “[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion.”<sup>40</sup>

Jappie J agreed with the applicants’ allegations in the *Gold Circle* case that regulation 4(3) of the KZN Horse Racing and Betting Ordinance placed a mandatory obligation and a forceful religious restraint on those persons who do not observe Christianity.<sup>41</sup> The applicants further alleged that the prohibition contained in regulation 4(3) of the KZN Horse Racing and Betting Ordinance may be seen as “observance by the horseracing industry in KwaZulu-Natal of the Christian religious holidays only.”<sup>42</sup> Jappie J held that regulation 4(3) of the KZN Horse Racing and Betting Ordinance was in conflict with section 9 of the Constitution. Jappie J ordered that regulation 4(3) of the KZN Horse Racing and Betting Ordinance was unconstitutional

and “invalid” or alternatively that “the words ‘Good Friday, Ascension Day or Christmas Day’” be removed from regulation 4(3) of the KZN Horse Racing and Betting Ordinance as it was unconstitutional and “invalid”.<sup>43</sup>

The matter was then brought before Southwood AJ. Southwood AJ considered regulation 4(3) of the KZN Horse Racing and Betting Ordinance and provided a more detailed meaning of “closed days”:

“Christians observe the closed days, Sundays, to rest from secular pursuits and to worship; the others to commemorate various events of special significance in their religion, and to worship. People in other religions, agnostics and atheists do not recognise the days as having any special significance.”<sup>44</sup>

It can, therefore, be argued that regulation 4(3) of the KZN Horse Racing and Betting Ordinance portrays a Christian character in terms of the more detailed meaning of closed days under the latter regulation as held by Southwood AJ.

The judgment of Southwood AJ highlights that persons observing the Christian religion are favoured status by the definition of closed days provided under regulation 4(3) of the KZN Horse Racing and Betting Ordinance.<sup>45</sup> In this regard, Southwood AJ clarified the purpose of the latter regulation as follows:

“It seems to me that the purpose of prohibiting horse racing on the closed days is to promote the precepts of Christianity. It is sought to promote them by recognising these Christian days of worship as worthy of being given special treatment and by eliminating, on the closed days, the secular attractions of horse race meetings so that those attractions do not compete with the behaviour and worship expected of Christians on those days. While s 4(3) seeks to promote these precepts, it does not seek to do so by compulsion, but by removing competing attractions. Although s 4(3)’s purpose is aimed at Christians, its

effects are visited on Christians and non Christians alike: Section 4(3) of the ordinance protects Christians from the effect of the attractions of horse racing meetings only, not from the attractions of gambling in general. It does not seek to protect non Christians. It prevents non Christians from enjoying the attractions and benefits of race meetings on days which have no significance for them. It compels the respondent to refuse requests for permission by the first and second applicants to hold race days on Sundays, Good Fridays, Ascension Days or Christmas Days and in so doing it discriminates against non Christians. It gives State support for one religion and not others. . . There are benefits for Christians in s 4(3), who have their religion recognised and fostered on closed days, but there are disbenefits in it for non Christians, who are deprived of race horse meetings and all that goes with them, on closed days.”<sup>46</sup>

Southwood AJ emphasised the importance of the reasoning of O’Regan J and Sachs J in respect of the infringement caused by legislation, that is section 90(1) of the Old Liquor Act, to persons observing minority religions in South Africa regarding the right to freedom of religion guaranteed by the Interim Constitution. Such legislation has a Christian character, favours the Christian religion and promotes the precepts of Christianity. In this regard, Southwood AJ specifically stated that:

“[t]here is no material difference between the s 14(1) of the interim Constitution and s 15(1) of the Constitution. Section 4(3) is a far clearer case of an infringement of s 15(1) of the Constitution than the infringement of s 14(1) of the interim Constitution considered in *S v Lawrence*; *S v Negal*; *S v Solberg*. In my view, the reasoning of O’Regan and Sachs JJ for the majority of the Judges in that case, supporting their conclusion that s 90(1) of the Liquor Act infringed against s 14(1) of the Constitution, applies with more force in this case. I respectfully agree with that reasoning.”<sup>47</sup>



Southwood AJ held that the right to freedom of religion of persons observing minority religions in South Africa is infringed by regulation 4(3) of the KZN Horse Racing and Betting Ordinance and the limitation of the latter right is unreasonable and unjustifiable. Southwood AJ, however, did not consider the limitations clause provided for under section 36 of the Constitution.<sup>48</sup> Southwood AJ further held that persons observing minority religions in South Africa were being discriminated against, regarding the right to equality, based on the ground of religion in terms of section 9(3) read together with section 9(1) of the Constitution. Southwood AJ held that the discriminatory provision in regulation 4(3) of the KZN Horse Racing and Betting Ordinance could not be considered as fair, as provided under section 9(5) of the Constitution, and was therefore not justifiable.<sup>49</sup> Ultimately, Southwood AJ held that regulation 4(3) of the KZN Horse Racing and Betting Ordinance was unconstitutional and invalid.<sup>50</sup>

### **5.3.3 KwaZulu-Natal Horse Racing and Betting Control Regulations**

Because of the minority judgment in the *Lawrence* case there has also been positive legislative amendments in enforcing the right to freedom of religion of persons observing minority religions in South Africa. For example, through the abolishment of legislation that has a Christian character and promotes the precepts of Christianity. Following the decision in the *Gold Circle* case, the premier of the KwaZulu-Natal province changed the KZN Horse Racing and Betting Ordinance that prohibited horse races on the Christian holy days of Sunday, Good Friday, Ascension Day and Christmas Day, as provided for by regulation 4(3) of the KZN Horse Racing and Betting Ordinance, by implementing the KwaZulu-Natal Horse Racing and Betting Control Regulations. The latter regulations came into effect on 16 July 2010, and it does not provide for the closure of horse racing on Christian religious holidays or what was previously considered to be “closed days” under regulation 4(3) of the KZN Horse Racing and Betting Ordinance.

## **5.4 Conclusion**

This chapter discussed the case law dealing with the constitutionality of legislation that endorsed the Christian religion. In this regard, this chapter discussed the *Lawrence* case, which dealt with the constitutionality of section 90(1) of the Old Liquor Act. This section provided a blanket prohibition of the sale of alcohol on closed days, which was based on Christian holy days. The majority of the Constitutional Court in *Lawrence* held that there was no infringement caused by section 90(1) of the Old Liquor Act regarding the right to religious freedom of persons observing minority religions guaranteed under the Interim Constitution. The minority judgment of the Constitutional Court in *Lawrence* took a different approach, finding that there was indeed infringement of the right to freedom of religion of persons observing minority religions by section 90(1) of the Old Liquor Act and that such infringement was not reasonable and justifiable under the limitations clause of the Interim Constitution. Therefore, the minority in the *Lawrence* case would have found section 90(1) of the Old Liquor Act unconstitutional. Although there was significant disagreement between the majority and the minority of the Constitutional Court in *Lawrence*, it was the judgment of the minority in the latter case which was ultimately followed in the *Gold Circle* case and endorsed the legislature.

## Endnotes

- 1 1997 4 SA 1176 (CC) (*Lawrence*). This chapter is based on the author's doctoral thesis titled: *Religious Holidays and the Rights to Religious Freedom and Equality* (currently in progress, UJ).
- 2 2006 JOL 16397 (D). This is the citation of the judgment for the interim order.
- 3 2005 4 SA 402 (D). This is the citation of the judgment for the final order.
- 4 27 of 1989.
- 5 *Lawrence* (n 1) par 3.
- 6 200 of 1993.
- 7 *Lawrence* (n 1) par 4.
- 8 s 2(v) of the Old Liquor Act.
- 9 *Lawrence* (n 1) par 2.
- 10 *Lawrence* (n 1) par 4, 7.
- 11 *Lawrence* (n 1) par 4, 85, 86.
- 12 *Lawrence* (n 1) par 97.
- 13 *Lawrence* (n 1) par 97.
- 14 *Lawrence* (n 1) par 133.
- 15 *Lawrence* (n 1) par 178.
- 16 *Lawrence* (n 1) par 97, 125.
- 17 *Lawrence* (n 1) par 125.
- 18 *Lawrence* (n 1) par 125.
- 19 *Lawrence* (n 1) par 125.
- 20 *Lawrence* (n 1) par 116.
- 21 *Lawrence* (n 1) par 116.
- 22 *Lawrence* (n 1) par 128, 129.
- 23 *Lawrence* (n 1) par 128, 129.
- 24 1995 3 SA 391 (CC) par 104.
- 25 *Lawrence* (n 1) par 128, 130.
- 26 *Lawrence* (n 1) par 130, 132.
- 27 *Lawrence* (n 1) par 132.
- 28 *Lawrence* (n 1) par 132.
- 29 *Lawrence* (n 1) par 133.
- 30 *Lawrence* (n 1) par 133.
- 31 *Lawrence* (n 1) par 160, 163, 164.
- 32 *Lawrence* (n 1) par 178.
- 33 *Lawrence* (n 1) par 152.
- 34 59 of 2003.
- 35 *Gold Circle* (n 2).
- 36 *Gold Circle* (n 3).
- 37 The term "race days" was used by Jappie J in his judgment and the term "closed days" was used by Southwood AJ in his judgment.
- 38 28 of 1957.
- 39 See reg 2 – definitions section of the KZN Horse Racing and Betting Ordinance (n 38).
- 40 s 9 of the Constitution reads as follows: "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair

discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

41 *Gold Circle* (n 2) 1-2.

42 *Gold Circle* (n 2) 2.

43 *Gold Circle* (n 2) 3-5 and see reg 4(3) of the KZN Horse Racing and Betting Ordinance (n 38).

44 *Gold Circle* (n 3) 408.

45 *Gold Circle* (n 3) 412-414.

46 *Gold Circle* (n 3) 412-414.

47 *Gold Circle* (n 3) 414-415.

48 The limitations clause provided under s 33 of the Interim Constitution is reiterated under the limitations clause provided under s 36 of the Constitution. S 36 of the Constitution reads as follows: “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

49 *Gold Circle* (n 3) 414.

50 *Gold Circle* (n 3) 414.