

Explanatory Note

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

The matter involved a challenge to ss 6(3), 6(4), 6(5), 6(6) and 6(7) of the Gambling Act 51 of 1965. The applicants were charged with the contravention of one of the three offences listed in s 6(1) of the Act, namely that they were in control or in charge of a place in which they permitted the playing of gambling games.

The Court upheld the validity of the referral from the Cape Provincial Division in terms of ss 103(3) and (4) of the interim Constitution, with the exception of the portion of the referral relating to s 6(7) of the Act. This section was held to be irrelevant to the criminal proceedings against the applicants.

In terms of s 6(4) of the Act, an accused is presumed to have permitted the playing of a gambling game at a place over which he or she is in control or in charge, in circumstances where a member of the police force is wilfully prevented from, or obstructed or delayed in, entering the place. The Court held that this provision imposed a legal burden on an accused which could result in conviction despite the existence of a reasonable doubt as to the accused's guilt. Therefore s 6(4) infringed the right to be presumed innocent (s 25(3)(c) of the interim Constitution). The Court further held that s 6(4) could not be justified in terms of the limitations clause, s 33(1) of the Constitution.

In terms of s 6(3) of the Act, if items, such as playing-cards or dice, used or capable of being used for playing any gambling game are found at a place or on a person at such place, it is prima facie evidence of a contravention of s 6(1) of the Act. The Court held that s 6(3) was an evidential device which could result in requiring, innocent persons, against whom there was no evidence suggestive of criminal conduct at all, to come to court to defend themselves. This provision breached the right to a fair trial (s 25(3)) and was not saved by the limitations clause. The unconstitutionality of this provision could not be remedied by severance.

Section 6(5) of the Act provides that, where it is proved at the trial of an accused charged with contravening s 6(1), that any gambling game was played or intended to be played, it shall be presumed, until the contrary is proved, that the game was played or intended to be played for stakes. The Court found that this provision did not impose a burden of proof upon the accused because once it has been proved that a gambling game was played, it will have been proved that the game was played for stakes. The provision was thus held not to be unconstitutional.

Under s 6(6) of the Act, any person supervising, directing, assisting or acting as banker, dealer, croupier or in like capacity, at the playing of a gambling game at any place and further, any person acting as porter, doorkeeper, servant or holding any other office at such

place, shall be deemed to be in control or in charge of the place. The Court held that this provision defined who was in control or in charge of a place where a gambling game was held, for the purposes of a conviction under s 6(1) of the Act. As an element of the offence, it could not be attacked in terms of the presumption of innocence. In addition, the Court held that severance of the word 'servant' was unnecessary to save the provision from constitutional invalidity.

The Court declared that ss 6(3) and (4) were constitutionally invalid.

The judgment of the Court was delivered by O'Regan J and was concurred in by the other members of the Court.