



IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Michael Weare and Betting World (Pty) Ltd v Joel Sibusiso Ndebele NO; KwaZulu-Natal Gambling Board; KwaZulu-Natal Bookmakers Committee; Mandisi Bongani Mabuto Mpahlwa NO and the National Gambling Board.

**Case CCT 15/08
[2008] ZACC 20**

Judgment Date: 18 November 2008

MEDIA SUMMARY

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

Today the Constitutional Court handed down judgment in a case concerning an order made by the Pietermaritzburg High Court declaring section 22(5) of the KwaZulu-Natal Regulation and Betting Ordinance 28 of 1957 (the Ordinance) unconstitutional.

The case arises out of an agreement between the applicants. Betting World (Pty) Ltd carries on the business of bookmaking in eight of South Africa's nine provinces. It does not do so in KwaZulu-Natal, because section 22(5) of the Ordinance provides that juristic persons – companies like Betting World – may not hold licences to engage in bookmaking in the province. Only natural persons, such as Mr Weare, are permitted to hold these licences in KwaZulu-Natal. In other provinces, both juristic and natural persons may hold licences. In terms of the agreement, Mr Weare was to sell to Betting World, conditionally, the bookmaking business he operates under his licence.

The authorities in KwaZulu-Natal took the view that the agreement violated section 22(5), whereupon the applicants challenged the constitutionality of the section. The High Court found that differentiation contained in the section was arbitrary and irrational, and ruled that it breached the constitutional right to equal protection and benefit of the law. It also held that the section constituted unfair discrimination.

The applicants applied to this Court for confirmation of the High Court's order. The first respondent, the Premier of KwaZulu-Natal, appealed against the order.

The Premier argued that the differentiation between natural and juristic persons in section 22(5) reflects the fact that juristic persons, by virtue of their separate legal personality and the limited liability of those who operate them, are more difficult to regulate. Section 22(5) therefore represents a legitimate way to protect the public by ensuring that only natural persons, who are easier to hold accountable, can hold bookmaking licences.

The applicants contended that the differentiation was obsolete. They noted that the province had for some years been preparing new legislation to replace the Ordinance. The proposed legislation permits juristic persons to hold bookmaking licences. They argued that the exclusion of juristic persons was out of step with modern business realities. The differentiation in the section was therefore no longer rationally linked to the achievement of a legitimate government purpose.

In a unanimous judgment written by Van der Westhuizen J, the Court held that section 22(5) did not breach the right to equality before the law protected by the Constitution. The regulation of gambling represented a legitimate government purpose. Different practical considerations might indeed apply to the regulation of juristic persons and natural persons, and so it was not irrational to treat the two differently in the interests of regulation. The fact that reform was being considered, and that an allegedly better policy might exist, did not show that the current law was irrational. Furthermore, the section did not amount to unfair discrimination.

Another question had to be decided, namely whether the invalidation of a provision of a provincial ordinance by the High Court must be confirmed by this Court. Section 172(2)(a) of the Constitution provides that an order of constitutional validity made in respect of a “provincial Act” must be confirmed by this Court.

Van der Westhuizen J held that section 172(2)(a) reflected the important status of provincial legislation in our constitutional order. Although this status did not necessarily accrue to all pre-1994 provincial enactments, the Ordinance before the Court had been amended by the KwaZulu-Natal provincial legislature and incorporated by reference into a provincial Act regulating gambling. The provincial legislature in effect decided that the Ordinance should be part of the provincial gambling regime. It therefore should be treated as a provincial Act for the purposes of section 172(2)(a).

The Court therefore held that the order of constitutional invalidity made by the High Court required confirmation by the Court, but declined to confirm the order and upheld the validity of section 22(5).

The appeal accordingly succeeded and the application for confirmation was dismissed.