

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

REPORTABLE

CASE NUMBER: 18175/07

In the matter between:

DATE: 30/7/2008

RAJAH, EBRAHIM

First Applicant

BENETT, SARAH WILHELMINA

Second Applicant

And

THE PREMIER: NORTH WEST PROVINCE

First Respondent

**THE MEC FOR FINANCE AND ECONOMIC
DEVELOPMENT**

Second Respondent

**THE CHAIRPERSON: NORTH WEST
GAMBLING BOARD**

Third Respondent

SUN INTERNATIONAL SOUTH AFRICA LTD

Fourth Respondent

PERMONT GLOBAL (NORTH WEST) (PTY) LTD

Fifth Respondent

JUDGMENT

INTRODUCTION

1. The applicants are owners, and in possession of gambling machines as defined by and in the North West Gambling Act 2 of 2001 ("the Gambling Act" or "the principal act").
2. The possession of these machines has been prohibited upon pain of severe criminal sanctions by an amendment of the principal act by the North West Gambling Amendment Act 5 of 2005 ("the Amendment Act"), which in section 16 thereof amended section 82(1)(xi); (xii); (xiii); (xiv); (xxiv) and 82(4) and thereby introduced statutory provisions that disentitle the applicants to continue to possess the aforesaid machines.
3. As will become apparent later, the respondents contend that the prohibition of possession is not absolute but that the amended act merely prohibits possession without a valid license issued by the North West Gambling Board.
4. The applicants seek the setting aside of the putting into operation of the Amendment Act and to declare the amended subsections of section 82 of the Gambling Act unconstitutional.
5. Pending confirmation of the declaration of unconstitutionality of these amendments the first, second and third respondents are furthermore sought to be interdicted from implementing the impugned subsections.

6. Due notice has been given by the applicants of their intention the constitutional incompatibility of the amended subsections as intended by Rule 16A of the Rules of this Court.
7. During argument, the constitutional attack upon subsection 82(1)(xi) was abandoned.

THE PARTIES

8. The applicant is Ebrahim Raja, an adult businessman who owns gambling machines as aforesaid, and does business *inter alia* at Potchefstroom, Klerksdorp, Stilfontein and Orkney in the North West Province.
9. The second applicant is Sarah Wilhelmina Bennett, an adult businesswoman trading as "Mermaids", "Pink Panther", "Golden Nugget" and "Circus Circus" at Potchefstroom, Orkney, Vryburg, Stilfontein and Rustenburg in the North West Province.
10. The first respondent is the premier of the North West Province in her official capacity of c/o the Office of the State Attorney, 8th Floor, Old Mutual Centre, 167 Andries St., Pretoria.
11. The second respondent is the MEC of the North West Province responsible for finance and economic development in his official capacity, responsible for the administration of the Gambling Act, c/o the Office of the State Attorney as set out above.
12. The third respondent is the chairperson of the North West Provincial Gambling Board, cited in her official capacity of c/o the North West Gambling Board, third floor, East Wing, Mega City Shopping Complex, Mmabatho.
13. The fourth respondent is Sun International South Africa, a public company with limited liability duly registered and incorporated in accordance with the company laws of the Republic of South Africa,

with registered office and principal place of business at 27 Fredman Drive, Sandown, Sandton, doing business as licensed casino operator in *inter alia* the North West Province.

14. The fifth respondent is Peermont Global (North West) (Pty) Limited, a company with limited liability duly incorporated and registered in accordance with the company laws of the Republic of South Africa, doing business as a licensed casinos operator in the North West Province, cited c/o their attorneys of record.

THE RELIEF SOUGHT

15. As has been set out above, the applicants demand the setting aside of the putting into operation of the North West Gambling Amendment Act 5 of 2005 by the first respondent by way of publication in the Provincial Government Gazette of the 28th September 2005.
16. The Amendment Act came into operation on the same date.
17. The applicants argue that the first respondent's action was irrational and unreasonable to the extent that the promulgation of the Amendment Act ought to be set aside.
18. The applicants further contend that the amendment of subsections 82(1)(xii), (xiii), (xiv), (xxiv) and 82(4) identified above is unconstitutional because the effect thereof amounts to an unjustifiable deprivation of their proprietary rights in and to their gambling machines.
19. They further seek an interdict, if the said subsections are indeed declared unconstitutional, to prevent the first to third respondents from implementing the amendment pending confirmation of the declaration of constitutional incompatibility by the Honourable Constitutional Court.
20. The respondents oppose all the applicants' claims.

THE CHRONOLOGICAL BACKGROUND OF THE RELEVANT LEGISLATION

21. At common law, gambling was neither prohibited nor regulated, see: *Schoeman v The Chairperson of the North West Gambling Board and Others* (unreported) Bophuthatswana Provincial Division, Civil Appeal 6/2005; par 12.
22. Gambling debts were, however, unenforceable at common law.
23. It is clear that gambling poses significant risks for society and must therefore be strictly controlled, see *Magajane v Chairperson North-West Gambling Board and others* 2006 (5) SA 250 (CC); *Poswa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape* 2001 (3) SA 582 (SCA).
24. For present purposes it is unnecessary to consider legislation that antedates the advent of democracy in the Republic.
25. The National Gambling Act 33 of 1996 repealed the pre-constitutional Gambling Act 57 of 1997 and was in turn replaced by the National Gambling Act 7 of 2004.
26. It must be recorded in passing that the applicants have, in another application, launched a constitutional challenge against the provisions of section 9(1)(a) of this latter act. This matter is still pending, apparently awaiting enrolment of an oral hearing of disputed issues referred to oral evidence by the late Patel J of this Division under case number 483/2005.
27. Section 9(1)(a) of the said act prohibits, *inter alia*, the possession of gambling machines or gambling devices unless the possessor is duly authorized to possess such a machine in terms of the national act or a provincial law.

28. The *Schoeman* decision *supra* referred to this section, commenting that possession of a gambling machine was lawful if proper authorization to do so was granted to the possessor.
29. The first act regulating gambling in the North West Province was the North-West Casino, Gaming and Betting Act 13 of 1994, which determined in Chapter IV thereof that gambling activities in the province could only be conducted only in terms of a licence duly issued for such purpose.
30. This Act was repealed by the North West Gambling Act 2 of 2001, which came into effect on the 30th April 2002. It contains extensive provisions regulating the gambling industry through licensing and registration of gambling activities and of persons employed in the gambling industry.
31. Sections 64 and 65 of this Act were the subject of a successful constitutional challenge against the power granted to inspectors to search premises where gambling activities were conducted without a warrant.
32. This Act that was altered by the Amendment Act. The new subsections 82(1)(xii) to (xiv), 82(1)(xxiv) and section 82(4) are challenged on the constitutional grounds set out above.
33. The relevant subsections read as follows:
 " 82(1) *Any person who*

 (xii) *is in possession of-*
 (a) *a reel tape designed for use is a gambling machine;*
 (b) *any device which would be a gambling machine but for the removal of any of its parts or the reprogramming thereof,'*
 (c) *any device which is capable of electronically representing the reels used in a gambling machine;*

- (d) *any device which was manufactured as a gambling machine and which has been converted at any time so that it is unable to payout cash or tokens, whether such device enables a player to win a prize or not;*
- (e) *any computer software which enables a player to download any credits won on a gambling game to another computer or to an external data storage device; or*
- (f) *any computer hardware which is primarily designed or constructed for use to play a gambling game on a computer, without an appropriate license or without being registered in terms of section 60(1);*
- (xiii) *is in possession of any gambling machine, table or device contemplated in section 66(1) and this section and is not-*
 - (a) *the holder of an appropriate licence;*
 - (b) *registered in terms of section 60(1);*
 - (c) *authorized by the Board to use such device for social gambling; or*
 - (d) *authorized by the Board to transport such machine, table or device in or through the Province as contemplated in section 66C(2);*
- (xiv) *uses a gambling device or amusement machine otherwise than in accordance with the provisions of the Act;*
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- (xxiv) *possesses or exposes for play by members of the public or any section thereof, an amusement machine capable of playing games such as roulette, bingo, twenty-one, blackjack, chermine de fer, baccarat, poker, Chinese roulette, keno and other games of similar type usually played on gambling machines or derived from such games;*
- (4) *Whenever any person is convicted of an offence in terms of this Act or pays an admission of guilt fine in respect thereof in terms of section 57 of the Criminal Procedure Act, 1977 (Act 51 of 1977), all costs incurred by the Board or the South African Police Service, including costs of the transport or storage of any gambling machine, gambling device, equipment or other thing which was used in the commission of the offence*

or which was found in the possession of the convicted person, and any testing thereof by the South African Bureau of Standards shall be paid by such person in addition to any fine or penalty imposed or paid by such person.

The subsections came into effect on the 28th September 2005.

THE RELEVANT FACTUAL BACKGROUND TO THE PRESENT APPLICATION

34. The applicants allege that they have been in possession of the machines that are affected by the amendment of the principal act since the nineties.
35. Although the deponents on behalf of the first, second and third respondents criticize the lack of detail of this averment, nothing much turns on this as the applicants concede that the machines in their possession are "gambling machines" as intended by the Gambling Act.
36. The applicants are at pains to underline that their machines are not used for any gambling purposes, a claim which is disputed and ridiculed by the officials representing the third respondent. Reference is made in this regard to various photographs and reports which the applicants submit constitute inadmissible and irrelevant evidence. Apart from remarking that many of the third respondent's representatives' allegations in this regard appear to be either hearsay or to fall foul of the best evidence rule, it is not necessary for purposes of this judgment to deal with this issue.
37. It is clear that the applicants and particularly the officials of the third respondent have been locked in an increasingly acrimonious debate over a number of years about the question whether the applicants can lawfully own, possess and operate their machines in any manner and fashion. There have been several confrontations between them in several High Court applications, arising from actual or threatened seizure and removal of applicants' machines.

38. The papers are replete with recriminations in which the applicants and third respondent's deponents accuse each other of malice, dishonesty and selective disclosure of relevant facts. Apart from rendering the papers much more prolix than they should have been, these accusations could not be resolved without oral evidence - if a resolution thereof were necessary for the determination of the fate of the present application. Fortunately, this is not the case. Nonetheless, it is regrettable that the proceedings were allowed to become a vehicle for personal attacks and counter attacks.
39. After the Amendment Bill was introduced, the provincial legislature referred the Bill to the Portfolio Committee for Finance and Economic Development. This body decided to invite comment by interested parties and the general public in respect of the proposed amendments.
40. The applicants made several submissions to the Portfolio Committee and to officials of the Gambling Board in respect of the intended amendments and sought to ensure the introduction of a regulatory system that would allow them to apply for licenses to possess their machines. Neither the Portfolio Committee nor the Gambling Board were amenable to consider the request to include the applicants' suggestions in the proposed amendments.
41. In this connection, the first applicant states the following in his replying affidavit at paragraph 119.1:
- " I once again reiterate that meeting upon meeting took place with the Gambling Board and the Portfolio Committee in order to secure a properly regulated process to accommodate people such as myself. It was never met with any fairness but always met with scant regard for my and others' rights."*
42. Mr Erasmus, a law enforcement officer in the service of the Gambling Board, delivered written notices to the applicants informing them of the promulgation of the amendments within what was then expected to be a month after delivery of such notice. The notice was received on the

14th September 2004, contemplating the promulgation of the Amendment Act at the end of October of that year. The promulgation was only effected upon the 30th September 2005, giving the applicants more than a year's period to adjust their affairs to the intended change in the regulation of the industry.

43. The applicants have presented no evidence that they attempted to divest themselves of the machines in their possession in spite of their prior knowledge that the amendment would be introduced.
44. Applicants confirm further that they were advised by an official at the Government Printer's Office that promulgation of the Amendment Act was imminent less than a week before publication of the relevant Provincial Gazette in 2005.
45. Again, they did nothing to dispose of the machines at this late stage.
46. In the founding affidavit the first applicant repeatedly asserts, and the second applicant confirms the allegation that the Amendment Act was promulgated suddenly, without warning and without affording the applicants the opportunity to divest themselves of the machines or take other appropriate action to regularize their position.
47. In the light of the foregoing, these protestations, which are fundamental to the case that the promulgation of the Amendment Act was unreasonable because of the unexpectedness and suddenness thereof, cannot hold water.
48. The applicants repeatedly use phrases such as "... / ... *have been faced with an overnight criminalisation of possession.*" (Paragraph 141.3 of the replying affidavit). It is difficult to understand this terminology, which appears to be incompatible with the common cause facts.
49. In addition, and in keeping with the note of personal acrimony that permeates the papers, the first applicant repeatedly blames the Gambling Board and its officials for the failure to create a regulatory structure that would accommodate the possession of machines like those that are owned by the second applicant and himself. It is unclear

why this criticism is voiced against the Board while it is common cause that the Portfolio Committee and the Legislature as well as the first respondent through the Portfolio Committee were appraised of the applicant's concerns prior to approving the Amendment Bill in spite of the applicants' objections.

50. The applicants do not make out a case that their machines could not have been sold or exported, leased or transferred to operators in other jurisdictions in which the possession of these machines is not unlawful or is permissible in terms of a permit. There is no evidence that the applicants attempted to dispose of their machines gainfully before or after the Amendment Act was promulgated.
51. It should be noted in passing that the applicants launched an earlier application in this court under case number 33405/05 in which they claimed virtually the same relief that they seek now. That application was withdrawn on the 9th May 2007.

THE ARGUMENTS REGARDING THE PROMULGATION OF THE AMENDMENT ACT

52. The parties are agreed that the gambling industry requires strict regulation and that it is the government's duty to provide the regulatory structure.
53. As the regulation of the gambling industry is, in terms of Schedule 4 of the Constitution 108 of 1998, a function of both the central authority and the Province, that duty rests upon the Provincial Government of the North West Province as well.

54. The applicants contend that such regulation does not impose a duty to regulate the ownership of gambling machines. No facts are, however, presented to underpin this suggestion.
55. In principle, it is difficult to understand why regulation of the gambling industry should not include, or indeed demand, the power to prevent certain classes of gambling machines to be owned or possessed by any person, or a certain class of persons, if such prohibition were to be reasonably necessary for the effective control of the industry.
56. Applicants contend that their possession of the gambling machines was lawful until the promulgation of the Amendment Act, a proposition vigorously contested by the respondents.
57. It is not necessary to come to a final conclusion of this question in order to be able to deal with the present issue. *Prima facie*, the Gambling Act prior to its amendment - in section 60(1)(a) and 60(10) thereof - and its predecessor required possessors of any gambling devices to be registered or to be the holders of an appropriate licence issued with an eye to regularizing such possession.
58. This view is supported by the provisions of section 9(1)(a) of the National Gambling Act 7 of 2004 - and fortified in no small measure by the fact that the applicants have in the proceedings under case number 483/2005 challenged this section as an unconstitutional infringement of their right to possession.
59. The provisions of the Regulation 29, promulgated under the Gambling Act, restrict the possession of gambling devices to holders of valid casino, route operator, site operator or independent site operator licences for machines defined in section 66 of the Gambling Act. These machines *prima facie* include the gambling machines in the applicants' possession.
60. The applicants have apparently never applied for any of the aforesaid licences.

61. The applicants rely upon the alleged lawfulness of their possession of the gambling machines to fortify their argument that the promulgation of the Amendment Act was sudden and irrational, without taking their position into account. (They also advance this argument in support of the attack upon the constitutional compatibility of the amended subsections because of the alleged resultant deprivation of their property rights).
62. The first, second and third respondents annexed a report of the Finance and Economic Development Portfolio Committee Report on the proposed Amendment Bill, which was presumably presented to the Provincial Parliament in 2005 - although undated, it deals with events in the second half of 2004.
63. The report is not denied. It records that the Portfolio Committee held public meetings on the Amendment Bill at five centres in the North West Province to discuss the recommendations of the Committee in respect of the proposed amendments.
64. Both the applicants and their legal representatives made recommendations to the Portfolio Committee and to the Gambling Board.
65. The recommendations were aimed at persuading the Portfolio Committee and the legislature to establish a regulatory framework to accommodate the applicants by allowing them to apply for appropriate licences to enable them to continue possessing their gambling machines in the same manner and fashion as they did before the Amendment Act was introduced.
66. Their representations were unsuccessful. The Legislature, advised by the Portfolio Committee, was clearly of the view that the existing licence categories were sufficient to cater for the regulation of the type of machines possessed by the applicants, and that no further category was required to serve the public interest.

67. Viewed against this background, the applicants have failed to establish that the first respondent acted irrationally in introducing the Amendment Act at the time and in the manner and fashion in which she did. The applicants could not have been at all surprised and should not have been so, given their active engagement in discussions with the authorities and the extensive litigation in which the applicants - or their legal representatives on their behalf and on behalf of other parties with similar interests as the applicants - were involved against the third respondent and the Gambling Board and its officials prior to the 30 September 2005.
68. The unwillingness on the part of the authorities to create further categories of licences - or to adapt existing licence categories - to accommodate the applicants cannot on these papers be said to be irrational. No evidence is presented by the applicants to justify this conclusion. The applicants neither have the right to demand, nor, given the history of their relationship with the regulatory authorities, could they ever have had a legitimate expectation that a new licence category should or would be created to accommodate their concerns. Apart from emphasizing that no further casino licences are available in the North West Province, the applicants make no attempt to enlighten the court why they could not adapt their activities to avoid the effects of the amended subsections.
69. The applicants have not explained the manner in which their machines are presently used to produce an income, other than to deny that they are involved in gambling activities and to agree with the respondents that their machines cannot be monitored electronically. In the absence of any evidence, the court cannot consider the validity of the claim that the applicants are entitled to continue to pursue whatever activity they are engaged upon in the use of the machines.
70. As has already been remarked earlier, the applicants have advanced no evidence that the machines could not be sold, exported, let or

otherwise be gainfully disposed of - and neither have they shown the contrary.

71. The evidence advanced falls far short of that which was common cause before the Honourable Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa and another: In Re ex parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC), namely that a new act had been promulgated that could not be applied in the absence of any regulations, which had not been prepared by the time the act was placed upon the statute book. There is no suggestion of irrationality approximating such a degree in this matter.
72. The attack upon the promulgation of the Amendment Act must therefore fail.

THE CONSTITUTIONAL COMPATIBILITY OF THE AMENDED PROVISIONS

73. The applicants argue that the amended provisions are unconstitutional because they have the effect of depriving them of their rights to property.

74. The right to property is protected by section 25 of the Constitution. Subsection(1) thereof reads as follows:

"Nobody may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

75. The Constitution draws a clear distinction between deprivation of property rights and expropriation of property, the latter being dealt with in subsection (2) and further of section 25 of the Bill of Rights. See, generally in this connection, *Harksen v Lane* NO 1998 (1) SA 300 (CC), Parr [32] to [40].

76. The applicants do not contend that their property is being expropriated.

77. Their contention is rather that the Amendment Act's impugned provisions cause an effective interference with their enjoyment of the possession of their machines and the economic use to which they are being put.

78. This argument must, of course, assume that their possession to date of the Amendment Act was lawful, an issue that has been dealt with above. Once again, it is unnecessary to finally decide the question whether the possession of the gambling machines was lawful or not prior to the 30th September 2005.

79. I will assume for purposes of this argument that possession of the machines was lawful prior to the Amendment Act coming into force.

80. Apart from the provisions of section 82(4), which will be discussed below, the impugned provisions prohibit the possession, use or exposure to the public of gambling machines without an appropriate licence to do so.

81. It is therefore not the ownership of the machines but rather the prohibition of the possession and use thereof that the applicants seek to have declared an unconstitutional deprivation of property.

82. A limitation of this nature may be regarded as a deprivation of property, see *First National Bank of South Africa t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of South Africa t/a Wesbank v Minister of Finance* 2002 (4) SA 769 (CC) at par [57] where Ackermann J says the following:

'the term "deprivation" is distinguished very clearly from the narrower term "expropriation" in constitutional jurisprudence worldwide'. 92 (Reference is made here to Van der Walt: The Constitutional Property Clause).

In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned. If s 25 is applied to this wide genus of interference, 'deprivation' would encompass all species thereof and 'expropriation' would apply only to a narrower species of

interference. Chaskalson and Lewis, using a slightly different idiom and dealing with both the interim and 1996 Constitutions, put it equally correctly thus:

'Expropriations are treated as a subset of deprivations. There are certain requirements for the validity of all deprivations.' 93 (Reference is made to Chaskalson et al Constitutional Law of South Africa)

[58] Viewed from this perspective s 25(1) deals with all 'property' and all deprivations (including expropriations). If the deprivation infringes (limits) s25(1) and cannot be justified under s 36, that is the end of the matter. The provision is unconstitutional. "

- 83 Yacoob J put the concept of "deprivation" thus in *Mkontwana v Nelson Mandela Metropolitan Municipality and Another* (and two other cases) 2005 (1) SA 530 (CC) at [32]:

'Whether there has been a deprivation depends on the extent of the interference with or the limitation of use, enjoyment or exploitation ... at the very least, substantial interference or limitation that goes beyond the general restrictions on property use or enjoyment found in an open or democratic society would amount to deprivation. "

84. The test whether such deprivation is arbitrary, and would thus infringe section 25(1) of the Constitution, has been defined in the *Wesbank* case *supra*, and reiterated in *Armbruster and Another v Minister of Finance and*

Others 2007 (12) BCLR 1283 (CC) at [70] as follows:

"Having regard to what has gone before, it is concluded that a deprivation of property is 'arbitrary' as meant by s 25 when the 'law' referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:

- (a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.*
- (b) A complexity of relationships has to be considered.*
- (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.*

- (d) *In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.*
 - (e) *Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive.*
 - (f) *Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.*
 - (g) *Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.*
 - (h) *Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under s 25. "*
85. It is clear that the Amendment Act and the Gambling Act are laws of general application.
86. The applicants must therefore show that the amendments are arbitrary in order to establish that they are constitutionally unsound.
87. The property right affected by the amendment is less than ownership, while the purpose of the deprivation, namely the regulation of an industry that is admittedly in need of strict control is the public interest and the protection of vulnerable individuals.
88. There can be no doubt about the validity and desirability of the purpose of the impugned amendments.
89. The prohibition of the possession of the machines and related activities does not constitute an absolute bar to the commercial exploitation thereof. As has been set out above, the applicants have not attempted to show that the machines cannot be leased to other licenced operators in the North West Province or outside the borders of this province or the Republic of

South Africa, or that they cannot be sold to other interested parties in other parts of the country or the world.

90. The applicants have also not fully dealt with the reasons why they are unable to acquire a licence - other than a casino licence - that would entitle them to the continued possession of the machines.

91. In the context of these facts there is a legitimate and rational purpose for the prohibition of the unlicensed possession of the machines. The restriction is one that is compatible with an open and democratic society and does not interfere unduly with the applicants' property rights when weighed up against the purpose of the legislative provisions.

92. It follows that the amendments effected to subsection 82(1)(xii), (xiii), (xiv) and (xxiv) are not incompatible with the Constitution. Prayer 2 of the Notice of Motion must therefore be dismissed in respect thereof and the interdict sought in that respect must be refused.

SECTION 82 (4)

93. This subsection decrees that a convicted accused or a person who pays an admission of guilt fine must pay all costs that have arisen for the Gambling Board and the South African Police Services in connection with the prosecution.

94. It is immediately apparent that the trial court convicting and sentencing the accused, possibly to imprisonment in addition to a fine that may amount to R10 million, has no discretion to decide whether payment of these costs should be enforced or not, in full or in part, once the accused has been found guilty or paid an admission of guilt fine.

95. Neither party addressed the court on this issue, but it would appear at first blush that this provision is a criminal punishment as described in *Armbruster's* case *supra* in [52] to [55], because the sanction is imposed as a result of a conviction or admission of guilt consequent upon a criminal charge having been laid against the accused.

96. If this is indeed the case, the provision might fall foul of the provisions of section 34 of the Constitution, guaranteeing the right to have disputes that are capable of adjudication tried by a court or other independent tribunal.
97. Section 165 of the Constitution might also be infringed in this case as the power of adjudication of the question whether such additional penalty should be imposed or not is taken out of the hands of the trial court.
98. The question was not debated and the court has not called for additional argument on this issue as it would clearly be premature to do so at this stage. This case can be decided without delving into the constitutional hurdles that might stand in the way of an enforcement of section 82(4).
99. It is clear that the applicants face the immediate consequences of unlicensed possession of gambling machines, which include not only potential criminal sanctions, but also possible search and seizure operations as contemplated in section 65 of the Gambling Act. The amended subsections that relate to such possession must consequently be considered at this stage. The need to consider the enforceability of section 82(4) would only arise if and when the applicants were to be prosecuted and convicted - or were to pay an admission of guilt fine after having been duly charged in terms of the amendments - an eventuality that is not an issue at present.
100. As constitutional issues are generally issues of last resort, see *De Kock and Others v Van Rooyen* 2005 (1) SA 1 (SCA), it would be inappropriate to deal with section 82(4) at this stage.
100. It follows that the application must fail.
101. The following order is therefore made:
 "The application is dismissed with costs, such costs to include the costs consequent upon employing senior counsel in respect of the first, second and third respondents and senior and junior counsel for the fourth and fifth respondents."

E Bertelsmann

Judge of the High Court.

CASE NO: 18175/07

HEARD ON: 17/4/2008

FOR THE APPLICANTS: ADV N JAGGA

INSTRUCTED BY: GERBER ATTORNEYS, PTA

ON BEHALF OF: NIENABER & WISSING, MAFIKENG

FOR THE 1ST TO 3RD RESPONDENTS: ADV M DONEN SC

WITH ADV A J SWART

INSTRUCTED BY: STATE ATTORNEY, PRETORIA

FOR THE 4TH AND 5TH RESPONDENTS: ADV G J MARCUS SC

WITH ADV A P H COCKRELL

INSTRUCTED BY: FRIEDLAND HART & PARTNERS, PTA

ON BEHALF OF KNOWLES HUSAIN LINDSAY INC