CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 322/22

In the matter between:

CASINO ASSOCIATION OF SOUTH AFRICA	First Applicant
PEERMONT GLOBAL (NORTH WEST) (PTY) LIMITED	Second Applicant
SUN INTERNATIONAL (SOUTH AFRICA) LIMITED	Third Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL FOR ECONOMIC DEVELOPMENT, ENVIRONMENT, CONSERVATION AND TOURISM	First Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR PROVINCIAL TREASURY	Second Respondent
NORTH WEST GAMBLING BOARD	Third Respondent
MINISTER OF FINANCE	Fourth Respondent

Neutral citation:	*Casino Association of South Africa and Others v Member of the Executive Council for Economic Development Environment Conservation and Tourism and Others* [2023] ZACC 39
Coram:	Zondo CJ, Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Potterill AJ, Rogers J, Theron J and Van Zyl AJ
Judgments:	Makgoka AJ (unanimous)
Heard on:	11 May 2023

Decided on: 29 November 2023

Summary: Confirmation of the order of constitutional invalidity granted by the High Court — North West Gambling Act 2 of 2001 — Sections 84(1)(e), 87(1)(a), and 87(3) of the North West Gambling Act — Regulation 73(1) of the North West Gambling Regulations 2002

Section 228(1)(a) of the Constitution — Provincial Tax Regulation Process Act 53 of 2001 — Imposition of tax and levies by Member of the Executive Council — Application of the dominant purpose test to determine whether a charge amounts to a tax or levy — Sufficient nexus is required between the impugned charge and the regulatory scheme of the statute to determine whether the charge is a tax

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ORDER

On application for confirmation of the order of constitutional invalidity granted by the High Court of South Africa, North West Division, Mahikeng:

1. The declaration of constitutional invalidity made by the High Court of South Africa, North West Division, Mahikeng, is confirmed in the terms set out in paragraph 2 of this order.
2. Sections 84(1)(e), 87(1)(a), and 87(3) of the North West Gambling Act 2 of 2001 are declared invalid to the extent that they purport to authorise the Member of the Executive Council for Economic Development, Environment, Conservation and Tourism, to impose gambling levies as a tax as contemplated in section 228(1)(a) of the Constitution.
3. The declaration of invalidity takes effect from 23 January 2020.
4. The first and second respondents, jointly and severally, are ordered to pay the second and third applicants the difference between:
   (a) the gambling levies that the second and third applicants have paid pursuant to regulation 73(1) of the North West Gambling

Regulations 2002, from 23 January 2020 to the date of this judgment; and

(b) the gambling levies that would have been payable during the period mentioned above, had regulation 73(1) not been amended.

5. The first and second respondents, jointly and severally, are ordered to pay interest on the amounts referred to in paragraph 4 above, as follows:

(a) in respect of the gambling levies already paid by the second and third applicants by the date on which the application in the High Court was served, such interest to be at the prescribed rate from the date of service of the application on the respondents to the date of payment;

(b) in respect of the gambling levies not yet paid by the second and third applicants by the date on which the application in the High Court was served, such interest to be paid at the prescribed rate from the date of each payment by the applicants.

6. The first, second and third respondents, jointly and severally, are ordered to pay the first, second, and third applicants' costs, including the costs of two counsel.

JUDGMENT

MAKGOKA AJ (Zondo CJ, Kollapen J, Madlanga J, Majiedt J, Potterill AJ, Rogers J, Theron J and Van Zyl AJ concurring):

Introduction

[1] These are proceedings in terms of section 172(2)(d) of the Constitution[1] for confirmation of an order of constitutional invalidity granted by the High Court of South Africa, North West Division, Mahikeng (High Court). The High Court declared certain empowering provisions in the North West Gambling Act[2] (NW Gambling Act) invalid and unconstitutional. The provisions concerned are sections 84(1)(e), 87(1)(a) and 87(3), which empower the Member of the Executive Council for Economic Development, Environment, Conservation and Tourism (MEC for Tourism) to make regulations prescribing the gambling levies that licensed casino operators in North West are required to pay. The order of the High Court followed an amendment (impugned amendment) to regulation 73(1) of the North West Gambling Act 2 of 2001: North West Gambling Regulations[3] (Regulations) by the MEC for Tourism, relying on the empowering provisions.

[2] As this matter relates to the confirmation of an order of constitutional invalidity by the High Court, this Court's jurisdiction is engaged. In terms of section 167(5) of the Constitution, this Court makes the final decision on whether a provincial Act is constitutional and must confirm any order of constitutional invalidity made by either the High Court or the Supreme Court of Appeal before that order has any force. However, this Court must still conduct its own evaluation and satisfy itself that the impugned provisions do not pass constitutional muster before confirming the order of invalidity.[4]

[1] Section 172(2)(d) of the Constitution provides:

> "[a]ny person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

[2] 2 of 2001.

[3] North West Gambling Regulations, GN 353 *Provincial Gazette 5823*, 25 November 2002.

[4] *Phillips v Director of Public Prosecutions, Witwatersrand Local Division* [2003] ZACC 1; 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) at para 8.

[3] The first applicant, the Casino Association of South Africa (CASA), is a voluntary association that represents various licensed casino operators across the country. CASA's members operate 36 of the 38 operational casinos in South Africa, including all four of the casinos in the North West. Peermont Global (North West) (Pty) Limited (Peermont), the second applicant, is a casino licensee which owns and operates two casinos in Mmabatho, North West, namely, Palms Casino and Rio Casino. The third applicant, Sun International (South Africa) Limited (Sun International), is licensed to operate the Sun City Casino, North West, and was, until February 2022, licensed to operate the Carousel Casino in Hammanskraal, Gauteng.

[4] The MEC for Tourism is the first respondent. The second respondent is the Member of the Executive Council for Provincial Treasury (MEC for Treasury). The third respondent is the North West Gambling Board (Board). The Board is established in terms of section 3 of the NW Gambling Act and is responsible for, among others, the oversight and control of gambling activities in North West, including the collection of levies and fees imposed on gambling licensees in the Province. The fourth respondent is the Minister of Finance. He is the only respondent who does not participate in these proceedings.

The impugned amendment

[5] Regulation 73(1) of the Regulations prescribes the gaming levies payable by casino licensees. Prior to its amendment, the regulation read as follows:

> "A licensee shall pay a gaming levy in relation to each of its licensed casinos at the following rates depending on the licensee's gross gaming revenue.

Gross Gaming Revenue (per month) where the taxable revenue in the tax period-	**Rate of levy**
Does not exceed R4 million	4% of each R1 of the taxable Revenue

Exceeds R4 million but does not exceed R8 million	R160 000 plus 7% of the amount by which the taxable revenue exceeds R4 million
Exceeds R8 million but does not exceed R12 million	R440 000 plus 8% of the amount by which the taxable revenue exceeds R8 million
Exceeds R12 million	R760 000 plus 10% of the amount by which the taxable revenue exceeds R12 million"

[6] Subsequent to its amendment, the regulation reads as follows:

> "A licensee shall pay a gaming levy in relation to each of its licensed casinos of the following rates, depending on the licensee's gross gaming revenue.

Gross Gaming Revenue (per month) where the taxable revenue in the tax period-	**Rate of levy**
Does not exceed R6 million	6% taxable revenue
Exceeds R6 million, but less than R10 million	R360 000 plus 8% of the amount above R6 million
Exceeds R10 million, but less than R15 million	R680 000 plus 10% of the amount above R10 million
Exceeds R15 million	R1 180 000 plus 12% of the amount above R15 million"

[7] As can be seen from this comparison, the effect of the impugned amendment was to substantially increase the gambling levies payable by licenced casino operators, including the applicants, in the North West Province. In terms of regulation 74(2) of the Regulations, these gambling levies are payable on the seventh day of the month and licensees who fail to pay a levy on or before the prescribed date are liable to pay a penalty. There is also no grace period for gambling levy payments and failure to pay timeously may result in a suspension of licences and criminal charges. Regulation 74(2)

also requires licensees to submit monthly returns to the Board, and simultaneously to pay the Board any gaming levies that are due. Regulation 75(1) stipulates that if a gaming levy is not paid in accordance with regulation 74, a penalty is payable at 1% per day up to a maximum of 100%.

[8] Peermont and Sun International have, as a result of these provisions, paid the levies under protest in accordance with the impugned amendment and subject to full reservation of their rights, including the right to claim repayment of the difference between the levies that would have been payable had regulation 73(1) not been amended.

[9] The impugned amendment was a culmination of a process that commenced in November 2018, when the Board published for comment a proposed amendment to regulation 73(1) in terms of which there would be a levy increase. CASA raised several objections to the proposed amendment and made extensive representations to the Board. On 15 February 2019, the MEC for Tourism promulgated a second version of the amendment to regulation 73(1) which merely corrected typographical errors in the draft published in November 2018.

[10] There were various developments between February 2019 and January 2020, the importance of which relate to the review proceedings. However, in view of the conclusion I reach, it is unnecessary to detail these developments. Suffice it to say, on 23 and 24 January 2020, the MEC for Tourism relying on the empowering provisions, promulgated the impugned amendment, which was, in all material respects, the same as the first proposed amendment published in November 2018. On 3 February 2020, the Board notified casino licensees in the Province of the impugned amendment and that they should pay the prescribed amended tariffs with effect from 1 February 2020.

Constitutional and statutory framework

[11] It is necessary to set out the constitutional and statutory framework within which the application has to be considered. Section 228 of the Constitution reads as follows:

"Provincial taxes

(1) A provincial legislature may impose—

(a) taxes, levies and duties other than income tax, value-added tax, general sales tax, rates on property or customs duties; and

(b) flat-rate surcharges on any tax, levy or duty that is imposed by national legislation, other than on corporate income tax, value-added tax, rates on property or customs duties.

(2) The power of a provincial legislature to impose taxes, levies, duties and surcharges—

(a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across provincial boundaries, or the national mobility of goods, services, capital or labour; and

(b) must be regulated in terms of an Act of Parliament, which may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered."

[12] The Provincial Tax Regulation Process Act[5] (Process Act) is the legislation envisaged in section 228(2)(b) of the Constitution to regulate the powers of Provincial Legislatures to impose taxes, levies and duties. In section 1, "provincial tax" is defined as "a tax, levy or duty, or a flat-rate surcharge on the tax base of a tax, levy or duty that is imposed by national legislation, which a Province may impose in terms of section 228 of the Constitution". The Process Act entails various intergovernmental processes, which involve the Minister of Finance and other organs of state and interested persons, including the Budget Council and the Financial and Fiscal Commission, both of which are statutory bodies. In the *First Certification* judgment, this Court held that section 228 includes gambling taxes in the Provinces' general taxing powers.[6]

[5] 53 of 2001.

[6] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 442.

[13] Section 228 must be read with section 120 of the Constitution, which specifies the manner in which taxes or levies may be imposed by a Provincial Legislature. In terms of section 119, only a provincial MEC for Treasury may introduce a "money Bill" in a Provincial Legislature. In terms of section 120(1), a Bill is a "money Bill" if it: (a) appropriates money; (b) imposes provincial taxes, levies, duties or surcharges; (c) abolishes or reduces, or grants exemptions from, any provincial taxes, levies, duties or surcharges; or (d) authorises direct charges against a Provincial Revenue Fund.[7]

[14] The upshot of the constitutional and statutory framework outlined above is that an MEC may not introduce a provincial tax by way of regulation, and a provincial Act may not purport to empower an MEC to do so. It is against this framework that the empowering provisions of the NW Gambling Act have to be considered. They read as follows:

Section 84(1)(e):

> "The Responsible Member may, in consultation with the Board, by notice in the *Provincial Gazette* make regulations regarding
>
> . . .
>
> (e) any matter pertaining to gambling levies and fees."

Section 87(1)(a):

> "A holder of a license shall be liable to, at such intervals as may be prescribed, pay a gambling levy which shall be calculated on such basis and at such rate as may be prescribed and be payable in the manner and before the date as prescribed: Provided that different rates may be so prescribed in respect of different types of licenses."

Section 87(3):

[7] See section 120 of the Constitution.

> "The Responsible Member may, with the concurrence of the Member of the Executive Council responsible for finance, by notice in the *Provincial Gazette* make regulations prescribing the matters in respect of which gambling levies and fees shall be payable and the tariffs relating thereto."

[15] Section 3 of the NW Gambling Act provides for the establishment of the Board as a juristic person. Section 4 sets out the powers and functions of the Board, which, among others, include: (a) overseeing gambling activities in the Province; (b) exercising such powers and performing such functions and duties as may be assigned to the Board in terms of the Act or any other law; and (c) inviting applications for licences and considering such applications. The Board also has the power to make and enforce rules for the conduct of its proceedings and hearings, and to consult with any person or employ consultants regarding any matter relevant to the performance of its functions on such terms and conditions as it may determine.

[16] Section 21 of the NW Gambling Act identifies three sources of funding for the Board: (a) monies transferred from the Department of Economic Development, Environment, Conservation and Tourism (Department);[8] (b) annual Board administrative fees and investigation fees charged in respect of applications for licences and registration; and (c) money accruing to the Board from any other service.

Litigation history

High Court

[17] In July 2020, the applicants launched an application in the High Court seeking an order reviewing and setting aside the impugned amendment. In addition, "to the extent necessary" the applicants sought an order declaring the empowering provisions to be unconstitutional and invalid. The applicants contended that the decision to promulgate the impugned amendment was unlawful and reviewable on the following grounds.

[8] This is the current name of the Department which, in the NW Gambling Act, is referred to as the Department of Economic Development and Tourism.

[18] First, the empowering provisions were unconstitutional as they: (a) delegate legislative power to impose provincial taxes or levies to the Provincial Executive, in breach of section 228(1) of the Constitution and the principle of separation of powers (section 228 challenge), and (b) assign "plenary legislative power" from the Legislature to the Executive, without adequate guidance to the Executive as to how the power should be exercised (delegation of plenary power challenge). Second, in the event it was found that the empowering provisions do not authorise the imposition of provincial taxes and levies and thus do not contravene section 228(1) of the Constitution, the applicants asserted that the impugned amendment itself amounts to an unconstitutional imposition of tax. Third, in breach of section 87(3) of the NW Gambling Act, the MEC for Treasury did not concur in the impugned amendment (section 87(3) challenge).

[19] In the alternative, the applicants challenged the amendment by way of a review application. They complained about the lawfulness and fairness of the process by which the amendment was promulgated (review challenge).

[20] In opposition, the respondents relied on a number of technical defences, including: CASA's lack of standing; lack of authority of CASA's deponent to the founding affidavit; and the alleged misjoinder of the Minister of Finance. On substance, the respondents contended that a gaming levy as contemplated in regulation 73 is not a provincial tax as contemplated in the definition of "provincial tax" in section 1 of the Process Act, as it is not imposed by the national Gambling Act or any other national legislation, but by the NW Gambling Act.

[21] In its judgment, the High Court referred to sections 43(b) and 104(1) of the Constitution as vesting legislative authority in the Provincial Legislature.[9] The Court also noted that sections 119 to 124 of the Constitution set out the process for the

[9] *Casino Association of South Africa v MEC for Economic Development, Environment, Conservation and Tourism* unreported judgment of the High Court, Case No: M374/2020 (7 October 2022) (High Court judgment) at para 7.

introduction and passing of provincial legislation. The Court then alluded to the trite principle that the Legislature (including a Provincial Legislature) is generally entitled to delegate subordinate regulatory authority to other bodies, including the Executive, subject to constitutional controls. The Court recited at length the relevant judgments of this Court in this respect.[10] The High Court went on to mention the applicants' assertion that the empowering provisions were at odds with the constitutional controls,[11] that the delegation implicated the applicants' right to property, and recited this Court's jurisprudence on this topic.[12]

[22] The High Court concluded that the empowering provisions are unconstitutional and invalid on the basis that they impermissibly delegated law-making power to the MEC for Tourism. It accordingly directed the respondents to pay the second and third applicants, together with interest, the difference between: (a) the gambling levies that the second and third applicants had paid and would have paid in terms of the impugned amendment, from the date of the amendment to the date of the Court's judgment; and (b) the gambling levies that would have been payable during this period had regulation 73(1) not been amended.[13]

[23] Having reached this conclusion, the High Court did not consider the other grounds raised by the applicants, namely: (a) the section 228 challenge and its alternative challenge; (b) the section 87(3) challenge; or (c) the review challenge.

In this Court

Applicants' submissions

[24] The applicants submit that the High Court's order of invalidity should be confirmed by this Court as the empowering provisions unconstitutionally delegate

[10] Id at para 8.

[11] Id at paras 9-10.

[12] Id at paras 11-13.

[13] Id at para 18.4.

powers to the Provincial Executive to impose taxes and levies in contravention of section 228 of the Constitution. In this regard, the applicants rely on this Court's decision in *Shuttleworth*[14] where it was emphasised that "the dominant purpose" of a statute must be considered to determine whether a charge amounts to a tax or levy.

[25] The applicants argue that various provisions of the NW Gambling Act illustrate that the dominant purpose of the statute is to authorise the raising of revenue for the provincial fiscus, rather than to regulate conduct. Consequently, the applicants contend that the provisions are unconstitutional and must be declared invalid. The applicants further submit that even if this Court were to find that the NW Gambling Act does not unconstitutionally delegate taxing powers to the MEC for Tourism, the provisions nevertheless constitute an impermissible and unconstitutional delegation of plenary law-making power to the Provincial Executive, as held by the High Court. This is because, the applicants argue, it is unconstitutional to assign unfettered discretionary and plenary legislative powers to the Executive, as done by the North West Legislature in this instance in terms of the empowering provisions.

[26] Lastly, the applicants argue that the MEC for Tourism's decisions, including her regulation-making powers, are subject to administrative law prescripts. In particular, the applicants submit that rule-making and regulation-making constitute administrative action and are thus reviewable under the Promotion of Administrative Justice Act[15] (PAJA). To the extent that the impugned amendment is not subject to PAJA, the applicants submit that it is nonetheless subject to the principle of legality. The applicants, accordingly, complain about the lawfulness and fairness of the process by which the amendment was promulgated and as a result argue that the impugned amendment should be reviewed and set aside.

[14] *South African Reserve Bank v Shuttleworth* [2015] ZACC 17; 2015 (5) SA 146 (CC); 2015 (8) BCLR 959 (CC).

[15] 3 of 2000.

Respondents' submissions

[27] The first to third respondents oppose confirmation of the declaration of constitutional invalidity. In the event of this Court confirming the constitutional invalidity of the impugned provisions, the respondents submit that the declaration of invalidity should be suspended for 24 months to enable the Provincial Legislature to remedy the defects.

[28] As a preliminary point, the respondents argue that the applicants were inordinately late in their challenge to the Regulations. The assertion is that the Regulations were initially introduced in 2002. If the imposition of the gambling levies in regulation 73(1) was impermissible, it was so from the outset. Thus, the respondents submit that the review challenge, if brought under PAJA, should have been brought within 180 days of their obtaining knowledge of regulation 73(1) as initially promulgated.[16] Thus, the 180-day limit imposed by section 7 of PAJA had long passed. In the circumstances, the respondents submit that there was a delay in launching the review application. Absent an application in terms of section 9(1) of PAJA for the extension of the period, the High Court had no jurisdiction to hear the matter.

[29] With regard to the substance of the applicants' section 228 constitutional challenge, the respondents' contentions are these. It is the design of the NW Gambling Act, and the Legislature's choice, to create a flexible regulatory scheme that grants the MEC for Tourism wide regulation-making powers in respect of any matter that may be necessary or expedient to prescribe in order to achieve the objectives

[16] Section 7(1) of PAJA provides:

> "(1) any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date—
>
> (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
>
> (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."

of the Act. The provisions of the NW Gambling Act and its purpose would be frustrated were the MEC for Tourism not empowered to impose levies and fees. In particular, the Province's ability to generate revenue would be seriously compromised by the curtailment of the MEC for Tourism's powers. The respondents also contend that section 228(1) only applies to provincial taxes imposed by national legislation. Thus, argue the respondents, the empowering provisions do not constitute a tax, but a regulatory measure.

[30] In answer to the delegation of plenary power challenge, the respondents submit that the imposition of levies and fees by the MEC for Tourism is not plenary in nature in that it is regulated by regulation 73 which is a subordinate piece of legislation promulgated in terms of section 84. The regulation and any amendments to it do not pass, amend or repeal the NW Gambling Act.

The judgment of the High Court

[31] As mentioned, the High Court declared the empowering provisions unconstitutional and invalid. The High Court arrived at the latter conclusion on a misconceived basis. It erroneously thought that the respondents' Counsel had conceded during argument that the empowering provisions unconstitutionally delegated law- making power to the MEC for Tourism. The Judge had misunderstood the nature of the concession made by Counsel.

[32] The concession concerned a different "delegation", namely, that the MEC for Treasury was not entitled to delegate her concurrence powers to the Treasury Head of Department in terms of section 87(3) of the NW Gambling Act. The concession, therefore, had nothing to do with the delegation of plenary powers to the Executive. Other than this erroneous basis for its conclusion, the High Court's judgment does not proffer any reasoning for its conclusion that the empowering provisions are unconstitutional and invalid.

[33] There is another feature of the High Court's judgment that warrants comment. It is the failure by the Court to consider and determine all the constitutional grounds before it – contrary to what has been cautioned in *Jordaan*[17] and in *Spilhaus*.[18] In *Jordaan*, this Court held that where the constitutionality of a provision is challenged on a number of grounds and the court upholds one such ground, it is desirable that it should also express its opinion on the other challenges. This is necessary in the event of this Court declining to confirm the ground upheld by the High Court.[19] And in *Spilhaus*, this Court said "[l]itigants are entitled to a decision on all issues raised, especially where they have an option of appealing further. The court to which an appeal lies also benefits from the reasoning on all issues."[20]

Issues

[34] The issues before this Court are whether:

(a) the applicants unduly delayed in their application;

(b) the empowering provisions and/or the impugned amendment authorise the imposition of taxes or levies in contravention of section 228(1) of the Constitution;

(c) the empowering provisions constitute an unconstitutional delegation of plenary legislative power from the Legislature to the Executive, without adequate guidance to the Executive as to how the power must be exercised;

(d) the MEC for Tourism's decision to amend regulation 73(1) is reviewable under PAJA or the principle of legality; and

(e) the levies paid by the respondents pursuant to the impugned regulation should be repaid.

[17] *S v Jordaan (Sex Workers Education and Advocacy Task Force and others as amici curiae)* [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (CC).

[18] *Spilhaus Property Holdings (Pty) Limited v MTN* [2019] ZACC 16; 2019 (4) SA 406 (CC); 2019 (6) BCLR 772 (CC).

[19] *Jordaan* above n 17 at para 21.

[20] *Spilhaus* above n 18 at para 44.

Respondents' delay objection

[35] I dispose of the respondents' preliminary PAJA delay objection. The applicants do not challenge the gambling levies as they were before the amendment. The respondents' objection would have some force had the applicants sought to impugn the pre-amendment regulation 73. The applicants' challenge is limited to the regulation post-amendment. The impugned amendment was promulgated on 24 January 2020. The application was launched on 17 July 2020, well within the 180-day period prescribed in section 7 of PAJA. There is therefore no merit in this objection.

Section 228 challenge

Is the NW Gambling Act, as a provincial Act, exempt from complying with the Process Act?

[36] Before I consider whether the empowering provisions and/or the impugned amendment authorise the imposition of taxes or levies in contravention of section 228(1), I consider an issue related to section 228. It is the respondents' contention that a "provincial tax" is confined to a tax imposed by national legislation, so that the NW Gambling Act, being a provincial Act, did not need to comply with the Process Act. The definition of "provincial tax" in the Process Act is "a tax, levy or duty, or a flat-rate surcharge on the tax base of a tax, levy or duty that is imposed by national legislation, which a Province may impose in terms of section 228 of the Constitution". Based on this definition, the respondents argue that a "provincial tax" is confined to a tax imposed by national legislation, so that the NW Gambling Act, being a provincial Act, did not need to comply with the Process Act.

[37] This contention is unsustainable. Section 228 of the Constitution envisages that a Provincial Legislature may impose two forms of provincial taxes, namely (a) taxes, levies and duties (other than income tax, value-added tax, etc.); and (b) flat-rate surcharges on any tax, levy or duty that is imposed by national legislation. Therefore, the reference to "national legislation" in section 228(1) refers to national legislation

which imposes a tax, levy or duty and upon which a provincial flat-rate surcharge is imposed by a Province. In other words, section 228(1)(b) envisages the imposition of a surcharge by a Provincial Legislature upon a national tax, levy or duty.

[38] The contention that the reference to "imposed by national legislation" in the Process Act's definition of "provincial tax" means that a provincial tax is confined to a tax, levy or duty imposed by the national legislation has no merit. First, it would mean that section 228(1) of the Constitution envisages the imposition of a provincial tax by a Provincial Legislature but only where the tax is imposed by national legislation. That cannot be, as a Provincial Legislature has no authority to enact national legislation.

[39] In addition, such an interpretation would permit Provinces to impose taxes and levies without limitation, and in particular, without complying with the requirements in section 228(2) of the Constitution or the Process Act, provided they do so by way of provincial legislation. But the limitations on "the power of a provincial legislature" to impose taxes, levies, duties and surcharges is expressly provided for in section 228(2), pursuant to which the Process Act is enacted. What is more, such an interpretation would render section 228(1)(a) nugatory.

[40] The definition of "provincial tax" in the Process Act is intended to give effect to section 228(1) of the Constitution. Thus, although the definition of "provincial tax" is not sub-categorised as (a) and (b), it should be read – in line with section 228(1) of the Constitution – as follows: "(a) a tax levy or duty; or (b) a flat-rate surcharge on the tax base of a tax, levy or duty that is imposed by national legislation". Section 228(1)(b) of the Constitution, like the second part of the definition of "provincial tax", is a flat- rate surcharge imposed by a Province on top of any tax, levy or duty imposed by national legislation. The reference to national legislation does not apply to the type of taxes and levies envisaged by section 228(1)(a) of the Constitution and in the first part of the definition of "provincial tax".

[41] If the NW Gambling Act purports to empower the MEC for Tourism – a member of the Provincial Executive – to impose a provincial tax or levy within the meaning of section 228(1)(a) and within the meaning of the first part of the definition of "provincial tax" in the Process Act, such provision would thus be in violation of the Constitution and the Process Act. It is therefore necessary to consider whether regulation 73(1) constitutes a provincial tax, and whether the NW Gambling Act purports to authorise the imposition of a provincial tax, within the meaning of the Constitution and the Process Act. It is to these questions I now turn.

Do the impugned provisions of the NW Gambling Act authorise the imposition of a tax and does regulation 73(1) impose a tax?

[42] It is settled that the power of taxation and appropriation of government funds are reserved for Legislatures, and that the Executive has no power to raise taxes itself. This Court in *Fedsure*[21] pointed out that when the Legislature exercises the power to raise taxes or rates or determines appropriations to be made out of public funds, "it is exercising a power that under our Constitution is a power peculiar to elected legislative bodies. It is a power that is exercised by democratically elected representatives after due deliberation".[22]

[43] This Court in *Shuttleworth* affirmed the principle and expanded on its rationale:

> "[T]he manner and the extent to which national taxes are raised and appropriated must yield to the democratic will as expressed in law. It is the people, through their duly elected representatives, who decide on the taxes that residents must bear. An executive government may not impose a tax burden or appropriate public money without due and express consent of elected public representatives. That authority, and indeed duty, is solely within the remit of the Legislature. This accords with this Court's decision in *Fedsure*, as well as the Canadian Supreme Court decision in *Eurig Estate*. Both cases hold that the primary object of the limits on how to raise national taxes or appropriate

[21] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).

[22] Id at para 45.

> revenue, as our Constitution does in relation to a money Bill, is to ensure that there is "no taxation without representation". It is plain that in our jurisdiction a decision or law that purports to impose a tax will be invalid to the extent of its inconsistency with the limits imposed by the Constitution or other law."[23] (Footnotes omitted.)

[44] Much as the power of taxation by the national government is constitutionally regulated, so it is in respect of the provincial sphere of government. Section 226(1) of the Constitution establishes, for each Province, a Provincial Revenue Fund into which all revenues raised or received by the provincial government in question must be paid. In terms of section 226(2), money may be withdrawn from a Provincial Revenue Fund only: (a) in terms of an appropriation by a provincial Act; or (b) as a direct charge against the Provincial Revenue Fund, when it is provided for in the Constitution or a provincial Act.

[45] An evaluation of our jurisprudence on whether a charge is a tax as contemplated by the Constitution or merely a regulatory charge reveals that this is never an easy task. In *Shuttleworth* this Court grappled with that question. The issue there was whether a particular amount charged by the Reserve Bank as an exit charge upon a resident transferring capital out of this country was a tax or a regulatory charge. After an excursus of local and foreign authorities, writing for the majority, Moseneke DCJ formulated the test as follows:

> "So, aside from mere labels, the seminal test is whether the primary or dominant purpose of a statute is to raise revenue or to regulate conduct. If regulation is the primary purpose of the revenue raised under the statute, it would be considered a fee or a charge rather than a tax. The opposite is also true. If the dominant purpose is to raise revenue then the charge would ordinarily be a tax. There are no bright lines between the two. Of course, all regulatory charges raise revenue. Similarly, 'every tax is in some measure regulatory'. That explains the need to consider carefully the dominant purpose of a statute imposing a fee or a charge or a tax. In support of this

[23] *Shuttleworth* above n 14 at para 42.

> basic distinguishing device, judicial authorities have listed non-exhaustive factors that will tend to illustrate what the primary purpose is."[24]

[46] The Deputy Chief Justice went on to consider a number of cases, which he said give "open-ended but helpful guidelines" on determining the dominant purpose of a particular piece of legislation. Those guidelines must be weighed carefully on a case- by-case basis to arrive at a correct decision.[25] Those cases included *Permanent Estate*,[26] *Israelsohn*,[27] *I L Back*,[28] *Maize Board*,[29] and *Gaertner*.[30]

[47] In *Permanent Estate*, a tax was said to be identifiable by the fact that money is paid into a general revenue fund for general purposes and no specific service is given in return for payment.[31] In *Israelsohn*, the Appellate Division held that the charge in question was a tax because it was subject to the general machineries of tax assessment and collection.[32] In *I L Back*, there was a fee rather than a tax, because its purpose was to empower the Minister to impose a fee for services and facilities he had to provide.[33] In *Maize Board*, the measure was found not to be a tax because it was "not imposed on the public as a whole or on a substantial sector thereof" and its proceeds were not used for public benefit, but largely to cover administrative costs.[34] In *Gaertner*, this Court considered the primary and secondary functions of customs and excise duties and held

[24] *Shuttleworth* above n 14 at para 48.

[25] Id at para 52.

[26] *Permanent Estate and Finance Co Ltd v Johannesburg City Council* 1952 (4) SA 249 (W).

[27] *Israelsohn v Commissioner for Inland Revenue* 1952 (3) SA 529 (A).

[28] *The Master v I L Back* 1983 (1) SA 986 (A).

[29] *Maize Board v Epol (Pty) Ltd* [2008] ZAKZHC 99; 2009 (3) SA 110 (D).

[30] *Gaertner v Minister of Finance* [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC).

[31] *Permanent Estate* above n 26 at 259.

[32] *Israelsohn* above n 27 at 539F-G.

[33] *I L Back* above n 28 at 1002-1003.

[34] *Maize Board* above n 29 at para 27.

that, although the regulatory aspect of the duties served an important public function, the statute in question was "essentially fiscal".[35]

[48] More recently, the Supreme Court of Appeal had occasion to consider the issue in *Randburg Management District*.[36] It held that the dominant purpose of a municipal levy payable by landowners to the municipality's general revenue fund for general public use and to enable provision of municipal services, was in the nature of a tax or levy. This was because the levy had as its dominant purpose the raising of revenue to fund the provision of services by the municipality.[37] In *Pioneer Foods*,[38] the Western Cape Division of the High Court held that a tariff on wheat imports payable under the Customs and Excise Act[39] had as its main function the imposition of taxes paid into a general revenue fund.[40]

[49] In *Shuttleworth*, although the Deputy Chief Justice refers to the "dominant purpose of a statute", a careful consideration of the judgment reveals that, in coming to the conclusion that the exit charge imposed pursuant to the impugned exchange control legislation was not a tax, the dominant purpose of the exit charge itself was determinative.[41]

[50] This is consistent with the position in Canada, where a "sufficient nexus" is required between a governmental levy with the characteristics of a tax, and a regulatory scheme of a statute, to determine whether a charge is regulatory, as opposed to a tax.[42]

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[35] *Gaertner* above n 30 at paras 54-5.

[36] *Randburg Management District v West Dunes Properties* [2015] ZASCA 135; 2016 (2) SA 293 (SCA).

[37] Id at para 29.

[38] *Pioneer Foods (Pty) Ltd v Minister of Finance* [2017] ZAWCHC 110; 2019 (1) SA 273 (WCC).

[39] 91 of 1964.

[40] Id at para 21.

[41] *Shuttleworth* above n 14 at paras 48, 53, 56, 57 and 60.

[42] *In Reference re Greenhouse Gas Pollution Pricing Act* 2021 SCC 11 (*Greenhouse Gas*) at para 213. See also *Westbank First Nation v British Columbia Hydro and Power Authority* [1999] 3 SCR 134 (*Westbank*) at para 44 and *620 Connaught Ltd v Canada (Attorney General*) 2008 SCC 7; [2008] 1 SCR 131 at para 24.

In *Greenhouse Gas*, the Canadian Supreme Court reiterated the "two-step approach for determining whether a governmental levy is connected to a regulatory scheme"[43] as set out in its judgment in *Westbank*:[44]

> "The first step is to identify the existence of a relevant regulatory scheme. If such a scheme is found to exist, the second step is to establish a relationship between the charge and the scheme itself."[45]

[51] As also pointed out in *Greenhouse Gas*, in every case, the court must scrutinise the scheme in order to identify the primary purpose of the levy on the basis of the *Westbank* test.[46]

[52] The upshot of the above is this. The fact that the dominant purpose of a statute is regulatory is not determinative of the enquiry. It must further be determined whether the impugned charge has a sufficient nexus with the regulatory scheme of the statute in question. This analysis might reveal that, even though the dominant purpose of the statute as a whole is regulatory, the dominant purpose of the impugned provision is not part of that regulatory scheme but is instead the imposition of a tax. With this in mind, I turn to the NW Gambling Act.

Does the NW Gambling Act provide for a regulatory scheme?

[53] The NW Gambling Act's long title says that it is enacted "to provide for the regulation of gambling activities in the Province". Chapter II makes provision for the establishment of the Board, with its powers and functions mainly aimed at regulating gambling in the Province. Chapter III deals with licensing in general, and Chapter IV regulates hearings, investigations and enquiries relating to gambling. Chapter V sets out miscellaneous provisions pertaining to licensing in general, including the power of

[43] *Greenhouse Gas* Id at para 213.

[44] *Westbank* above n 42 at para 43.

[45] Id at para 44.

[46] *Greenhouse Gas* above n 42 at para 218.

the Board to suspend and revoke licences of licensees that have overdue levies. Chapter XI makes provision for the appointment of inspectors, as well as setting out their powers and functions.

[54] These are strong indicators that the dominant purpose of the NW Gambling Act as a whole is regulatory. It authorises the Board to regulate gambling in the Province. I therefore conclude that the primary or dominant purpose of the NW Gambling Act is regulatory in nature.

Is there a sufficient nexus between the gambling levies and the regulatory scheme of the NW Gambling Act?

[55] In *Westbank,* it was said that the required nexus with the scheme will exist "where the charges themselves have a regulatory purpose".[47] I consider six aspects in respect of the gambling levies.

[56] First, the preamble of the NW Gambling Act says that "gambling provides a significant source of public revenue for the Province" and that "the levying of such taxes has to be dealt with in terms of the Provincial Legislation". This clearly shows that the purpose of imposing the gambling levies is more than the regulation of gambling by funding the Board.

[57] Second, section 21 provides that the Board is funded by monies transferred from the Department headed by the MEC for Tourism. Thus, the Board is not directly funded by gambling levies. The Department therefore has a discretion to decide upon the amount of funds to allocate to the Board from time to time.

[58] Third, section 87(1)(f) provides that levies "shall be paid to the Board for the benefit of the Provincial Revenue Fund", while section 87(2) provides that gambling levies "shall be a debt due to the Provincial Administration". It is worth reiterating here

[47] *Westbank* above n 42 at para 44.

that section 226(1) of the Constitution establishes a Provincial Revenue Fund for each Province into which all revenues raised or received by the provincial government in question must be paid.

[59] Fourth, section 89(1) describes the gambling levies as a tax, by empowering the MEC for Tourism to enter into agreements with the provincial government to regulate and coordinate the levying and collection of "gambling levy or any similar tax".

[60] Fifth, the gambling levies are imposed upon the casino licence holders and are paid into a general revenue fund – the Provincial Revenue Fund – for general purposes of benefitting the population in the Province as a whole.[48] The revenue generated from the gambling levies is clearly meant to support the provincial government's activities in general.

[61] Sixth, there is no dispute that the gambling levies generate significant revenue for the Province. The levies received by the Board from licensees, and paid across to the Provincial Revenue Fund, far exceed the grants received by the Board from the Provincial Government, and a sizeable portion of the revenue generated by means of gambling levies and taxes is thus used for purposes other than funding the operations of the Board. To illustrate the point, in the 2016 and 2017 financial years, the amount collected by the Board and paid over to the Provincial Revenue Fund exceeded the amounts paid by the Department to the Board by more than R70 million and R40 million respectively.

[62] In my judgment, the above serve as ample evidence that the dominant purpose of the impugned provisions of the NW Gambling Act – sections 84(1)(d), 87(1)(a) and 87(3) – and of regulation 73(1) has nothing to do with regulating gambling in the Province. It is well-established that influencing behaviour is a valid purpose for a regulatory charge. The gambling levies imposed by regulation 73(1) are not aimed at,

[48] Section 87(1)(f) of the NW Gambling Act.

or connected to, influencing or altering any behaviour. Rather, they are revenue- generating charges, whose purpose is to raise funds for the Province. This is not connected to the regulatory scheme of the NW Gambling Act, and thus, the gambling levies cannot be characterised as regulatory in nature. Despite the dominant purpose of the statute being regulatory, the impugned provisions stand out with strong characteristics of a tax. According to Christians et al:[49]

> "Existing Canadian jurisprudence does not indicate whether there is a restriction on surplus net revenues when the role of a fee is to advance a regulatory purpose. . . . However, significant revenue could be 'a strong indication that the levy was in pith and substance a tax'. In that case, a court would likely consider whether the fee was in substance a colourable device for raising revenue for general purposes."[50] (Footnotes omitted.)

[63] In the present case, there is indubitably significant revenue to the Province generated by the gambling levies imposed by regulation 73(1). It is common cause on the papers that the gambling levies are raised as general revenue for the Province's general service delivery obligations. For example, the Board's Annual Report for the year 2016/2017 shows that the taxes and levies collected by the Board for the 2016 and 2017 financial years totalled R120 784 869 and R138 619 580, respectively. The report also shows that similar amounts, i.e. R119 799 149 and R139 001 688, respectively, were transferred from the Board to the Provincial Revenue Fund for those financial years. This is also evident in the Board's Annual Reports for the 2014/2015; 2015/2016 and 2018/2019 financial years.

[64] For these reasons, I conclude that there is no sufficient nexus between (a) the gambling levies authorised by the impugned provisions of the NW Gambling Act and imposed by regulation 73(1) on the one hand and (b) the regulatory scheme of the

[49] Christians, Hewson and Jarda "The Pan-Canadian Carbon Tax: A Constitutional Perspective" in Salassa Boix *Aspectos Constitucionales Controvertidos De La Tributación Ambiental / Controversial Constitutional Aspects of Environmental Taxation* (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3099588.

[50] Id at 26.

NW Gambling Act on the other hand. It follows that the gambling levies are constitutionally invalid.

[65] The order of the High Court declaring the empowering provisions unconstitutional and invalid must therefore be confirmed. Having reached this conclusion, it is not necessary to consider the review challenge, or whether the empowering provisions constitute an impermissible delegation of plenary powers, as found by the High Court.

Remedy

[66] What remains is to consider the remedy, in particular, whether Peermont and Sun International are entitled to the repayment of the gambling levies unlawfully imposed and paid pursuant to the impugned amendment. It is common cause that the second and third applicants paid the gambling levies under protest. Once the declaration of unconstitutionality and invalidity of the empowering provisions is confirmed, the impugned amendment must be deemed as if it was never promulgated. It must be set aside as a natural consequence. Peermont and Sun International thus paid more in respect of the gambling levies than was legally required.

[67] Accordingly, they claim repayment of the difference between the levies paid pursuant to the impugned amendment and the levies that would have been paid had the impugned amendment not been promulgated. Their claim is based on the *condictio indebiti* (an action in terms of which a plaintiff may recover what she or he has paid a defendant by mistake). In *First National Industrial Bank,*[51] the Appellate Division recognised that the *condictio indebiti* is not confined to the recovery of monies paid involuntarily because of a mistake, but that it is "also available when the payment (or indeed any performance), although deliberate, perhaps even advised, was nevertheless

[51] *Commissioner for Inland Revenue v First National Industrial Bank Ltd* [1990] ZASCA 49; 1990 (3) SA 641 (A).

involuntary because it was effected under pressure and protest".[52] In the present case, it is common cause that Peermont and Sun International paid the unlawful gambling levies expressly under protest, and only because of the severe consequences attached to non-payment of the levies, including the revocation of a license.[53]

[68] In addition to the *condictio indebiti* as a basis for repayment, Peermont and Sun International also invoke the power of this Court to order a just and equitable remedy under section 172(1)(b) of the Constitution. They are correct. Just and equitable relief should generally be aimed at correcting or reversing the consequences of unconstitutional action. In *Allpay (No 2)*,[54] this Court articulated what it referred to as the "corrective principle" as follows:

> "Logic, general legal principle, the Constitution, and the binding authority of this Court all point to a default position that requires the consequences of invalidity to be corrected or reversed."[55]

[69] Applying that principle to the present case, the consequences of invalidity can only be corrected if the gambling levies paid pursuant to the unlawful amended regulation 73(1) are repaid to Peermont and Sun International. Repayment is a just and equitable order under section 172(1)(b) of the Constitution. However, in the context of this case, not all the taxes and levies imposed and paid in terms of the Regulations are repayable. The reason is that Peermont and Sun International did not seek to impugn the taxes and levies imposed in terms of the empowering provision other than those imposed pursuant to the January 2020 amendment. Accordingly, it is only with effect from that date that gambling levies paid by them should be reckoned. In other words,

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[52] Id at 647C-D.

[53] Section 88 provides for penalties and interest for the failure to pay gambling levies or fees when due. It makes any licence holder who fails to pay levies or fees as prescribed liable for a penalty of 1% per day up to a maximum of 100%, plus interest at the prescribed rate. It also empowers the Board to revoke or suspend the licence of any licensee whose unpaid levies or fees have been overdue for a period of 45 days.

[54] *Allpay (No 2) Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC).

[55] Id at para 30.

the declaration of invalidity does not affect the regulations as they existed before the promulgation of the impugned amendment.

Costs

[70] The applicants have succeeded in having the High Court's order of invalidity confirmed. It is the norm to award costs in favour of a successful applicant for confirmation.[56] There is no reason in these proceedings why the respondents should not be ordered to pay the applicants' costs.

Order

[71] In the result, the following order is made:

1. The declaration of constitutional invalidity made by the High Court of South Africa, North West Division, Mahikeng, is confirmed in the terms set out in paragraph 2 of this order.

2. Sections 84(1)(e), 87(1)(a), and 87(3) of the North West Gambling Act 2 of 2001 are declared invalid to the extent that they purport to authorise the Member of the Executive Council for Economic Development, Environment, Conservation and Tourism, to impose gambling levies as a tax as contemplated in section 228(1)(a) of the Constitution.

3. The declaration of invalidity takes effect from 23 January 2020.

4. The first and second respondents, jointly and severally, are ordered to pay the second and third applicants the difference between:

   (a) the gambling levies that the second and third applicants have paid pursuant to regulation 73(1) of the North West Gambling Regulations 2002, from 23 January 2020 to the date of this judgment; and

[56] *Gaertner* above n 30 at para 87.

(b) the gambling levies that would have been payable during the period mentioned above, had regulation 73(1) not been amended.

5. The first and second respondents, jointly and severally, are ordered to pay interest on the amounts referred to in paragraph 4 above, as follows:

(a) in respect of the gambling levies already paid by the second and third applicants by the date on which the application in the High Court was served, such interest to be at the prescribed rate from the date of service of the application on the respondents to the date of payment;

(b) in respect of the gambling levies not yet paid by the second and third applicants by the date on which the application in the High Court was served, such interest to be paid at the prescribed rate from the date of each payment by the applicants.

6. The first, second and third respondents, jointly and severally, are ordered to pay the first, second, and third applicants' costs, including the costs of two counsel.

For the Applicants:	F Snyckers SC and M Mbikiwa instructed by Webber Wentzel Attorneys
For the First to Third Respondents:	L Montsho-Moloisane SC, K T Bokaba and Z Mahamba instructed by State Attorney