CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 31/05

PHUMELELA GAMING AND LEISURE LIMITED	Applicant
versus	
ANDRÉ GRÜNDLINGH	First Respondent
ULRICH OSMUND SCHÜLER	Second Respondent
THE MINISTER OF TRADE AND INDUSTRY	Third Respondent
THE NATIONAL GAMBLING BOARD	Fourth Respondent
THE GAUTENG GAMBLING BOARD	Fifth Respondent
MEC, FINANCE AND ECONOMIC AFFAIRS, GAUTENG	Sixth Respondent

Heard on : 15 November 2005

Decided on : 18 May 2006

JUDGMENT

LANGA CJ:

Introduction

[1] A person who wishes to wager money on the outcome of a horserace may choose to place a bet with a bookmaker or on a totalisator. The two systems are different in that the bookmaker quotes odds in advance while the totalisator does not

fix odds in advance but pays out "dividends" in proportion to the amount of money wagered. To the extent that both rely for their business on the betting money of the public, they are in competition. Both operate by virtue of licences issued by the provinces and their activities are regulated by provincial legislation[1] within the framework of national legislation[2] and the Constitution.

[2] This case concerns a delictual claim by a totalisator against two bookmakers on the grounds that they are exploiting its dividend results in a manner that constitutes unlawful competition.

The parties

[3] The applicant is Phumelela Gaming and Leisure Limited (Phumelela), a public company which has its place of business in Turffontein, Johannesburg. It is licensed to operate totalisator betting in seven of the nine provinces and conducts horseracing at seven of the twelve racecourses in South Africa. Phumelela applies for leave to appeal against the judgment of the Supreme Court of Appeal. It also seeks direct access to this Court to challenge certain provisions of the National Gambling Act 7 of 2004 (the Act).

[1] The North West Gambling Act 2 of 2001; the Eastern Cape Gambling and Betting Act 5 of 1997; the Northern Cape Gambling and Racing Act 5 of 1996; the Northern Province Casino and Gaming Act 4 of 1996; the Free State Gambling and Racing Act 6 of 1996; the Western Cape Gambling and Racing Law 4 of 1996; the Gauteng Gambling Act 4 of 1995; the Horse-Racing and Betting Ordinance 24 of 1978 (Mpumalanga); the Regulation of Racing and Betting Ordinance 28 of 1957 (KwaZulu-Natal).

[2] The National Gambling Act 7 of 2004.

[4] Mr André Gründlingh and Mr Ulrich Osmund Schüler, the first and second respondents respectively, conduct business as bookmakers (they will be referred to collectively in this judgment as "the bookmakers"). The third respondent is the Minister of Trade and Industry (the Minister). The fourth and fifth respondents are the National Gambling Board and the Gauteng Gambling Board respectively. The sixth respondent is the Gauteng Member of the Executive Council for Finance and Economic Affairs.

The dispute

[5] Totalisators work on the basis that all the money placed on any particular betting event is pooled and, after deductions for administration fees and taxes, divided equally among the winners. The amount of money paid out to an individual winner therefore depends on the size of the pool and the number of winning bets.

[6] The totalisator operated by Phumelela is a national computerised system for betting on horseracing and other sports, operating on and off racecourses throughout the country. Phumelela currently has approximately 2600 terminals at 220 branches throughout the country, which are linked to a central computer at Phumelela's head office. Bets can also be placed by telephone or on the internet. The results of the races and the totalisator dividends to be paid out are publicised widely by Phumelela at the racecourse, on television, over a phone-in service, in the press and on certain radio channels.

[7] A bookmaker, on the other hand, fixes odds in advance. A bookmaker may take "fixed odds bets", "starting price bets" and "open bets", depending on what the provincial legislation and the bookmaker's individual licence permits. To determine a "fixed odds bet", a bookmaker, prior to the race, calculates contingencies on a particular event happening. With an "open bet" no fixed odds are agreed upon at the time that the bet is laid, but the amount to be paid out is dependent on other contingencies. "Starting price bets" are a sub-category of open bets and entail an on-course bookmaker offering the odds that are the average of all the fixed-odds at the start of the race.

[8] Apart from a simple bet on which horse will win a race, there are the so-called "exotic bets". These are more complex in that punters must predict, for example, the winner of four or six consecutive horse races, or the first to third or first to fourth places in a particular race in the correct order. As these results are more difficult to predict, winners are fewer and dividends larger. This in turn makes these bets attractive to punters.

[9] Phumelela approached the Pretoria High Court seeking an interdict, which the High Court granted, prohibiting the bookmakers from unlawfully taking bets which were not "fixed odds bets", and from engaging in conduct that amounts to unlawful competition by using Phumelela's published results or dividends derived from its totalisator pool, as a basis on which to offer or take bets.

[10] When the matter came before the Supreme Court of Appeal on appeal by the bookmakers,[3] the decision of the High Court was reversed on both issues. On the first, the unanimous finding of the Supreme Court of Appeal was that the "exotic bets" that formed the subject matter of the complaint were "fixed odds bets", which meant that bookmakers were perfectly entitled to deal with them. This aspect has not been pursued any further by Phumelela and no issue is made of it in these proceedings. On the second issue, the Supreme Court of Appeal held by a majority that the conduct of the bookmakers was not wrongful and did not constitute the delict of unlawful competition. The application to appeal to this Court is concerned only with this issue.

The Supreme Court of Appeal

[11] In its majority judgment, the Supreme Court of Appeal accepted that Phumelela "and its predecessors have developed a business system of such reliability and sophistication that it has earned the trust of the betting public", and that the "resulting income potential is part of its goodwill and as such a valuable asset".[4] The majority in the Supreme Court of Appeal held that Phumelela's business system constitutes property and also inclined to the view that the bookmakers, in the course of their business, "appropriate the results of [Phumelela's] endeavour to calculate pay-out dividends, something that is fundamental to the operation of its totalisator business."[5]

[3] *Gründlingh and Others v Phumelela Gaming and Leisure Ltd* 2005 (6) SA 502 (SCA).

[4] Id per Farlam et Conradie JJA at para 33.

[5] Id at para 34.

[12] The Court saw the test for wrongfulness in the context of an action based on unlawful competition as based on public policy and the legal convictions of the community, which would ordinarily include "not only right-thinking members of the community who might be expected to hold a view on the particular topic but also . . . those involved in the industry".[6] In the application of the test, the Court considered that factors which come into play include:

> "an inherent sense of fairplay and honesty; the importance of a free market and strong competition in our economic system; the question whether the parties concerned are competitors; [and] conventions with other countries, like the Convention of Paris".[7]

[13] Whilst the majority judgment accepted that legislative provisions are expressions of policy, it held that they may, and in the Court's view they do in this case, give expression to the community's legal convictions.[8]

[14] After reviewing legislative enactments[9] on the issue from as far back as 1961, the majority of the Court concluded that, "apart from a short interval of proscription enacted by the Gauteng Provincial Legislature", legislation in the Transvaal (more recently in Gauteng) and nationally did not consider it offensive for bookmakers to

[6] Id at para 40, citing *Lorimar Productions Inc and Others v Sterling Clothing Manufacturers (Pty) Ltd* 1981 (3) SA 1129 (T) at 1153.

[7] Id at para 40, quoting *Lorimar* above n 6 at 1153.

[8] Id at para 40.

[9] Reference was made to (1) chapter IV of the Betting (Horse Racing) Regulations in Administrator's Notice 2944, Official Gazette Extraordinary, Province of Transvaal dated 29 December 1961; (2) the Horse-Racing and Betting Regulations published under the Administrator's Notice 1916 of 1978 dated 22 December 1978 (Mpumalanga): these regulations were made under the Horse-Racing and Betting Ordinance No 24 of 1978; (3) Regulation 13 of the regulations (Provincial Notice 244 of 1992 dated 17 September 1992) which were promulgated in terms of the (repealed) Regulation of Racing and Betting Ordinance 28 of 1957 (Kwazulu-Natal); (4) the Gauteng Gambling Act 4 of 1995; (5) Section 1(e) of Gauteng Gambling and Betting Amendment Act 1 of 1998; (6) section 1(a) of the Gauteng Gambling Amendment Act 6 of 2001; (7) the National Gambling Act 7 of 2004.

make use of totalisator dividends in calculating the payout on exotic bets. The Court observed that for many years before 1995, such conduct by bookmakers was expressly permitted and that in terms of the national Act presently in force it is lawful.[10]

[15] The Court took the view that once it was accepted that the practice was legislatively sanctioned and had been so for a long time, it could never be said to be unfair or dishonest. It reasoned that it was unlikely that the legal convictions of the community would, after a long period where a practice was accepted and legislatively sanctioned, suddenly turn around and frown upon such practice.[11] It held that the conduct in question was neither unfair nor dishonest and accordingly did not amount to unlawful competition.

[16] In a comprehensive and careful minority judgment, Comrie AJA disagreed with the majority finding, his view being that the competition was unlawful.[12]

[17] I pause here to note that the national Act referred to in the reasoning of the Supreme Court of Appeal is the National Gambling Act 7 of 2004. The Act was not in force when the application for an interdict was entertained by the High Court. It only came into force a few months before the matter was heard by the Supreme Court of Appeal.

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[10] *Gründlingh* above n 3 at para 39.

[11] Id at para 42.

[12] Id at para 30.

The application before this Court

[18] In this Court, Phumelela challenges the finding of the Supreme Court of Appeal that the conduct of the bookmakers is not wrongful. Phumelela contends that the Supreme Court of Appeal erred in that it relied on the provisions of the Act as well as various provincial enactments but omitted to have any regard to the provisions of the Constitution when it embarked on its investigation of the legal convictions of the community (the boni mores). More specifically, Phumelela contends that the majority judgment of the Supreme Court of Appeal failed to develop the common law, as envisaged in section 39(2) of the Constitution, which requires every court to promote "the spirit, purport and objects of the Bill of Rights" when interpreting legislation, and when developing the common law or customary law.[13] It was contended in the alternative that the Supreme Court of Appeal developed the common law of unlawful competition in a manner which results in the unlawful appropriation of Phumelela's intellectual property, in breach of section 25 of the Constitution.[14]

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[13] The text of section 39(2) reads:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[14] Section 25 reads:

> "(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
> (2) Property may be expropriated only in terms of law of general application—
> (a) for a public purpose or in the public interest; and
> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
> (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
> (a) the current use of the property;
> (b) the history of the acquisition and use of the property;

[19] It bears noting that the application made to this Court is somewhat different in focus to the case brought before the High Court and the Supreme Court of Appeal. In those Courts, Phumelela's case was that the bookmakers should be prohibited from using Phumelela's results or dividends as a basis on which to offer bets because, as it claimed, this constituted the delict of unlawful competition. In this Court, however, Phumelela based its case on what it claimed was the failure of the Supreme Court of Appeal to determine the wrongfulness of the conduct of the bookmakers by reference to the provisions of section 39(2) of the Constitution. It was submitted that had the Supreme Court of Appeal developed the common law as it ought to have, it would have recognised Phumelela's goodwill as protectable incorporeal property meriting constitutional protection under section 25(1) of the Constitution.

(c) the market value of the property;
(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
(e) the purpose of the expropriation.

(4) For the purposes of this section—
(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6)."

[20] As already stated, Phumelela also applies for direct access to this Court to enable it, "in so far as this may be necessary", to challenge the constitutional validity of certain provisions of the Act, in particular the definition of "open bets" contained in the Act.

[21] The bookmakers oppose the applications and the contentions advanced by Phumelela. No relief is sought against the third, fourth, fifth and sixth respondents who, save to a limited extent only by the fourth respondent,[15] offered no opposition to Phumelela's challenge to the judgment of the Supreme Court of Appeal.

The questions facing this Court

[22] It will be convenient for clarity's sake to summarise the questions which present themselves as a result of Phumelela's request for leave to appeal. The first relates to the jurisdiction of the Court. In terms of section 167(3)(b) of the Constitution, the Court "may decide only constitutional matters and issues connected with decisions on constitutional matters". Once the jurisdiction of this Court has been established, the following further questions arise: (1) Is it in the interests of justice for leave to appeal to be granted in this case on the issue of the development of the common law of unlawful competition? The question arises because this was not raised or argued in both the High Court and the Supreme Court of Appeal and is raised for the first time in this Court. If the answer to this is in the negative, that is the end of the matter and the application based on this ground must be refused. If the answer is

[15] The fourth respondent has submitted "conditional" written and oral argument.

in the affirmative, the next question is: (2) Ought the Supreme Court of Appeal to have developed the common law in terms of section 39(2) of the Constitution? Alternatively, in purporting to develop the common law, did it do so inappropriately, in a manner which results in the arbitrary deprivation of Phumelela's intellectual property in breach of section 25 of the Constitution? (3) Should the conditional application for direct access to challenge the definition of "open bets" in the Act be granted?

Is there a constitutional issue?

[23] The Supreme Court of Appeal is criticised by Phumelela for an alleged failure to have regard to the spirit, purport and objects of the Bill of Rights in the application of the test for wrongfulness. The application of the Bill of Rights to the current set of facts is a constitutional issue.[16] This Court accordingly has the jurisdiction to deal with the application for leave to appeal. The next question to be considered is whether it is in the interests of justice for leave to appeal to be granted on the issue.

Should the application for leave to appeal be granted?

[24] Whether or not to grant an application for leave to appeal is a matter which is in the discretion of the Court. Of crucial importance is what is in the interests of justice. Factors which may be relevant to the enquiry include: the circumstances of the parties, the nature of the rights involved, the question whether the issue has been decided by

[16] See for example *S v Basson* 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) at para 97; *K v Minister of Safety and Security* 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) at para 18; *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 14; *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 4.

the Supreme Court of Appeal, the question whether or not anyone else might be harmed by the relief sought and the prospects of success.[17] This last-mentioned factor requires Phumelela to show that there is a reasonable prospect that the Court will reverse or materially alter the judgment sought to be appealed against. This Court has however held that although the prospects of success are an important factor, they are not necessarily decisive.[18] Ultimately, the enquiry involves a judgment based on the particular circumstances of each case.

[25] Phumelela seeks to invoke the development of the common law in terms of section 39(2) of the Constitution. This Court has on a number of occasions pointed out that when the development of the common law is in issue it is preferable to have the benefit of a well-considered judgment from the Supreme Court of Appeal[19] in order to avoid acting as a court of first and final instance.[20] Quite clearly, it is also important that litigants should themselves raise the matter when they believe that the common law is in need of development. This should, as far as possible, be raised at the outset of litigation for the benefit of both the court and the opposing litigant.

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[17] See *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at paras 25-29; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and Others* 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 3; *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3; *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32; *President of the Republic of South Africa and Others v United Democratic Movement (African Christian Democratic Party Intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* 2003 (1) SA 472 (CC); 2002 (11) BCLR 1164 (CC) at para 32.

[18] See *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12; *National Education* above n 17 at paras 25-29; *Fraser v Naudé and Others* 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 10.

[19] *Carmichele* above n 16 at paras 58-59.

[20] Id at paras 50-55; *Bruce and Another v Fleecytex* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 8; *S v Bequinot* 1997 (2) SA 887 (CC); 1996 (12) BCLR (CC) at para 15. See also the discussion on the granting of direct access below at paras 50-51 of this judgment.

[26] However, the failure to plead section 39(2) in the high court or the Supreme Court of Appeal specifically does not necessarily and on its own, bar a litigant from raising the matter in this Court.[21] This Court also bears the obligation to develop the common law when this is necessary. What is clear is that the High Courts and the Supreme Court of Appeal should at all times view the interpretation of legislation as well as the development of the common law and customary law in light of the spirit, purport and objects of the Bill of Rights. It is accordingly necessary that the provisions of section 39(2) should always be borne in mind by these courts. This is particularly so when the court is engaged with applying an open textured normative rule, such as wrongfulness or fairness, to a set of facts. This obligation was described by this Court in the following terms in *K v Minister of Safety and Security*:

> "The obligation imposed upon courts by section 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue."[22]

[27] A court is required to promote the spirit, purport and objects of the Bill of Rights when "interpreting any legislation, and when developing the common law or customary law".[23] In this no court has a discretion. The duty applies to the interpretation of all legislation and whenever a court embarks on the exercise of developing the common law or customary law. The initial question is not whether

[21] *Carmichele* above n 16 at paras 39-40.

[22] 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) at para 17.

[23] Section 39(2) of the Constitution.

interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights. The same applies to the development of the common law or customary law.[24]

[28] The majority judgment of the Supreme Court of Appeal does not expressly give consideration to the impact of the Bill of Rights in its determination of the legal convictions of the community. It should however not be lightly assumed that the Court did not take this into account, particularly in view of the decisions of that Court in *Carmichele*[25] and *Van Eeden v Minister of Safety and Security*[26] where the following was said:

> "The concept of the legal convictions of the community must now necessarily incorporate the norms, values and principles contained in the Constitution. The Constitution is the supreme law of this country, and no law, conduct, norms or values that are inconsistent with it can have legal validity, which has the effect of making the Constitution a system of objective, normative values for legal purposes . . . The entrenchment of fundamental rights and values in the Bill of Rights, however, enhances their protection and affords them a higher status in that all law, State actions, court decisions and even the conduct of natural and juristic persons may be tested against them and all private law rules, principles or norms, including those regulating the law of delict, are subjected to, and thus given content in the light of the basic values in the Bill of Rights".[27]

[24] *Carmichele* above n 16 at paras 33-36.

[25] *Minister of Safety and Security and Another v Carmichele* 2004 (3) SA 305 (SCA) at paras 29-30.

[26] *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA).

[27] Id at para 12.

[29] Given the obligation upon courts to consider the norms, values and principles of our Constitution, it is perhaps a pity that the Supreme Court of Appeal did not expressly state what effect, if any, those norms and values would have on the issues under consideration in the present case.

The test for wrongfulness

[30] Phumelela does not dispute that the proper test for wrongfulness in the sphere of delict involves a determination of what is public policy and the legal convictions of the community. That is in fact the approach followed by both the majority and the minority judgments in the Supreme Court of Appeal. Phumelela's submission is that the legal convictions of the community should have been determined against the backdrop of the intellectual property protection afforded by section 25 of the Constitution. It contends that the failure by the Supreme Court of Appeal to do so precluded it from recognising that Phumelela's goodwill is property in terms of section 25 of the Constitution and that the use by the bookmakers of Phumelela's published dividends to take bets constitutes the delict of unlawful competition.

[31] The delict of unlawful competition is based on the Aquilian action and, in order to succeed, an applicant must prove wrongfulness. This is always determined on a case by case basis and follows a process of weighing up relevant factors, in terms of the boni mores now to be understood in terms of the values of the Constitution.[28]

[28] *Carmichele* above n 16 at paras 54-56.

[32] Any form of competition will pose a threat to a rival business. However, not all competition or interference with property interests will constitute unlawful competition. It is accordingly accepted that it is only when the competition is wrongful that it becomes actionable.[29] The role of the common law in the field of unlawful competition is therefore to determine the limits of lawful competition. This determination, which takes account of many factors, necessitates a process of weighing up interests that may in the circumstances be in conflict. Fundamental to a determination of whether competition is unlawful is the boni mores or reasonableness criterion. This is a test for wrongfulness which has evolved over the years.[30]

[33] The Bill of Rights protects the right to property, and also promotes and protects other freedoms, notably in this case, the right to freedom of trade.[31] The consequence of the right to freedom of trade is competition.

[34] The question is whether, according to the legal convictions of the community, the competition or the infringement on the goodwill is reasonable or fair when seen through the prism of the spirit, purport and objects of the Bill of Rights. Several

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[29] See *Matthews and Others v Young* 1922 AD 492 at 507; *Franschhoekse Wynkelder (Ko-operatief) Bpk v South African Railways and Harbours* 1981 (3) SA 36 (C) at 38-39; *A Becker & Co (Pty) Ltd v Becker and Others* 1981 (3) SA 406 (AD) at 417; *Union Wine Ltd v E Snell and Co Ltd* 1990 (2) SA 189 (C) at 197D-F and 198I-J; *Taylor and Horne (Pty) Ltd v Dentall (Pty) Ltd* 1991 (1) SA 412 (AD) at 421-422; *Bress Designs (Pty) Ltd v GY Lounge Suite Manufacturers (Pty) Ltd* 1991 (2) SA 455 (W) at 473 and 475. See also Neethling et al *Law of Delict* 4 ed (Butterworths, Durban 2001) at 316; Van Heerden and Neethling *Unlawful Competition* (Butterworths, Durban 1995) at 119.

[30] See *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others* 1981 (2) SA 173 (T) at 188-189; *Lorimar Productions* above n 6 at 1152-1153; *Bress Designs* above n 29 at 473; *Payen Components SA Ltd v Bovic Gaskets CC and Others* 1994 (2) SA 464 (W) at 474. See also Van Heerden and Neethling *Unlawful Competition* above n 29 at 68.

[31] Section 22 of the Constitution provides:

> "Every citizen has the right to choose their trade, occupation or profession freely. The practise of a trade, occupation or profession may be regulated by law."

factors are relevant and must be taken into account and evaluated. These factors include the honesty and fairness of the conduct involved, the morals of the trade sector involved, the protection that positive law already affords, the importance of competition in our economic system, the question whether the parties are competitors, conventions with other countries and the motive of the actor.[32]

[35] In the consideration of all the above factors, the promotion of the spirit, purport and objects of the Bill of Rights cannot be confined to the impact of section 25 of the Constitution alone, as Phumelela seems to suggest. The process of weighing up must include consideration of other provisions of the Bill of Rights which might be relevant to the issue, for example, as has already been mentioned, the right to freedom of trade.

[36] In its judgment, the Supreme Court of Appeal noted that goodwill is a valuable asset in the sphere of competition.[33] The Bill of Rights does not expressly promote competition principles, but the right to freedom of trade, enshrined in section 22 of the Constitution is, in my view, consistent with a competitive regime in matters of trade and the recognition of the protection of competition as being in the public welfare.[34]

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[32] See *Atlas Organic Fertilizers* above n 30 at 188-189; *Lorimar Productions* above n 6 at 1152-1153; *Elida Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd (1)* 1988 (2) SA 350 (W) at 356-357; *Times Media Ltd v South African Broadcasting Corporation* 1990 (4) SA 604 (W) at 606; *Bress Designs* above n 29 at 473 and 475-476; *Aetiology Today CC t/a Somerset Schools v Van Aswegen and Another* 1992 (1) SA 807 (W) at 816-820; *The Concept Factory v Heyl* 1994 (2) SA 105 (T) at 115; *Payen Components* above n 30 at 474. See also Neethling *Law of Delict* above n 29 at 317.

[33] *Gründlingh* above n 3 at para 33.

[34] See Devenish *A commentary on the South African bill of rights* (Butterworths, Durban 1999) at 301-307.

[37] It is not permissible for a litigant to simply carve out those provisions that are favourable to it in the application of section 39(2). The interests of other holders of rights must also be taken into account in the balancing exercise. In this case, the section 39(2) exercise would have to balance the goodwill enjoyed by Phumelela against the rights that may be protected by the right to trade.

[38] The constitutional property clause is not absolute and should not be employed in a manner that ignores other rights and values. Section 25(1) of the Constitution cannot possibly mean that it is the right of every property owner to be immunised from all competition. If the Court were to develop the common law test of wrongfulness to protect Phumelela's property rights to the detriment of the values on the other end of the scale, it would be discarding the nuanced test that has been developed through case law.

[39] The Supreme Court of Appeal had at its disposal the history of the legislation and the practice of the gambling public with which to determine the legal convictions of the community. The majority of that Court reviewed the legislation and weighed up the impact of the other factors it enumerated and came to the conclusion that the conduct complained of was not wrongful and accordingly did not constitute unlawful competition. Subject to the impact of the Bill of Rights, I am unable to fault either its reasoning or its conclusion. The Bill of Rights in this respect merely emphasises the competing principles already at play in the common law.

[40] In the circumstances, I hold that invoking the spirit, purport and objects of the Bill of Rights in this instance does not produce the result for which Phumelela contends. Although the appeal on this aspect cannot succeed, I consider that the application for leave to appeal has some merit and should be granted. I turn now to the question whether the judgment of the Supreme Court of Appeal results in an arbitrary deprivation of the intellectual property of Phumelela, in breach of section 25 of the Constitution.

Was there an arbitrary deprivation of Phumelela's property?

[41] It was submitted by Phumelela that the interpretation placed on the common law by the Supreme Court of Appeal constitutes an arbitrary deprivation of Phumelela's property. It contended that this deprivation offends against the boni mores and further that the wrongfulness test should be developed to incorporate the test for arbitrary deprivation.

[42] As already indicated, the conclusion reached by the Supreme Court of Appeal that the conduct of the bookmakers did not constitute unfair competition cannot be faulted. That being the case, it follows that the judgment of the Supreme Court of Appeal does not result in the arbitrary deprivation of Phumelela's property.

Direct access and the definition of "open bets" in the National Gambling Act

[43] Phumelela's suggestion that the Supreme Court of Appeal wrongly took into account the provisions of the Act in making its decision can only be correct if the

impugned section is found to be invalid. The question of invalidity can be considered by this Court if the application for direct access is granted. I now turn to that application.

[44] Phumelela seeks direct access to challenge the constitutionality of the definition of "open bet" in the Act. The Act defines an "open bet" as:[35]

> "(a) a bet, other than a totalisator bet, taken by a bookmaker on one or more contingencies, in which no fixed-odds are agreed at the time the bet is placed; or
> (b) a bet in respect of which the payout is determined after the outcome of the contingency on which such a bet is struck became known, with reference to dividends generated by a totalisator".[36]

[45] A "bookmaker" is defined as:

> "a person who directly or indirectly lays fixed-odds bets or open bets with members of the public or other bookmakers, or takes such bets with other bookmakers".[37]

[46] Phumelela contends that it is possible to read the above provisions in a way that is consistent with the Constitution. The essence of this submission is that the definition of open bets in the Act merely aims to classify bets and does not, in itself, authorise the use of totalisator dividends by bookmakers. It contends that the effect of the above provisions is that provincial governments are able to enact legislation which will empower a provincial gambling authority to licence activities which interfere

[35] Section 1 of the Act.

[36] Phumelela notes that no provision is made in the National Gambling Act for totalisator licences. These are regulated at provincial level. Phumelela submits that it is irrational that the definition should therefore refer to totalisators.

[37] Section 1 of the Act.

with Phumelela's section 25 rights. It contends further that on the interpretation of the Supreme Court of Appeal, the Act allows for the deprivation of some of the most important aspects of Phumelela's property rights, including the right to exploit its intellectual property for its own commercial gain. According to Phumelela, the provisions are arbitrary in that they do not provide any reason for such deprivation; nor is there any relationship between the deprivation and the end that the Act seeks to achieve, namely the uniform regulation of gambling. Furthermore, there is no public purpose that is served.

[47] In the event of the Court however holding that the definition permits the use of totalisator dividends by bookmakers, Phumelela contends that the definition of open bets is unconstitutional.

[48] For their part, the bookmakers oppose this part of the application as does the fourth respondent.

[49] There was no challenge to the constitutionality of the provisions of the Gauteng Gambling Act or any other provincial gambling Act. It is therefore not necessary for this Court to go into the question whether there is a duty on provincial legislatures instituting their own gambling legislation to either declare such bets as unlawful or to provide for some form of "compensation" to the totalisator by the bookmakers.

[50] The requirements for the granting of direct access are set out in *Zondi v MEC for Traditional and Local Government Affairs*, where this Court held:

> "Under these provisions, this Court has discretion whether to grant direct access but an application will only be granted if it is in the interests of justice to grant it . . . [T]he question whether it is in the interests of justice to grant direct access must be decided in the light of the facts of each case. In this regard this Court will consider a range of factors. These include the importance of the constitutional issue raised and the desirability of obtaining an urgent ruling of this Court on that issue, whether any dispute of fact may arise in the case, the possibility of obtaining relief in another court, and time and costs that may be saved by coming directly to this Court."[38]

[51] Granting Phumelela direct access on this issue would not be in the interests of justice since it would mean that this Court would decide the issue as the court of first and last instance in a matter of importance in which there is no possibility of an appeal. Phumelela has not shown that there are compelling circumstances that would justify such a course of action and I can find none.

[52] In all the circumstances of this case, the application for direct access to challenge the constitutionality of the Act must accordingly be refused.

Costs

[53] Although Phumelela has not succeeded on the issues it raised, I consider that the challenge based on section 39(2) of the Constitution is one of considerable importance and that there should accordingly be no order as to costs.

[38] 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 12. See also *Bruce v Fleecytex* above n 20 at paras 4-9; *S v Bequinot* above n 20 at para 15; *National Gambling Board v Premier KwaZulu-Natal and Others* 2002 (2) SA 715 (CC); 2002 (2) BCLR 156 (CC) at para 29.

Order

[54] The following order is accordingly made:

1. The application for leave to appeal is granted.
2. The appeal is dismissed.
3. The application for direct access is dismissed.
4. There is no order for costs.

Moseneke DCJ, Mokgoro J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Langa CJ.

For the applicant: DN Unterhalter SC, JM Heher, JA Cassette, A Gotz
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For the first and second respondents: GJ Marcus SC, A Cockrell
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For the fourth respondent: SV Notshe SC
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