LL Case No 285/1992

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

MINISTER OF MINERAL AND ENERGY AFFAIRS Appellant

and

LUCKY HORSESHOE (PTY) LTD

Respondent

CORAM: CORBETT CJ, VAN HEERDEN, VIVIER, KUMLEBEN and NIENABER JJA

HEARD: 18 NOVEMBER 1993

DELIVERED: 1 DECEMBER 1993

JUDGMENT

VAN HEERDEN JA:

2 During 1991 the respondent initiated a scheme whereby it supplied tickets to certain retailers who had become partakers in the scheme ("the Lucky Horseshoe scheme"). Those retailers, about 23% of whom were eventually filling station operators, bought the tickets from the respondent. In turn they distributed the tickets free of charge to members of the public. Such a ticket entitled the recipient to participate in a monthly draw which determined prizewinners by chance.

There is no doubt that the respondent originally encouraged partaking retailers to give a ticket to every customer buying some article or commodity from them. Indeed, the perceived raison d'etre of the scheme was that once having procured a ticket a customer would regularly return to the same outlet to obtain more tickets by making further purchases. However, after the legality of the scheme

had been queried, the respondent began distributing amended guide-lines. In it partaking retailers - or at least filling station operators - were advised to distribute tickets to all members of the public visiting their outlets whether or not they made any purchases.

Some time after the inception of the Lucky Horseshoe scheme the appellant and two other parties, the Motor Industries Federation and its executive director, took up the attitude that as far as filling stations were concerned, the scheme was hit by regu-lations ("the petroleum regulations") published under the Petroleum Products Act 120 of 1977 (Regulation 1100, Government Gazette 10260 of 2 June 1986). In response to what it considered to be threats or veiled threats, the respondent then brought motion proceedings against the appellant and the other two parties in the Transvaal Provincial Division. In the

main it sought orders declaring that a phrase in regulation 1(b) of the petroleum regulations was ultra vires the enabling provisions of the Act, and that hence the Lucky Horseshoe scheme did not offend against those regulations. The application was opposed by the appellant and the other two parties who disputed the alleged invalidity of the phrase in question. In a supplementary opposing affidavit the appellant moreover contended that the scheme was a lottery in contravention of the Gambling Act 51 of 1965.

The court a quo (Van Dijkhorst J) found that the scheme did not contravene the relevant provisions of the Gambling Act; that the said phrase was ultra vires the enabling section of the Petroleum Products Act, and that once that phrase is excised the scheme does not fall foul of the petroleum regulations. Hence it allowed the application with

costs, but subsequently granted the appellant leave to appeal to this court. (The judgment has been reported: Lucky Horseshoe (Pty) Ltd v Minister of Mineral and Energy Affairs 1992 (3) SA 838 (T): the other two parties did not seek leave to appeal.)

On appeal the appellant again submitted that the Lucky Horseshoe scheme is hit by the provisions of the Gambling Act. Although the respondent did not seek a declarator that the scheme was not in conflict with those provisions, its counsel, in his heads of argument, wisely did not contend that the appellants were precluded from relying upon them. In this court he submitted, however, albeit not with much vigour, that the appellant is indeed so precluded. The submission is without substance.For if the Lucky Horseshoe scheme is illegal on that score, the question whether it also contravenes the petroleum regulations would be of academic interest

only, and an order declaring that it does not do so would therefore be a brutum fulmen creating the false impression that it is legally unassailable. I therefore proceed to examine the appellant's first submission.

In so far as it is material, s 1 of the Gambling Act defines a "lottery" as

> "any lottery in the generally accepted meaning of the word, and more particularly every scheme, arrangement, system, plan or device by which any prize is or may be gained, won, drawn, thrown or competed for by lot, dice or any other method of chance, either with or without reference to the happening of any uncertain event other than the result of the application or use of such lot, dice or other method of chance ...."

S 2(1) provides inter alia that no person shall establish or commence a lottery or perform any act with the object of assisting any other person to acquire from any source any ticket in a lottery. In terms of s 8 any person who contravenes any provision

of s 2(1) shall be guilty of an offence. S 10(b) provides, however, that nothing contained in the Act "shall apply in relation to any lottery ... in respect of which no subscription is to be made". And in terms of s 1 "subscription" includes "the payment or delivery of any money, article, matter or thing ... for and in consideration of the right to compete".

The Gambling Act repealed legislation pertaining to lotteries which had been enacted in the pre-Union colonies and republics. The relevant contents of those laws are set out in the reported judgment of Dijkhorst J (at pp 842-3) and no purpose would be served by repeating his concise summary. It suffices to say that Transvaal Law 7 of 1890 defined a lottery in much the same way as does the Gambling Act, but subject to the requirement "waarbij inteekenen plaatsvind". "In te teekenen" was in turn

defined as:

> "te betalen of af te leveren, hetzij door tusschenkomst van een agent of niet, aan eenigen persoon, wien ook, eenige som gelds of eenig artikel, zaak of voorwerp, roerend of onroerend, hetzij zoodanig artikel of voorwerp in zich zelf van geldswaarde is of niet, voor, en in consideratie van en met net oogmerk om van eenigen persoon of eenige personen, wie ook, eenig recht of de erkenning van eenig recht te ontvangen om deel te nemen in, of eenige kans te verzekeren om eenigen prijs in een loterij te winnen."

In R v Lew Hoi 1937 AD 215,220 this court held that the following were the essential characteristics of a lottery under Law 7 of 1890:

> "(a) some payment by the participant in the form of a stake,
> (b) in return for this payment or in consequence of it, acquisition by the player of a right to a prize on the occurrence of an event,
> (c) determination of the occurrence of the event by chance."

It was rightly common cause that by virtue of the provisions of s 10 of the Gambling Act those

are also the characteristics of an illegal lottery under that Act, and in particular that a scheme which does not require some or other participant to make a subscription does not contravene the Act's substantive provisions (cf Commissioner for Inland Revenue v Insolvent Estate Botha t/a 'Trio Kulture' 1990 (2) SA 548 (A) 554, 561 and 563). It was furthermore, and again rightly, common cause that if the Lucky Horse-shoe scheme involves payment of subscription (a stake) it satisfies the above requirements. As regards the application of the Gambling Act the only issue therefore was whether a participant (or a retailer-partaker) in the scheme pays something in the nature of a stake in order to obtain a ticket, i e, whether he makes a subscription.

The court a quo firstly found (at p 845) that the only persons who make subscriptions are the retailers who, however, cannot be regarded as par-

ticipants (or "players"), since they do not obtain a "right to compete". The retailer is therefore "in the camp of the organizer of the lottery [and] not in the camp of the participant who is to pay or deliver" the subscription. Secondly, the court found (at p 846-8) that because a customer cannot compel the issue of a ticket, there is no subscription made by him, and that dicta in R v Morrison 1914 TPD 329, and the decision of this court in R v Ellis Brown Ltd 1938 AD 98, do not assist the appellants.

Before this court counsel for the appellant challenged both findings. He repeated his argument in the court a quo, viz, that s 10(b) of the Gambling Act saves a lottery only if no subscription is made; that a subscription includes a payment made by any source other than the organizer (in casu the respondent), and that under the Lucky Horseshoe scheme retailers do make subscriptions. I shall,

however, assume that the first finding is unassailable . I therefore proceed to examine, in the context of the second finding, the applicability of the above cases.

In Morrison the appellant had offered to give a coupon to any person purchasing for cash five shillings worth of goods at his store. In terms of the offer the holder of one of the coupons to be issued would eventually win a prize determined by lot. It was held that the scheme constituted a lottery within the meaning of Transvaal Law 7 of 1890. In arriving at this decision the court rejected an argument that prospective customers would not make subscriptions since they would not pay more for goods (plus the coupon) then they would in any event have paid for the goods as such. In this regard Mason J said (at p 333):

> "The appellant offers to sell his goods and offers every purchaser of goods an option

to take one of the coupons. Now the acceptance of the offer by the purchaser constitutes a complete contract of sale. If the contract were entirely valid, there is no question about it that every person who went into the appellant's shop and purchased for cash five shillings' worth of goods could compel the delivery to him of a coupon. It seems to me impossible to say that that is in part a contract of sale, and in part a contract of gift - if one may use such a phrase. However difficult it may be to apportion the consideration (namely, the five shillings) which is given for the goods between the price of the goods and the coupon, and even though, as admitted, the goods are worth the price, nevertheless in my opinion that consideration includes both the price of the goods and the right to receive a coupon. I think, therefore, that where a person buys goods under these circumstances he has subscribed or paid money for and in consideration of the coupon and with the object of receiving the coupon, to secure a chance of winning a prize in a lottery. It is true that in some cases, perhaps, the persons who purchase goods do not accept the option of taking the coupon. But nevertheless, when once they accept it, and take the coupon, it all forms, to my mind, one contract, and that contract includes not only the goods but the coupon."

In Ellis Brown this court endorsed those

views. The appellant had sold tea and coffee in sealed tins, and had enclosed in some tins coupons entitling the purchaser of such a tin to a prize. It was held that the scheme was a lottery under s 2(a) of Natal Act 3 of 1902 because the element of subscription for the right to participate in the chance of winning a prize was present in the scheme. In the words of Watermeyer JA (at 101) the chance of a prize was inseparable from the tin of tea or coffee and was bought with it, so that the purchasers paid for their chance in the price which they paid for the tin of tea or coffee.

In Imperial Tobacco Ltd and Another v Attorney-General (1980) 1 All ER 866, the House of Lords reached a similar conclusion. In that case a tobacco company had launched a sales promotion cam-paign whereby every packet of cigarettes contained a ticket. If spaces on the ticket were rubbed possible

4 prizes were disclosed and if three of them corresponded the ticket holder, i e the purchaser of the cigarettes, was entitled to collect that prize. It was held that the scheme constituted a lottery even though the purchasers paid no more for the cigarettes plus the ticket than they would have paid for the cigarettes as such. In this regard Viscount Dilhorne (at p 874c) thus formulated the ratio decidendi of a number of cases of which he approved:

> "That ratio I take to be that where a person buys two things for one price, it is impossible to say that he paid only for one of them and not for the other. The fact that he could have bought one of the things at the same price as he paid for both, is in my view immaterial."

In the light of these decisions it seems clear that if under the Lucky Horseshoe scheme a customer becomes entitled to a ticket when making a purchase from a partaking retailer - or when purchasing a particular commodity or for more than a

5 stipulated minimum price - the customer in fact pays a subscription when so purchasing. Subject to an argument to which I shall advert, this much was not really disputed by counsel for the respondent. He relied, however, on the factual approach underlying Van Dijkhorst's J second finding.

The grounds upon which Van Dijkhorst J sought to distinguish the facts of this case from those of Morrison and Ellis Brown may be summarised as follows. The amended guide-lines of the respon-dent do not provide that a partaking retailer must give a ticket to a customer who makes a purchase, or a stipulated purchase, at his outlet. Hence, a customer who has concluded a purchase, cannot compel the retailer to issue a ticket to him. Moreover, the element of inseparability referred to in Ellis Brown is absent in casu. This is so because (at p 846): "All customers do not necessarily get tickets and

6 whether the customer does or does not obtain one the customer still pays the same price".

It is true that in the amended guide-lines retailers are urged to avoid any suggestion that a ticket is given to a customer in consideration for the purchase of petrol; that tickets should be made available to any person who visits an outlet for any purpose whatsoever, "whether that be for workshop services, spares, restaurant facilities, cloakroom facilities or the purchase of petrol"; that the issuing of tickets to customers is at the sole dis-cretion of the retailer, and that it must be borne in mind that the quid pro quo for the issuing of a ticket is simply that the "customer" has visited the outlet. Two points should be made. The first is that the amended guide-lines relate only to filling stations and not also to other retail outlets. However, since this appeal is concerned with the

lawfulness or otherwise of the operation of the Lucky Horseshoe scheme at filling stations, this aspect may be ignored. The second and more important point is that the guide-lines were not intended to govern the agreements concluded between the respondent and partaking retailers. Indeed, in the guide-lines, contained in its circular to operators of filling stations, the respondent recommended that the "guide-lines be implemented as far as possible".

On paper the present guide-lines can hardly be reconciled with the true purpose of the scheme as set out in the respondent's original promotional material. It was there said that:

> "The Lucky Horseshoe Marketing method is based on the simple precept that whenever a customer makes a purchase she is given a gift for doing so at your store. Not just a gift of nominal or little value, but a gift in the form of a Lucky Horseshoe draw ticket which could possibly win for your customer a prize ranging from R10 to more than R250 000 or even greater."

And the first of a number of examples given to explain how the scheme could be used to benefit a retailer's business, was thus phrased:

> "You can give a Lucky Horseshoe ticket to every customer buying from your shop. This will prompt the shopper to return again and again."

The court a quo held that the matter before it had to be judged on the amended guide-lines and that would appear to be correct. As will appear, however, the original guide-lines cannot simply be ignored.

It is true that in terms of the amended guide-lines a partaking retailer is not contractually bound to the respondent to issue a ticket to a customer who buys from him. But neither is he bound not to do so, or to issue a ticket to a prospective customer who eventually refrains from buying, or to somebody who without commercial intent makes use of a

9 portion of his premises, such as a rest room. And it is here that the original promotional material and guide-lines loom large. As has been pointed out, the very essence of the Lucky Horseshoe scheme is that if a prospective purchaser knows that when he buys from a retailer he will receive a ticket, he will make a point of again purchasing from that outlet. From the retailer's point of view little purpose would therefore be served in not giving a ticket to such a customer, or to distribute tickets to persons who have not made purchases. To adapt the catch lines in that material, a customer's sure knowledge that he will receive a ticket every time he makes a purchase - or at least one of a certain value - will prompt the customer to return again and again. By contrast, if he does not obtain a ticket he will feel aggrieved and take his custom elsewhere.

Hence, when amending its guide-lines, the

respondent must have appreciated that in all probability partaking retailers would issue tickets to purchasers, and seldom would provide tickets to mere "visitors". That this is precisely what happened in practice after the distribution of the amended guidelines, is illustrated by a number of affidavits filed in the court a quo. From these it appears that when requests were made at filling stations for the issue of Lucky Horseshoe tickets, the solicitors were told that in order to obtain tickets they first had to buy petrol.

There is also very little doubt that generally a partaking retailer will endeavour to make it known - if only by conduct - that a ticket will be issued to all purchasers, and that this offer will in the course of time be accepted by customers. I therefore cannot agree with the view of the court a quo that a purchaser at the outlet of a partaking

retailer will not be able to compel the issuing of a ticket to him. Ignoring the invalidating effect of the Gambling Act, he will as a rule be entitled to do just that.

In the result I am of the opinion that even on the amended guide-lines the Lucky Horseshoe scheme is in essence one whereunder a customer purchases not only a commodity, such as petrol, but also the chance of winning a prize. A portion of the price, albeit a small one, therefore constitutes a subscription as defined in the Gambling Act. (Judging by the price payable by a retailer to the respondent a ticket appears to be worth some 25 - 30 cents). To paraphrase the above quoted dictum of Watermeyer JA in Ellis Brown: it is only, or at the very least mainly, by the purchase of petrol that a chance of receiving a prize is acquired; hence that chance is so inseparable from the petrol purchased that it is

bought with the petrol. In sum, in purchasing the petrol the customer also buys the chance.

At the outset of his argument counsel for the respondent seemed to have suggested that there can be no prohibited lottery unless the participant makes a subscription to the organizer, i e the person providing the prizes. It is clear, however, that the definitions of "lottery" and "subscription" in s 1, read with s 10, of the Gambling Act postulates no such requirement, In casu the Lucky Horseshoe scheme results in a participant making a contribution to the retailer who has purchased the tickets from the respondent who will in turn provide prizes to some of the participants, and there is consequently a very real link between the three cogs of the scheme. In any event, in Ellis Brown and Imperial Tobacco it was regarded as immaterial that the prizes were provided by the manufacturer whereas the subscription was made

the dealer.

In view of my above conclusion it is obviously unnecessary to consider whether the Lucky Horseshoe scheme also falls foul of the petroleum regulations.

The appeal is allowed with costs, including the costs of two counsel, and the order made by the court a quo is altered to read:

"The application is dismissed with costs, including the costs of two counsel."

H J O VAN HEERDEN JA

CORBETT CJ
VIVIER JA CONCUR
KUMLEBEN JA

J U D G M E N T

NIENABER JA:

I have had the benefit of reading the judgment of Van Heerden JA. I arrive at the same conclusion but I do so along a different route. Hence this judgment.

Van Heerden JA refers to two findings of the court a quo. The first (to be found at 845C-G of the judgment of the court a quo, reported in 1992 (3) SA 838 (T)) is that retailers are "in the camp" of the organiser of the scheme and not in the camp of their customers; a payment made by the retailer to the organiser is accordingly to be treated as if it were a payment of the subscription by the organiser itself; and (so the finding concludes):

> "A subscription cannot, in my view, be called that if it does not originate with the participant but is in fact donated by the organiser."

The second finding of the court a quo (at 846A-B of the reported judgment) is that the customer acquires no contractual right to obtain a ticket; accordingly he cannot compel the retailer to give him one even if he

concluded a purchase; and that it is this feature (referred to as "the element of inseparability"), which distinguishes the present case from leading cases such as R v Morrison 1914 TPD 329 and R v Ellis Brown Ltd 1938 AD 98.

Van Heerden JA assumed the first finding to be unassailable and held the second to be wrong. My approach is the reverse: to regard the first finding as being wrong and to disregard the second. Either way the appeal is to succeed.

To be a prohibited lottery there must be a contribution or, as it is referred to in the Gambling Act 51 of 1965 ("the Act"), a subscription. In the instant case two forms of subscription are at stake: first, the 25-30 cents per ticket paid by the retailer to the organiser of the scheme and second, the undeterminable proportion of the fixed petrol price which is apportioned to the unsolicited ticket given to the customer and which

the customer is said to pay to the retailer when he fills his car with petrol (cf R v Morrison supra 333). Van Heerden JA considers the latter payment to be the required "subscription"; on my approach it is the former which is to be scrutinised. And that pertinently raises the question: must the subscription, for the game of chance to be a lottery in terms of the Act, necessarily be ventured by or on behalf of the player (sometimes called "the adventurer": cf R v Cotterill 1927 CPD 48 51) who qualifies for the draw?

There are the odd references, scattered throughout the cases, which seem to suggest that the subscription or stake must emanate from the player (and therefore not from anyone else) before the scheme can be said to be a prohibited lottery (cf R v Cotterill supra 51 52; R v Livingston 1924 TPD 45 50; R v Lew Hoi and Others 1937 AD 215 219; S v Mbonambi 1986 (3) SA 839 (N) 844E-H; Commissioner for Inland Revenue v Insolvent Estate Botha

t/a "Trio Kulture" 1990 (2) SA 548 (A) 561I-J; Imperial Tobacco Limited and Another v Attorney-General [1980] 1 All ER 866 (HL) 872c-d; 874d-e; 880b-881h). Other dicta describing the characteristics of a lottery are neutral (cf R v Clapp 1902 TS 106; R v Cranston 1914 AD 238; R v Gondo 1951 (3) SA 509 (A) 511B-E; S v Midas Novelties (Pty) Ltd and Another 1966 (1) SA 492 (A) 498A-H). In none of these cases did the point now under discussion crisply arise and in none of them was a principle in that regard formulated. A possible exception is R v Cotterill supra 51 52, but the issue in that case was again a different one: whether the scheme as a whole was a lottery when only some of the competitors made a contribution.

The definition of "lottery" in the Act (quoted in the judgment of Van Heerden JA) opens with the words:

"any lottery in the generally accepted meaning of the word.. ." The locus classicus in our law as to the

generally accepted meaning of the word remains the dictum in R v Lew Hoi and Others supra 220:

> "...[t]he essential characteristics of a lottery under Law 7 of 1890, are: (a) some payment by the participant in the form of a stake, (b) in return for this payment or in consequence of it, acquisition by the player of a right to a prize on the occurrence of an event, (c) determination of the occurrence of the event by chance." (My emphasis).

According to Van Dijkhorst J, at 845F-G of the reported judgment, the words "participant" in (a) and "player" in (b) "obviously refer to the same person". With respect I am not sure that it does. The selection of two separate words when, if a single concept was intended, either would have been appropriate in (a) or (b), may well have been deliberate. Mostly, of course, it will not matter. The subscription will usually be payable by the person who is a contender for the prize. But the facts of this case illustrate that it is not invariably true. The participant in the respondent's scheme, the retailer, is not a player and the player, the

customer, is not a participant in the scheme. In my opinion the dictum quoted above does not purport to lay down a rule that the subscription must in all cases be contributed by or on behalf of the player. It is also not without significance that the definition of "subscription" in section 1 of the Act is entirely noncommittal on the point. The legislature presumably had the dictum in mind when this definition was enacted. It reads:

> " 'Subscription' means the payment or delivery of any money, article, matter or thing (including any ticket, coupon or entrance form purporting to be supplied free of charge to the readers of any newspaper or other periodical publication) for and in consideration of the right to compete".

It is a matter for comment that there is nothing in that definition or in the definition of "lottery" to indicate by or to whom the subscription is to be made.

It was argued on behalf of the respondent that the expression "for and in consideration" is a clear indication that the subscription must of necessity be

made by the party who obtains "the right to compete". I disagree. The argument entails a petitio principii: it presupposes the addition (at the end of the definition) of the very words ("by the person making the subscription") which are needed to clinch the argument. Here it is the retailer who makes the payment to the organiser; in return ("in consideration of") he is given a ticket; the ticket carries with it "the right to compete". That right to compete is not, either in terms or by necessary implication, confined to the person who makes the payment.

The scheme amounts to this: the retailer pays an agreed amount to the organiser of the scheme in return for which he receives an agreed number of tickets. These he is at liberty to distribute as and to whom he pleases. When he hands a ticket to a customer the latter is free to enter the competition or not. If he chooses to do so he completes the prescribed form, inserts his name and

submits it to the organiser. If his number is drawn, which is a matter governed entirely by chance, he is entitled to the promised prize. There is no question, on that analysis, of the retailer being "in the camp" of the organiser, as was held by the court a quo. With respect, the payment for the ticket by the retailer to the organiser cannot be equated, as was also held, to a gift by the organiser of the ticket to the customer. All three parties are at arms' length to one another. The organiser of the scheme promotes it for the profits it generates; the retailer participates in it for the additional custom he hopes to attract by distributing tickets free of charge; and the customer accepts the ticket and enters the competition in the hope of winning a prize. In purchasing a ticket from the organiser the retailer is acting primarily in his own interests but in order to do so he is, at the same time, stipulating a benefit for a yet to be ascertained third party. That

benefit is the right to compete for the prize. The third party is identified as the beneficiary when he submits the completed form to the organiser. By doing so he accepts the benefit stipulated for him by the retailer and obtains the right to participate in the organiser's draw. This triangle of contracting parties conforms in every detail to the prototype of a contract in favour of a third party (cf Van der Merwe et al. Contract: General Principles par 9.2.5). As such it exhibits all the elements of a lottery: a stake, the opportunity, in return, to compete for a prize, the capturing of which is dependent on lot or chance.

And if that is the correct analysis it becomes unnecessary to grapple with a problem which would arise, on the view favoured by Van Heerden JA, if the retailer should give a ticket to a customer (or his family or friends) who does not buy petrol but, say, visits the retailer's cloak room; or to a customer who, without

prior knowledge of the scheme, does buy petrol but receives a ticket only after the sale had been concluded. It is not easy to appreciate how the customer in either of these situations can be said to pay a subscription to the retailer: in the one instance he pays nothing at all and in the other he clearly does not intend to buy two items (petrol and the ticket) for the price of one. Yet that is the construction which, on the other view, must perforce be placed on each transaction involving the hand-out of a ticket if it is to be characterised as a prohibited lottery. In addition the retailer's intention must also be considered, which might well be to regard the ticket not as part of the sale of petrol but as a bonus to his customer.

Upon the construction advanced above - that a subscription is made whenever the retailer, on payment of the prescribed sum, stipulates a benefit for his future customers in the form of a lottery ticket - the "element

of inseparability", which was the deciding factor in the Ellis Brown case supra, becomes immaterial. This construction has the added advantage that it avoids the necessity of making a finding to the effect that the amended guidelines were designed to disguise the true nature of the scheme (viz, that tickets are only to be handed to actual purchasers of petrol and that any such purchaser has a right to compel delivery of a ticket to him). On the view espoused above these issues no longer matter since the true nature of the transaction can objectively be gauged from the respondent's own version of the facts.

Looked at as a whole and from a practical standpoint, as one is enjoined to do (cf s v Midas Novelties (Pty) Ltd and Another supra 500A), the scheme unfolds itself as, in essence, a prohibited lottery. It is no less one because of the technicality that the stake is not paid by the designated player but by an

intermediary (the retailer) who is not an agent but is nevertheless acting both for his own and for his customer's ultimate benefit. The subscription which is a requirement for a prohibited lottery is the amount which the retailer pays to the organiser for the tickets which he in turn distributes to his customers. And because a subscription, as defined, is paid, s 10(b) of the Act cannot assist the respondent.

In the result I concur in the order proposed by Van Heerden JA.

P M Nienaber JA