REPORTABLE

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No. 166/99

In the matter between:

SUPREME GAMING CC **Appellant**

and

MINISTER OF SAFETY AND SECURITY **1st Respondent**
PREMIER OF THE PROVINCE OF THE EASTERN CAPE **2nd Respondent**
GAMBLING AND BETTING BOARD OF THE PROVINCE OF THE EASTERN CAPE **3rd Respondent**
THE MAGISTRATE, PORT ELIZABETH **4th Respondent**
DIRECTOR OF PUBLIC PROSECUTIONS, EASTERN CAPE **5th Respondent**

Court: SMALBERGER, HARMS, PLEWMAN, JJA AND MELUNSKY AND FARLAM AJJA
Heard: 2 MAY 2000
Delivered: 12 MAY 2000

Statutes: promulgation and commencement.

JUDGMENT

HARMS JA:

[1] One of the functional areas of concurrent national and provincial legislative competence relates to casinos, racing, gambling and wagering (Schedule 4 of the 1996 Constitution) and the National Gambling Act 33 of 1996 provides for a general policy in connection with gambling in South Africa (especially s 13). In the exercise of its legislative power, the Legislature of the Eastern Cape passed a bill on the subject which, having been assented to by the Acting Premier, became a provincial act (s 123 of the Constitution). It was published in the Provincial Gazette on 3 July 1997 as the Gambling and Betting Act 5 of 1997 (Eastern Cape). Provincial acts take effect when published or on a date determined in terms of the act (ibid).

[2] Section 93 of the Gambling and Betting Act provides as follows:

(1) This Act shall be called the Gambling and Betting Act, 1996 (Eastern Cape) and shall come into operation on a date to be fixed by the Premier by proclamation in the *Provincial Gazette*.

(2) Different dates may be so fixed in respect of different sections of this Act.

(The date, 1996, is an obvious error. It should be 1997.) The reason

for the provision is fairly obvious. A staggered coming into operation of different sections was necessary because of the recognition that certain sections must predate others in order to render the legislation workable. For instance, it was necessary to establish a Gambling and Betting Board before effect could be given to other sections of the Act (cf *Cats Entertainment CC v Minister of Justice and Others* 1995 (1) SA 869 (T) 876E-G).

[3] The provincial Premier issued a proclamation which was published on 9 July 1997 in the Provincial Gazette in the following form:

GAMBLING AND BETTING ACT, 1997 (EASTERN CAPE)

(ACT NO. 5 OF 1997)

COMMENCEMENT

In terms of section 93 of the Gambling and Betting Act, 1997 (Eastern Cape) (Act No. 5 of 1997), I, Makhenkesi Stofile, Premier of the Province of the Eastern Cape, fix 9 July 1997 as the date on which the following sections will come into operation:

(a) Section 1;

(b) Section 3 to section18 (inclusive);

(c) Section 41;

(d) Section 80; and

(e) Section 88.

Section 88(1)(h) makes it an offence to be in possession of any

gambling device - defined in s 1 - which is used without an appropriate licence. On 30 December 1997, the Premier issued a similar proclamation in which he fixed 1 January, 1998 as the date on which the balance of the provisions of the Act (i. e., those not covered by the proclamation of July 9) would come into operation. In the latter proclamation he also listed s 93.

[4] On 25 February 1999 an additional magistrate of Port Elizabeth issued a search warrant which permitted the search of the appellant's premises for gambling devices and related matter and which authorised the seizure thereof. It is common cause that the appellant was in possession of such devices without any authority and that the appellant, in spite of prior warning, persisted in using them in its so-called entertainment centre. The police executed the warrant and seized and removed a number of items from the premises. Shortly thereafter the appellant applied for an order declaring the search warrant invalid and for the return of its goods. The application was dismissed with costs by Ludorf J but he granted leave to appeal to this Court.

[5] The appellant's case is that s 88 has not been brought into

operation and that therefore the search warrant was, at the time of its issue and execution, invalid because it related to a criminal offence which did not yet exist. The argument is that the first proclamation did not in its terms purport first to bring s 93 into operation. This would seem to amount to an assertion that s 93 is subject to itself. The argument continues that the first proclamation was thus not capable of and did not bring s 88 into operation - with the result already mentioned; the matter was not saved by the second proclamation because, although it brought s 93 into operation, it failed to do likewise in relation to s 88. The same argument, albeit in another statutory setting, was rejected in *Harksen v Director of Public Prosecutions, Cape, and Another* 1999 (4) SA 1201 (C) par 27 - 28 because, it was said, it creates a legal catch-22 situation. In the court below, Ludorf J held that the argument is illogical and absurd because it is based upon the notion that the Premier is vested with the powers defined in s 93 prior to its coming into force; that presupposes that the Premier is empowered to bring the inoperative s 93 into operation by means of that very section while it is still inoperative. The fallacy of arguing in a vicious circle (*circulus in probando*) was already

identified by Aristotle.

[6] The authority of a premier to determine a date on which any act (or certain sections of an act) takes effect is not derived from the Constitution. The Constitution (s 121) only authorises a premier to assent to and sign a bill (save for the power of referral back to the Legislature or to the Constitutional Court). As mentioned, once assented to and signed, the bill becomes a provincial act; it is then published and takes effect when published or "on a date determined in terms of the Act" (s 123; cf s 13(1) of the Interpretation Act 33 of 1957). In other words, a provision in such an act which provides for a method of determination of an operative date is in force and becomes effective upon publication of the act. It is in the nature of a suspensive condition (cf *R v Magana* 1961 (2) SA 654 (T) 655A-B). The Premier derived his authority to fix a date by proclamation for the coming into operation of the act or some of its sections from s 93. (Cf *Pharmaceutical Manufacturers Association of SA and Others; In Re: Ex Parte Application of the President of the RSA and Others* 2000(3) BCLR 241 (CC) par 78.) If this section were not in operation due to its prior promulgation (publication), the first proclamation could not

have issued under the hand of the Premier. The fact that the Premier purported to bring the section into operation in the second proclamation is of no consequence because it was already in operation.

[7] The judgment of Steyn CJ in *S v Manelis* 1965 (1) SA 748 (A) concerned the question whether the Transvaal Shop Hours Ordinance 24 of 1959 had been properly brought into operation. The Governor-General had assented to the Ordinance in terms of s 90 of the South Africa Act, 1909. According to s 91, an ordinance so assented to and "promulgated ['afgekondigd'] by the administrator shall . . . have the force of law. . .". Section 21 of the Ordinance provided that it was to come into operation on a date to be fixed by the Administrator by proclamation, something permitted by s 13 (1) of the Interpretation Act. On 22 August 1959 the Administrator signed a proclamation in which he promulgated the Ordinance and fixed 26 August as the date on which the Ordinance was to come into operation. The proclamation was published on the latter date. This means that the actual promulgation was not on 22 August but on 26 August. Against that background, Steyn CJ proceeded to say at 752F-753A (my

underlining):

"When the Administrator signed the Proclamation on 22nd August, 1959, the Ordinance had been passed by the Provincial Council and the Governor-General had assented to it. Although it had then come into existence, it had not come into operation and its provisions could not be enforced or applied. According to our common law a statute only comes into operation on promulgation. That rule is preserved by sec. 13 (1) of the Interpretation Act, 33 of 1957, with the qualification (which may be said to be self-evident)

'unless some other day is fixed by or under the law for the coming into operation thereof'.

The question then is whether the power or duty to fix such a day under a law, may be exercised or performed before the law is first published in the appropriate Gazette as a law.

It is said that the answer must be in the negative because the power or duty could only be performed under a law at a time when the relevant provision conferring or imposing the power or duty is in force as a law. In the present case sec. 21 of the Ordinance would not have been so in force until the promulgation of the Ordinance on 26th August, 1959. <u>But although the date of commencement of the rest of the Ordinance could only have been the date to be fixed by the Administrator, this section [s 21] did come into operation on the date of promulgation. It could not otherwise serve its purpose</u>."

[8] In *Harksen*, Brand J analysed the judgment at some length (in par 17 to 26) and came to the conclusion that the underlined passage did not represent the view of the court but reflected a summary of an argument rejected in a subsequent part of the judgment. With respect to Brand J, my impression is that it purports to be a rebuttal of the submission in the preceding two sentences. "Promulgation" was used by Steyn CJ (as in the South Africa Act) in its dictionary meaning of

making publicly known (see also Hahlo & Kahn *The South African Legal System and its Background*

168). In other words, what the penultimate sentence implies is that s 21 came into operation by way of promulgation (publication), whereas the rest of the Ordinance had to come into operation by way of proclamation. Section 21 "could not otherwise serve its purpose", namely to provide the Administrator with the authority to fix the date of commencement. Because the dates of promulgation and proclamation coincided, the issue in the present case did not really arise and the decision was ultimately based upon the provisions of s 14 of the Interpretation Act. It is therefore not necessary to finally decide the meaning of the passage for purposes of this case. In any event, there is nothing in Steyn CJ's judgment which assists the appellant.

[9] The appeal has no redeeming features. In the result the appeal

is dismissed with costs including, where appropriate, the costs of two counsel.

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L T C HARMS
JUDGE OF APPEAL

Agree:

SMALBERGER JA
PLEWMAN JA
MELUNSKY AJA
FARLAM AJA