

JUDGMENT

Case No: 730/2007

NATIONAL LOTTERIES BOARD
Appellant

and

ROBIN LESLIE BRUSS NO

1st Respondent

BRIAN JEFFREY MILLER NO

2nd Respondent

GERHARD SCHALK VAN NIEKERK NO

3rd Respondent

JACQUELINE SCHOEMAN NO

4th Respondent

LESLIE MONDO NO

5th Respondent

DAWID CROUS

6th Respondent

JULIAN RICHARD CUTLAND NO

7th Respondent

SOUTH AFRICAN BROADCASTING
CORPORATION

8th Respondent

TAINTON MICHAEL NO

9th Respondent

Neutral citation: *National Lotteries Board v Bruss (730/2007)*
[2008] ZASCA 167 (1 December 2008).

Coram: HARMS ADP, CLOETE, MAYA JJA, LEACH,
BORUCHOWITZ AJJA

Heard: 13 NOVEMBER 2008

Delivered: 1 DECEMBER 2008

Corrected: 1 DECEMBER 2008

Summary: Lotteries Act, 57 of 1997 - power of Board to institute proceedings to enforce Act – meaning of ‘subscription’ – when a lottery is a promotional competition.

ORDER

On appeal from: High Court, Pretoria (R D CLAASSEN J sitting as court of first instance).

- (1) (a) The appeal is upheld;
 - (b) The first to seventh and ninth respondents in their capacities as trustees of the South African Children’s Charity Trust are ordered to pay the costs of the appeal including the costs of two counsel;
 - (c) The eighth respondent is to pay the costs of the appeal jointly and severally with the first to seventh and ninth respondents, the one paying the other to be absolved including the costs of two counsel;
- (2) The order of the court a quo is set aside and the following

order is substituted:

‘(a) It is declared that:

- (i) the Winikhaya competition conducted by the first to seventh and ninth respondents in their capacities as trustees of the South African Children’s Charity Trust is not a promotional competition as contemplated in the Lotteries Act, 57 of 1997 (the Act);
- (ii) the Winikhaya competition, as presently administered and implemented, is an unlawful lottery as contemplated in ss 56 and 57 of the Act;

(b) The first to seventh and ninth respondents, in their capacities aforesaid are ordered to pay the costs of this application including the costs of two counsel. These costs are to include the costs that were reserved on 30 November 2006;

(c) The eighth respondent is ordered to pay the costs of this application jointly and severally with the first to seventh and ninth respondents in their capacities aforesaid, the one paying the other to be absolved, including the costs of two counsel. These costs are to include the costs that were reserved on 30 November 2006.’

JUDGMENT

BORUCHOWITZ AJA (HARMS ADP, CLOETE JA, MAYA JA,
LEACH AJA concurring):

Introduction

[1] The appellant is the National Lotteries Board (the Board) established by s 2 of the Lotteries Act, 57 of 1997 (the Act). The first to seventh and ninth respondents are the trustees of the South African Children's Charity Trust (the Trust). The eighth respondent is the South African Broadcasting Corporation (SABC). Where appropriate I shall refer to them collectively as the respondents.

[2] The Trust was created in 2002 for the sole object of promoting and raising funds for charity and charitable causes. Its beneficiaries are a number of well known charities functioning within South Africa.

[3] In order to generate an income for these charities the Trust promotes a campaign through the medium of a competition known as Winikhaya which is broadcast by the SABC on television.

[4] The Board contends that the competition is an unlawful lottery and promotional competition as contemplated in terms of ss 56 and 57 of the Act and applied to the Pretoria High Court for a declaratory order to that effect.

[5] The High Court (per R D Claassen J) held that the Board lacked the power to seek an order to declare a promotional competition unlawful and dismissed the application. It further

ordered that the Board pay the respondents' costs including certain reserved costs of 30 November 2006. The appeal is with leave of the court a quo.

[6] The salient features of the Winikhaya competition are the following. Participants are required to send an SMS message or an approved short code to a predetermined cellular telephone number. The charge for the SMS message is at a premium rate of R7.50 per SMS. This rate is substantially more than cellular phone rates offered by cellular telephone network operators for SMS messages. From 6 November 2006 an alternative method of entry into the competition was made available: Participants were entitled to deliver a postcard including a subscriber's cellular telephone number.

[7] Each SMS constitutes one entry into the Winikhaya competition and entrants are furnished with an acknowledgement of receipt and a voucher number which is then used for the purposes of a lucky draw. The cost of the SMS is deducted from the entrant's cellular telephone account or prepaid balances, by the cellular telephone operator, who in turn makes payment to the Trust. The funds derived from the SMS messages are used to cover the cost of running the Winikhaya competition, including a portion of the prizes allocated. The balance is then distributed to various charities supported by the Trust.

[8] Winners are selected by lot or chance and prizes are allocated to the person who is the lawful holder of the cellular phone number billed for the premium rated SMS. Every month a main prize consisting of the proceeds of a home loan worth R500 000 is awarded to one winner. The winner of the home loan prize is required to ensure that a minimum amount of R25 000 of the home loan prize is used to purchase a home or is used to pay off an

existing bond. The balance of R475 000 can be withdrawn by the winner from a home loan account, at his or her election.

[9] The Winikhaya competition has undergone changes from time to time. The structure has been broadened to include monthly and daily cash prizes as well as prizes of merchandise supplied by various sponsors. These sponsors use Winikhaya to launch a number of promotions which are designed to promote their brands and products.

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[10] There are principally three issues that arise for determination:

- (a) The Board's power to institute proceedings for declaratory relief;
- (b) Whether the Winikhaya competition involves any 'subscription' as defined, and is therefore exempt from the operation of the Act by reason of s 63 thereof;
- (c) Whether the Winikhaya competition is a promotional competition as contemplated in s 54 of the Act and if so whether the competition is an unlawful lottery as contemplated in ss 56 and 57 of the Act.

[11] The legislative context in which these issues must be evaluated is the following. As its long title indicates, the essential aim of the Act is to regulate lotteries and to provide for matters connected therewith.

[12] In s 1 (xii) a lottery is defined to include 'any game, scheme, arrangement, system, plan, promotional competition or

device for distributing prizes by lot or chance and any game, scheme, arrangement, system, plan, competition or device, which the Minister may by notice in the *Gazette* declare to be a lottery’.

[13] Apart from a National Lottery, which is to be conducted under a licence to be awarded by the Board, the only other permissible forms of lotteries are those incidental to exempt entertainment, private lotteries, society lotteries and promotional competitions.

[14] In s 1 (xxiii) a promotional competition is defined as ‘a lottery conducted for the purpose of promoting the sale or use of any goods or services’.

[15] Section 54 of the Act deals with promotional competitions. Section 54(1) sets out a number of conditions, compliance with each of which is necessary to render a promotional competition lawful.

[16] Unauthorised lotteries are prohibited by s 56 and the conduct of such lotteries is made an offence by s 57. A lottery in respect of which there is no subscription as defined is not unlawful.

Power to institute proceedings

[17] Both in this court and in the court below the respondents challenged the power of the Board to seek an order declaring a promotional competition unlawful.

[18] It was submitted that there were clear indications in s 54 of the Act that the Minister and not the Board was vested with the power to seek such order. One of the conditions that has to be fulfilled in order to render a promotional competition lawful is that

such competition has not been declared to be unlawful by the Minister under Section 54 (4).¹ Section 54 (4) provides that:

‘The Minister may on the recommendation of the board by notice in the *Gazette* declare a promotional competition to be unlawful.’

[19] The respondents contend that on a proper construction of the above provisions the Board’s function in respect of promotional competitions is limited to the making of recommendations to the Minister as to the lawfulness or otherwise of any promotional competition. The argument is that the Board itself cannot declare a promotional competition unlawful because that power is reserved for the Minister.

[20] The argument that the Minister and not the Board has the requisite power to institute proceedings rejected by this court in *Firststrand Bank Ltd v National Lotteries Board*.² It was there held that s 10 of the Act, which assigned specific functions to the Board, implicitly conferred on it the power to institute legal proceedings.

[21] The respondents submit that *Firststrand* is clearly wrong as the court had not determined the Board’s power to institute proceedings with reference to s 54 (4) of the Act; and that this court is at liberty to depart therefrom.

¹ Section 54 (1)(f).

² 2008 (4) SA 548 (SCA) paras 30-32.

[22] The approach of this court to the question of *stare decisis* well settled. In order for this court to depart from a previous decision it must be clear to it that it erred.³ This approach applies with equal force where an interpretation of a statute is involved. The test in this regard was articulated by Schutz JA in *Robin Consolidated Industries Ltd v Commissioner for Inland Revenue*.⁴

‘. . . once the meaning of the words of a section in an Act of Parliament have been authoritatively determined by this Court, that meaning must be given to them, even by this Court, unless it is clear to it that it has erred (*Collett v Priest* 1931 AD 290 at 297).’

[23] The decision in *Firstrand* in my view unimpeachable. It was correctly held that although the Act did not expressly vest the Board with the power to institute legal proceedings, it impliedly conferred upon it the power to enforce the provisions of the Act.

[24] Section 10 of the Act deals with the functions of the Board. Section 10 (d) provides that:

‘The board shall, applying the principles of openness and transparency and in addition to its other functions in terms of this Act –

(a)...

(b)...

(c)...

³ See *Bloemfontein Town Council v Richter* 1938 AD 195 at 232.

⁴ 1997 (3) SA 654 (SCA) at 666G.

(d) monitor, regulate and police lotteries incidental to exempt entertainment, private lotteries, society lotteries and any competition contemplated in [s] 54.'

[25] Section 10 (d) therefore expressly assigns to the Board the function of 'monitoring, regulating and policing' competitions contemplated in s 54. The verb 'policing' is of particular significance. It is defined in the Oxford English Dictionary to mean, inter alia 'to control, regulate, or keep in order by means of the police or some similar force; to keep in order, administer, control'. Absent express indications to the contrary, it is implicit that a statutory body has such powers 'as are reasonably required to carry out the objects of an enactment'.⁵ The power to institute legal proceedings is in my view reasonably required in order to enable the Board to properly discharge its policing function. The submission that this function is limited to lawful promotional competitions because s 54 only contemplates promotional competitions which are lawful, is incorrect – because the section also contemplates unlawful competitions (in subsections (1)(f), (4) and (5)); and also because a lawful competition requires no policing and the suggestion that 'to police' means to 'hand over to the police' is equally without merit: the phrase is used in a civil context and obviously means that the Board must do the policing.

[26] For these reasons I conclude that the Board has the necessary power to institute the proceedings for declaratory relief in the court a quo.

⁵ See *Middelburg Municipality v Gertzen* AD 544 at 552-553.

Whether the competition involves a subscription

[27] Section 63 of the Act excludes from its ambit any lottery in respect of which there is no subscription. The section reads:

'Savings

63 Nothing in this Act shall apply in relation to any lottery, sports pool or competition in respect of which there is no subscription.'

[28] A 'subscription' is defined in s 1 of the Act to mean:

'[T]he payment, or delivery of any money, goods, article, matter or thing, including any ticket, coupon or any entry form, *for the right to compete in a lottery.*' (My emphasis.)

[29] It is plain from the above definition that the right to compete in any lottery is dependent upon there being payment of money or delivery of the goods or articles specified in the definition.

[30] The right to compete in the Winikhaya competition is described as follows in its rules.

1. Participants may enter by sending a text message via a mobile phone Short Message Service to a given phone number or short code. The text message will be charged at a rate fixed by the organisers from time to time.

2. The organisers will endeavor to ensure that the text message service is available continuously, but do not warrant

availability.

3. Participants may enter as many times as they wish and there is no restriction on the number of prizes that may be won. Each entry is allocated a unique number which will be entered into the competition draw.

4. Participants may also enter by sending a postcard with their name, cellphone number and the word “house” to the postal address advertised on www.winikhaya.co.za. The participant has to have a valid cellphone number and the winner will be the persons who on the date of the draw are the contracted or lawful owner of the mobile number that appears on the postcard. Each postcard is considered as one entry only. . . .

5. Winners will be selected by lot (lucky draw) and prizes allocated based on the mobile phone number that is billed for the winning text message. Winners will be the persons who on the date of the draw are the contracted or other lawful holder of the mobile phone number from which the text message was sent’

[31] The Trust contends that there is no contravention of the Act since there is no subscription as defined. I do not agree with that contention. It is clear from the Winikhaya competition rules that the payment of R7.50 in respect of the SMS message forms a fundamental and integral part of the method of participation. The alternative method of participation by means of a postcard also cannot avail the respondents as the delivery or posting of a postcard constitutes ‘. . . delivery of [a] . . . thing’ as envisaged in the definition of subscription.

[32] It was submitted on behalf of the respondents that a distinction must be made between the right to compete, and the mechanism of competing for those who have the right to compete. The argument was that the premium rated SMS and the postcard do not give a person the right to compete, but are merely the mechanisms employed to enable persons to compete. Reliance

was placed on a decision in *R v Barret & Co Ltd and another*.⁶ For the reasons stated above, I am not in agreement with this submission.

[33] I accordingly hold that the Winikhaya competition involves a subscription as defined and falls within the ambit of the Act.

Whether Winikhaya is a promotional competition

[34] A promotional competition is defined in s 1 (xxiii) of the Act as 'a lottery conducted for the purpose of promoting the sale or use of any goods or services'.

[35] The Board contends that Winikhaya is not a promotional competition in that it is not a lottery conducted for the purpose of promoting the sale or use of any goods or services. Accordingly the Board contends that the competition is an unlawful lottery which is neither authorised nor sanctioned under s 56 (a) of the Act.

[36] There is a significant difference in wording between the Act and the regulations as to the nature of the goods or services that may form the object of a promotional competition. The Act refers to 'the sale or use of any or services' whereas the regulations adopt a more restrictive definition. Goods or services are defined in s 1 of the regulations to mean:

'Goods or services which are ordinarily manufactured, sold,

⁶ 1956 (1) SA 751 (C).

supplied, distributed or delivered or in any other way form a substantial part of the business of the promoter involved in a particular promotional competition in the calendar year during which that promotional competition is held.' (My emphasis.)

[37] It is not permissible to use a definition created by a Minister in regulations to interpret the intention of the Legislature in an Act of Parliament, notwithstanding that the Act may include the regulations.⁷ On the basis of the definition contained in the Act any goods or services may form the object of a promotional competition and there is no reason why a competition cannot promote the goods or services of entities other than the promoters.

[38] The vital question that arises is whether the object or purpose of the Winikhaya competition is to promote goods or services.

[39] In their initial answering affidavit the first to seventh respondents assert that Winikhaya is a promotional competition which has as its objects the promotion of SABC 1 and in particular its programme 'Generations', and the Trust and the charities that it supports. Initially, Winikhaya also promoted People's Bank, and promotes from time to time various other products and brands which are related to homes or homelife, such as Tedalex and Motorola. In the first supplementary answering affidavit the respondents allege that the structure of the competition has been broadened to include a range of promotions and that various

⁷ See *Moodley v Minister of Education and Culture, House of Delegates* 1989 (3) SA 221 (A) at 233E-F.

sponsors use Winikhaya to launch a number of promotions each of which is designed to promote products related to house and home. By entering the competition a participant could win the various prizes such as for example a home theatre system, blankets or a voucher to spend at a well-known furniture supplier. In the third supplementary affidavit the respondents allege that during March 2007 Pep Stores became the headline sponsor of Winikhaya and that since then the monthly and daily cash prizes have been supplemented by the addition of Pep merchandise and shopping vouchers.

[40] It is clear that the dominant purpose and main activity of the Winikhaya competition is to raise funds and generate an income for the charities who are the beneficiaries of the Trust. In the questions and answers attached to the Winikhaya competition rules it is stated that 'the promotion was designed by the [Trust] in order to generate funding for its beneficiary charities.' To this end the Trust contracts with sponsors who have pledged prizes which are used to induce members of the public to enter the competition, thereby increasing the income to the Trust through the receipt of the premium rated SMS. The fact that Winikhaya provides goods as prizes is merely incidental to its main activity which is the raising of funds for the benefit of the various charities who are the beneficiaries of the Trust. It is artificial and incorrect to regard these fundraising activities as the promotion of goods or services. They no doubt have that effect but that is not the reason the competition is held.

[41] From the foregoing there can be no doubt that the

Winikhaya competition is not a promotional competition as defined.

Conclusion

[42] It follows that the Winikhaya competition as presently administered and implemented is an unlawful lottery as contemplated in terms of ss 56 and 57 of the Act. Section 56 contains a general prohibition against the conduct of lotteries and competitions which are not authorised under the Act. No matter how meritorious the competition might be it does not comply with the prescribed conditions and the Trust is obliged to discontinue its operations. The appeal must succeed.

Costs

[43] As the Board has been successful it is entitled to the costs of both the appeal and of the application in the court below. These costs should include the costs that were reserved on 30 November 2006. The postponement on that occasion was caused by the filing by the respondents of their first and second supplementary affidavits. The costs, which are to include the cost consequent upon the employment of two counsel, are to be borne by the first to seventh and ninth respondents jointly.

[44] Although the Board initially applied for certain interdictory relief against the SABC such application was withdrawn on 9 November 2006. Despite such withdrawal the SABC sought to intervene and further participate in the proceedings on the basis of a point of law which was abandoned during the course of the

appeal. In the circumstances the SABC ought to pay the costs of the appeal and of the application in the court a quo jointly and severally with the first to seventh and ninth respondents, the one paying the other to be absolved, including the costs consequent upon the employment of two counsel.

Order

[45] The following order is made:

(1) (a) The appeal is upheld;

(b) The first to seventh and ninth respondents in their capacities as trustees of the South African Children's Charity Trust are ordered to pay the costs of the appeal including the costs of two counsel;

(c) The eighth respondent is to pay the costs of the appeal jointly and severally with the first to seventh and ninth respondents, the one paying the other to be absolved including the costs of two counsel;

(2) The order of the court a quo is set aside and the following order is substituted:

‘(a) It is declared that:

(i) the Winikhaya competition conducted by the first to seventh and ninth respondents in their capacities as trustees of the South African Children's Charity Trust is not a promotional competition as contemplated in the Lotteries Act, 57 of 1997 (the Act);

(ii) the Winikhaya competition, as presently administered and implemented, is an unlawful lottery as

contemplated in ss 56 and 57 of the Act;

(b) The first to seventh and ninth respondents, in their capacities aforesaid are ordered to pay the costs of this application including the costs of two counsel. These costs are to include the costs that were reserved on 30 November 2006;

(c) The eighth respondent is ordered to pay the costs of this application jointly and severally with the first to seventh and ninth respondents in their capacities aforesaid, the one paying the other to be absolved, including the costs of two counsel. These costs are to include the costs that were reserved on 30 November 2006.'

P BORUCHOWITZ

ACTING JUDGE OF APPEAL

APPEARANCES:

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