



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

CASE NO: 385/07

In the matter between :

FIRSTRAND BANK LIMITED

Appellant

and

THE NATIONAL LOTTERIES BOARD

Respondent

Before: HOWIE P, STREICHER, NUGENT, COMBRINCK &
CACHALIA JJA

Heard: 29 FEBRUARY 2008

Delivered: 28 MARCH 2008

Summary: Lotteries Act 57 of 1997 – lottery – bank deposit conferring chance to win a prize – whether a prohibited lottery.

Neutral citation: Firstrand Bank v National Lotteries Board (385/07) [2008] ZASCA 29 (28 March 2008)

J U D G M E N T

NUGENT JA

NUGENT JA:

[1] Across the country there are people who keep their spare money under mattresses, or under the floorboards, or in glass jars. No doubt there are also many who have sufficient to warrant keeping it in a safe. If all that money could be gathered and deposited with a bank and the bank then lent it out at interest it can be expected that the bank's income would be considerable. And if the customer is not paid interest on money that would otherwise have remained under the mattress or in a glass jar he or she can hardly complain of being worse-off financially.

[2] But how does one persuade people who keep their spare money under mattresses or in glass jars – of which there are said to be some 17 million in this country – to deposit it with a bank instead? The cost of administering small accounts apparently precludes the payment of interest – at least at an appreciable rate – and even if interest is paid there are some for whom banking is not attractive. However, the chance of instant wealth – even if its realisation is remote – is notoriously mesmeric and it has occurred to the appellant, which is a large and reputable bank (I will refer to it as the bank), that this might attract at least some of that money. Events have proved the bank to be right.

[3] The scheme it has devised is not altogether novel. A comparable scheme was used by the former government to attract loans in the form of Defence Bonus Bonds (I will return to them later) and similar schemes are said to be used by banks abroad. I will set out presently the details of the scheme that the bank has devised but essentially it is this: a person who has money deposited in a particular 32 day call account on a particular day in each month qualifies to win one or more prizes that are randomly allocated.

The largest is a prize of R1 million hence the name of the account: the ‘Million-a-Month Account.’

[4] The scheme has brought the bank into conflict with the National Lotteries Board established by s 2 of the Lotteries Act 57 of 1997. The Board contends that the scheme is a lottery that is prohibited by the Lotteries Act and it applied to the High Court at Pretoria (Seriti J) for a declaration to that effect and for interdictory relief. The relief was granted and the appellant now appeals with the leave of this court.

[5] The Million-a-Month Account is relatively simple. It is essentially a savings account (with certain additional features) that is operated at no cost to the customer from which money may be withdrawn only upon 32 days’ notice to the bank. (Premature withdrawals are permitted but only upon payment of a charge that will in some cases be a considerable portion of the money deposited.¹) Interest is paid on deposits at a rate that may fairly be called nominal (0.25% annually) at the option of the depositor. The real attraction of the account is that for each R100 that is credited to the account on a selected date in each month the depositor has one chance of winning one or more monthly prizes. According to the bank’s promotional material there were 114 monthly prizes at the time the application was brought: one prize of R1 million, two of R100 000, ten of R20 000, one of 100 000 ‘e-bucks’, and 100 of R1 000. The prizes are awarded by computerized random-selection.

[6] No doubt the scheme has the many positive features that we were told about by the bank though it seems to me that it also has the potential to be disadvantageous to some depositors. But it is not for us to opine on whether

¹ The terms upon which the account is operated provides for an early redemption fee of 2% (including VAT) of the ‘amount invested over the remaining period of notice’ with a minimum charge of R250 for amounts over R10 000 and R100 for amounts under R10 000.

the scheme is meritorious or not. Our concern is only whether it is prohibited by the Lotteries Act.

[7] The Lotteries Act reflects an underlying policy that is altogether different from the policy that underlay earlier legislation dealing with lotteries. For over a hundred years before the Lotteries Act took effect lotteries were prohibited. The reason, it seems, was their propensity to draw money from those who could least afford it. In England, where lotteries were also prohibited, Lord Widgery CJ expressed it as follows in *Reader's Digest Association Ltd v Williams*:²

‘[T]he evil which the lottery law has sought to prevent was the evil which existed where poor people with only a few pence to feed their children would go and put these few pence into a lottery and lose them, and this sociologically was a bad thing.’

[8] The aim of the Lotteries Act is altogether different. The loss of the ‘few pence’ is no longer considered to be undesirable in itself. What is undesirable is only that it should be lost to someone other than the National Lottery, which is obliged to pay part of its net income to worthy causes.³ I think it is also clear that the intention of the Lotteries Act is that the National Lottery should generate as much money as possible for distribution to those causes.

[9] The National Lottery has a monopoly on collecting money from the general public in this way. All other lotteries that have a subscription are prohibited – no matter how meritorious they might be – but for lotteries of four kinds that are permitted under very restrictive conditions. Three are lotteries that are of relatively minor significance (lotteries conducted at bazaars, fetes, dinners and so on,⁴ private lotteries,⁵ and society

² [1976] 3 All ER 737 (QBD) at 739f-g. .

³ The National Lottery is a lottery that is permitted to be conducted by one licensee who has been licensed to conduct it under s 13 of the Lotteries Act.

⁴ Section 36.

⁵ Section 37.

lotteries⁶). The only commercial lotteries that are permitted are ‘promotional competitions’ – lotteries that are conducted ‘for the purpose of promoting the sale or use of any goods or services’ – if they comply with prescribed conditions, one of which is that they may not be ‘substantially similar’ to the National Lottery.⁷

[10] Although the policy of the legislation has changed the draftsman has nonetheless relied upon and largely adopted, for the purpose of describing an unlawful lottery, the rather unusual structure of the Gambling Act 51 of 1965⁸ and the content of its definitions (but with an important addition that I will return to). The relevant provisions of the Gambling Act largely (but not exactly) replicated the structure and content of the comparable provisions of some pre-Union legislation.⁹

[11] A lottery for purposes of the Lotteries Act is a lottery as ordinarily understood but extended to include

‘any game, scheme, arrangement, system, plan, promotional competition or device for distributing prizes by lot or chance...’.

Unauthorised lotteries are prohibited by s 56 and the conduct of a lottery is made an offence by s 57. The key to determining whether a lottery is unlawful is s 63, which allows lotteries that lack a ‘subscription’, and it is there that the dispute in this matter lies. The section reads as follows:

‘Nothing in this Act shall apply in relation to any lottery...in respect of which there is no subscription.’

[12] A ‘subscription’ is defined to mean

⁶ Section 38.

⁷ Section 54.

⁸ The provisions of the Gambling Act 51 of 1965 relating to lotteries were repealed by the Lotteries Act.

⁹ Act 9 of 1889 in the Cape, Law 7 of 1890 in the Transvaal, and Chapter CXLIII of the Law Book in the Orange Free State, all of which prohibited lotteries.

‘the payment, or delivery of any money, goods, article, matter or thing, including any ticket, coupon, or entry form, for the right to compete in a lottery’.

The punctuation in that definition might at first sight suggest that the word ‘payment’ stands separately from the remaining words, and that ‘money’ and ‘delivery’ go hand in hand. But if that were so the definite article preceding ‘payment’ would not make grammatical sense. I think it is clear that the comma after ‘payment’ appears inadvertently and that the definition refers to ‘the payment of money’ and the ‘delivery of (any goods or other articles)’.

[13] A ‘subscription’ was also essential for a lottery to be unlawful under the Gambling Act and legislation that preceded it. But the definition in the Lotteries Act adds to those definitions. The definition in the Gambling Act included ‘any ticket, coupon, or entrance form purporting to be supplied free of charge to the readers of any newspaper or other periodical publication’. The definition in the Lotteries Act goes further by including ‘any ticket, coupon or entry form’ without qualification.

[14] But for the moment I can leave tickets, coupons and entry forms aside, because this case turns on the meaning of a ‘payment of any money’ in return for the right to compete in a lottery, as it is used in the definition. For there is no doubt that the bank’s scheme falls within at least the extended meaning of a lottery as it is defined and the only question is whether it lacks a subscription and is thus excluded from the Lotteries Act by s 63.

[15] One submission that was made on behalf of the bank can be disposed of immediately because it has no merit and merely diverts attention from the true enquiry. It was submitted that the ‘payment of money’, as it is understood in law, is confined to a transfer of money in extinction of a debt, and that it is used in that sense in the definition. Because no obligation is extinguished by

the transfer of money for deposit in the Million-a-Month Account, so the argument went, it does not constitute a ‘payment’.

[16] A cursory examination of the Oxford English Dictionary will reveal that the ordinary meaning of ‘payment’ is not confined to the transfer of money in extinction of a debt and there is nothing in law that insists that it should bear only that meaning. It just as much describes a transfer of money in return for something and it is used in that sense every day by millions of people in the English-speaking world who pay money in return for a loaf of bread. That it is used with that meaning in the definition is apparent from the language itself. And the transfer of money to a bank in return for an undertaking that its equivalent will be returned in due course – a deposit – quite clearly falls within the terms of that meaning. If there is any residual doubt on that score it is dispelled by the definition of a deposit in the Banks Act 94 of 1990.¹⁰ There is nothing in that submission and the true case for the bank lies elsewhere.

[17] It has been said in cases decided under the earlier legislation that an essential element of a lottery (and thus of a subscription) in the context of gambling legislation is that something is ‘staked’. This is how Watermeyer AJA expressed it in *R v Lew Hoi*¹¹ after considering various dictionary definitions of a lottery:

‘Now it will be noticed that some of these definitions widen the meaning of lottery by omitting the element of wagering or gambling, which is introduced when something is staked in order to acquire a chance of drawing a prize.... The word may sometimes be used in that very wide sense but the current of decisions of Courts of Law both in England and in South Africa show that the gambling element must be present for a scheme to be a lottery of the kind which legislation seeks to prohibit.’

¹⁰‘[A]n amount of money paid by one person to another subject to an agreement in terms of which...an equal amount or any part thereof will be conditionally or unconditionally repaid ...’.

¹¹ 1937 AD 215 at 219.

And later, after considering various cases on the topic:¹²

‘Consideration of all this material leads me to the conclusion that the essential characteristics of a lottery under [Transvaal] 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 payer of a right to a prize on the occurrence of an event, (c) determination of the occurrence of the event by chance.’

That description was subsequently adopted by this court for purposes of the Gambling Act in *Minister of Mineral and Energy Affairs v Lucky Horseshoe (Pty) Ltd.*¹³

[18] I think that care should be taken not to read more into the first leg of the learned judge’s description of a lottery than is warranted. Clearly the learned judge did not mean that a stake must necessarily be in the form of money – it is apparent from its ordinary meaning and from the statutory definitions of a subscription that other forms of consideration will do. Nor did he purport to suggest that loss (or the risk of loss) through the payment of money must take a particular form before it can be said to constitute a stake. I think it is apparent from the second leg of his description that he meant only that the payment of the money must have the consequence – without purporting to prescribe what that consequence might be – that a stake is created. The question whether there was a stake was not in issue in that case. Other cases that have dealt with whether a ‘stake’ was present – *R v Ellis Brown & Co*¹⁴ and *Lucky Horseshoe*¹⁵ are examples – have been concerned with whether the payment of money and the chance of a prize were sufficiently connected to say that the one was given in return for the other and are not helpful in resolving this case.

¹² At 220.

¹³ 1994 (2) SA 46 (A) 52A-G.

¹⁴ 1938 AD 98.

¹⁵ Cited above.

[19] A ‘stake’ in the present context has been described variously as ‘that which is pledged or wagered; that which is laid down to abide the issue of a contest, to be gained by victory or lost by defeat’¹⁶ and as ‘that which is placed at hazard; *esp.* a sum of money or other valuable commodity deposited or guaranteed, to be taken by the winner of a game, race, contest, etc’¹⁷ and as ‘something (*esp.* money) bet in a wager, game or contest’.¹⁸

[20] I have great difficulty envisaging how money that is paid in return for a chance to win a prize could ever not have the consequence that a stake in some form is created – except, of course, if this is just that case. The fact alone that a person is willing to give a prize in return for the payment of money seems to me to demonstrate ineluctably that a consideration of some kind has passed that has value for why else would money be paid for the exchange? And if that is so it seems to me to follow that whatever passed from one to the other was what was wagered or lost for the chance of the prize and constitutes the stake.

[21] The bank’s case is that nothing is lost or put at risk by the customer who pays money for deposit to the account – he or she is assured that its equivalent will be returned – and for that reason the payment lacks the characteristics of a stake. That argument appealed to Van Dyk J in *Boardman v Minister van Finansies*,¹⁹ which is on all fours with the present case in all material respects. I will return to that case – and the bank’s argument – presently but first there is an observation that needs to be made.

[22] It is by no means clear to me that the meaning that has been given to a lottery in earlier cases – in as much as it requires something to be staked – is

¹⁶ The Imperial Dictionary.

¹⁷ Oxford English Dictionary.

¹⁸ Black’s Law Dictionary 8 ed.

¹⁹ 1984 (1) SA 259 (T).

equally applicable to a lottery under the Lotteries Act. As pointed out in *Lew Hoi* the word is capable in ordinary usage of a wider meaning that omits the element of gambling – it might mean merely the allotment or distribution of anything by chance or fate²⁰ – and it is quite possible that an unlawful lottery was intended to have that wider meaning in the Lotteries Act. It seems to me that there are two pointers in that direction. The first is the policy that underlies the Lotteries Act – which is not to prevent money being lost in this way but rather to ensure that the chance of instant wealth is attainable only through the National Lottery. It would make good sense in those circumstances to prohibit other lotteries that might divert its customers – whether or not they require the payment of money. (If it is thought that nobody would operate a lottery other than for a stake an example is the scheme that was considered in *Reader's Digest Association Ltd v Williams*.²¹) The second is the extension of the definition of a subscription in the Lotteries Act to include the delivery not only of money or property but also of ‘any ticket, coupon, or entry form’. Clearly a ticket or coupon or entry form alone does not have the characteristics of a stake. I can see no reason for that extension but to include amongst prohibited lotteries any scheme in which a prize may be won by chance merely by participants announcing their wish to be eligible for the prize by performing one of those acts.

[23] If the mere performance of one or other of the acts described in the definition – which include the act of paying money – is all that is required of a subscription under the Lotteries Act then clearly the Million-a-Month Account falls within its terms. But on the approach that I take to the matter I need not decide whether that is indeed the meaning. I have assumed for purposes of my decision, in favour of the bank, that the payment must have

²⁰ The Imperial Dictionary quoted in *Lew Hoi* at 218 and the definitions quoted in *Chief Constable, Durban v Stuart* 30 NLR 58 at 62. .

²¹ [1976] 3 All ER 737 (QBD).

the consequence that something is staked if the scheme is to be an unlawful lottery.

[24] To return to the decision in *Boardman*. That case concerned the Defence Bonus Bonds that I referred to earlier.²² Money was lent to the government in the form of a bond that was redeemable after not less than a year. Interest was paid on the loan at the rate of 5% but that is not material. The inducement to purchase a bond was the chance that it offered of substantial monetary prizes that were allocated at random. Van Dyk J held that the scheme was not an unlawful lottery under the Gambling Act because the investor was assured of receiving the equivalent of his or her investment when the bond was redeemed and thus could suffer no loss. The learned judge appears to have considered that to be self-evident because he expressed himself in a scant two sentences (my translation):²³

‘I think that it is such general knowledge, that the Court can take notice of it, that a lottery is a gamble and the gamble lies in the fact that a person will lose his or her ‘stake’ if [he or she does] not win the prize... [It] requires no persuasion to come to the conclusion that all the activities that occur with the purchase and sale of bonus bonds with the exception that the owner of such a bond might also come into contention for a *bonus* over and above his or her 5% tax-free interest, take place without any risk of loss of his or her investment.’²⁴

[25] But a reference only to the beginning and the end of the transaction is an incomplete description that misses the point of the transaction. To focus on those two events alone loses sight of what has occurred to the money in between. It is not correct that nothing is lost by the customer (and gained by the bank) only because the money-equivalent is ultimately returned. What passes from the depositor to the bank – irretrievably for the period concerned

²² The scheme is set out in Government Notice No. 372 dated 29 February 1980.

²³ At 266F-H.

²⁴ ‘Ek meen dat dit so algemene kennis is, dat die Hof daarvan kan kennis neem dat lotery ‘n waagstuk is en die waagstuk lê juis daarin dat mens jou inset (“stake”) gaan verloor as jy nie die prys wen nie... [Dit verg geen betoog] om tot die slotsom te kom dat al die aktiwieteite wat gebeur met die koop en verkoop van bonusobligasies met die uitsondering dat die eienaar van so ‘n obligasie ook in aanmerking mag kom vir ‘n *bonus* bo-en-behalwe sy 5% belastingvrye rente, plaasvind sonder enige risiko van verlies van sy belegging.’

– is possession of the money with its potential to be turned to account. The very purpose of the transaction is to bring about the transfer possession for possession of money – every banker will know – is what enables the bank to earn its interest.

[26] I have no doubt that a right of possession alone – whether of property or of money – is a consideration that is capable of being staked. I would be most surprised if the right to occupy a holiday house for the summer holidays is not capable of being staked in a game of poker only because it must be returned. I would be equally surprised if the right to use a motor vehicle for a period of time is not capable of being staked on the turn of the dice only because the vehicle would otherwise have remained stationary in the garage. And similarly I see no reason why a loan of money (which is effectively what is in issue in this case) might not be staked for the chance to win a prize. Indeed, I find it surprising that a bank should suggest that the possession of money – the bread-and-butter of banking – is not capable of constituting a stake. Particularly when the whole purpose of the scheme is to persuade people to part with it irretrievably for a time by offering them the chance of a prize.

[27] That the possession of money paid for credit to a Million-a- Month Account is of considerable value to the bank goes without saying. In determining whether it constitutes a stake I do not think it matters how – or even whether – the money would otherwise have been turned to account by the depositor. But in any event I do not think it can be said that possession of the money that is paid in the present case has no value to the depositor – even if it would otherwise have remained under the mattress. It has at least this value to every depositor that it can be exchanged for the chance to be a millionaire.

[28] There can be no dispute that the money is paid to the bank in return for the chance to win a prize: the very purpose of the scheme is to bring that exchange about. The unavoidable consequence of making the payment is that possession is lost to the depositor and acquired by the bank – irretrievably for the period that it remains with the bank. In my view that is indeed a consideration that is ‘laid down to abide the issue of [the] contest [to become a millionaire]’, ‘something [that is] wagered in a game’, and constitutes a stake. That the outcome is determined by chance is not in dispute. Those seem to me to be all the elements of a lottery as they were described in *Lew Hoi*. In my view *Boardman* was wrong on that point (the claim in that case was dismissed on other grounds).

[29] When legislation has received authoritative judicial interpretation it has been accepted by this court (*Ex parte Minister of Justice: In re Rex v Bolon*²⁵) that it might be presumed that later legislation was intended to bear that meaning. But it was pointed out in *Bolon* that for the presumption to be applied the interpretation must be one that is ‘well settled and well recognised’. I do not think the finding in *Boardman* that I have referred to can be said to fall into that category, particularly when it did not purport to be definitive of the outcome of that case. (It was held that even if the scheme fell within the prohibition in the Gambling Act the state was not bound by its own legislation and on that ground the claim was dismissed.)

[30] There is a further issue that arises in this appeal. The bank challenged the Board’s standing to seek the relief that it sought. Undoubtedly the bank was entitled to do so in law but it is curious that it should have elected to do so. Counsel explained that if the Minister responsible for the administration of the Act had brought the application instead, and the scheme had been declared

²⁵ 1941 AD 345 at 359-360.

by a court to be lawful, the Minister would have been bound by that decision. That would have precluded the Minister, so it was said, from later declaring the scheme to be unlawful, because that issue would already have been decided.

[31] It is not clear to me under which section of the Lotteries Act it is thought that the Minister might have acted²⁶ but in any event that reason for taking the point is misguided. Insofar as the Lotteries Act permits the Minister to declare something to be unlawful it does not purport to authorise the Minister to determine whether or not it falls within the terms of the Act (that is the function of a court). It rather empowers the Minister by declaration to bring under the umbrella of the Act something that would otherwise not have fallen within its terms. But misguided as the reason for doing so might be the point has been taken and it falls to be dealt with.

[32] The submission was said to go to the standing of the Board to bring the proceedings but in truth it goes rather to whether it had the power to do so, which is something different. Section 10 of the Lotteries Act assigns specific functions to the Board in addition to its other functions in terms of the Act. Unlike other legislation that creates statutory bodies the statute does not expressly confer any powers on the Board but I think it is implicit that it has all the powers that are necessary to fulfil its functions. The functions that are expressly assigned to the Board include ‘monitoring, regulating and policing’ promotional competitions as that term is defined in the Act.²⁷ In my view the lottery that is being conducted by the bank is indeed such a competition in that it is conducted for the purpose of promoting the use of its deposit account. (I should add that while promotional competitions are permitted by the Act if they comply with prescribed conditions there is no suggestion that

²⁶ The definition of a ‘lottery’ includes any scheme etc. that the Minister declares to be a lottery by notice in the Gazette. Section 54(4) allows the Minister to declare a promotional competition to be unlawful.

²⁷ See para 9 above.

the Million-a-Month Account conforms with those conditions.) On that point, too, the appeal must fail.

[33] The appeal is dismissed with costs that include the costs of two counsel.

R.W. NUGENT
JUDGE OF APPEAL

CONCUR:

HOWIE P)

STREICHER JA)

COMBRINCK JA)

CACHALIA JA)