

SOUTH AFRICA / JUDGMENT

**Magajane v Chairperson, North West
Gambling Board (CCT49/05) [2006] ZACC
8; 2006 (10) BCLR 1133 (CC) ; 2006 (5) SA
250 ; 2006 (2) SACR 447 (8 June 2006)
[2006] ZACC 8**

COURT

Constitutional Court

BEFORE

Van der Westhuizen

CASE / FILE NUMBER

CCT 49/05

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CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 49/05

ISAAC METSING MAGAJANE Applicant versus THE CHAIRPERSON, NORTH WEST GAMBLING
BOARD First Respondent JACOBUS CONRADÉ ERASMUS Second Respondent MEC FOR FINANCE
AND ECONOMIC DEVELOPMENT, NORTH WEST PROVINCE Third Respondent Heard on : 23
February 2006 Decided on : 8 June 2006

JUDGMENT

VAN DER WESTHUIZEN J: Introduction

- [1] The questions raised by this case include whether, consistent with the constitutional right to privacy, legislation may authorise warrantless inspections of unlicensed premises for the purpose of obtaining evidence for criminal prosecution. The North West Gambling Act 2 of 2001 (the Act) governs the regulation of gambling activities in the North West Province and establishes and empowers the North West Gambling Board (the Board). Section 65 of the Act lists the powers and functions of the Board's inspectors. [1] The applicant in this case, who was the subject of an inspection conducted pursuant to section 65, challenges the constitutionality of a number of the provisions of the section, alleging that they violate his rights to remain silent and to privacy and that one provision exceeds the constitutional competence of the provincial legislature.

Background

- [2] Board inspector Jacobus Conradé Erasmus, the second respondent, received a report from another Board inspector that illegal gambling was taking place at an establishment known as Las Vegas Gold Lichtenburg (Las Vegas Gold). Four days later, on 30 August 2004, Mr Erasmus arranged for undercover agents to visit Las Vegas Gold and to play on gambling machines using marked “trap” money. Upon the return and report of the undercover agents, Erasmus led a team of Board inspectors and members of the South African Police Service on a “raid” of Las Vegas Gold.
- [3] Mr Erasmus and the others did not seek a warrant to enter, search or seize property from Las Vegas Gold. They conducted their activities pursuant to section 65 of the Act.
- [4] Section 65 of the Act, entitled “Powers and functions of inspectors”, provides: [2]

“(1) An inspector shall for the purpose of this Act—

- (a) enter upon any licensed or unlicensed premises which are occupied or being used for the purposes of any gambling activities or any other premises on which it is suspected—
- (i) that a casino or any other gambling activity is being conducted without the authority of a licence, (ii) that persons are being allowed to play or participate in any gambling game or other gambling activities or to play any gambling machine, or (iii) that any gambling machine or any equipment, device, object, book, record, note, recording or other document used or capable of being used in connection with the conducting of gambling games or any other gambling activity may be found,

and may, after having informed the person who is deemed or appears to be in charge of the premises of the purpose of his or her visit, make such investigation or enquiry as he or she may think necessary;

- (b) with regard to any premises referred to in paragraph (a)—
 - (i) require the production of any licence or written permission or authorisation to conduct gambling activities from the person who is in control of such premises, (ii) question any person who is on or in such premises, and inspect any activities in connection with the conduct of any gambling activity, (iii) examine or inspect any gambling machine, equipment, device, object, book, record, note or other document referred to in paragraph (a) found on those premises and make a copy thereof or an extract therefrom, (iv) inspect and examine all premises referred to in paragraph (a) or any premises where gambling devices or equipment are manufactured, sold, distributed, or serviced, wherein any records of such activities are prepared or maintained,
 - (v) inspect all equipment and supplies, in, about, upon or around such premises, (vi) seize summarily and remove from such premises and impound any such equipment or supplies for the purposes of examination and inspection, (vii) examine, inspect and audit all books,

records and documents pertaining to licensed gambling operations, (viii) seize, impound or assume physical control of any book, record, ledger, game device, cash box and its contents, conducting room or its equipment, or gambling operations, and (ix) inspect the person, and personal effects present in any gambling facility licensed under this Act, of any holder of a licence or registration issued pursuant to this Act while that person is present in the licensed gambling facility;

- (c) require any person who is deemed or appears to be in charge of any premises referred to in paragraph (a)—
 - (i) to point out any equipment, device or object referred to in that paragraph which is in his or her possession or custody or under his or her control, (ii) to produce for the purpose of examination or of making copies or extracts, all books, records, note[s] or other documents referred to in paragraph (a) which are in his or her possession or custody or under his or her control, (iii) to provide any information in connection with anything which has been pointed out or produced in terms of subparagraph (i) or (ii), and
 - (d) seize and remove any gambling machine, equipment, device, object, book, record, note or other document referred to in paragraph
 - (a) which in his or her opinion may furnish proof of a contravention of any provision of this Act or mark it for the purposes of identification.
- (2) When performing any function in terms of subsection (1), an inspector may be accompanied by and avail himself or herself of the services of an assistant, interpreter or any police official.
- (3) An inspector shall in respect of any provision of this Act or any regulations promulgated thereunder be deemed to have been appointed a peace officer in accordance with section 334 of the Criminal Procedure Act 1977 (Act No. 51 of 1977), as amended for the purposes of section 40, 41, 44, 46, 47, 48, 49 and 50, of the said Act. . . .”
- [5] According to Mr Erasmus’ affidavit in the High Court, he and his colleagues entered the building. Erasmus introduced himself to the applicant, Mr Isaac Metsing Magajane, the manager of the Las Vegas Gold. Pursuant to section 65(1)(b)(i) of the Act, [3] Erasmus asked Magajane to produce a gambling licence or similar written authorisation. Magajane did not produce any authorisation. It is common cause that Las Vegas Gold was not licensed or otherwise authorised to be a gambling establishment. Erasmus then informed Magajane that he possessed evidence of illegal gambling and that he intended to search, inspect and seize gambling equipment, records and other items. He showed Magajane the relevant sections of the Act and handed him lists of the raiding officials and of materials that could be seized. Erasmus searched the cash register, which contained the marked money spent by the undercover agents. He seized R 4 890 from the cash register and R 24 120 from a safe. Erasmus and one of his colleagues photographed some of the gambling machines on the premises. An inventory list indicates that there were 60 machines. A police officer [4] then

arrested the applicant and three employees for conducting a casino without a licence in violation of the Act. [5] Erasmus seized the gambling machines by locking the premises.

The High Court

- [6] Mr Magajane launched an urgent application in the High Court in Mmabatho against the chairperson of the North West Gambling Board, Mr Erasmus and the MEC for Finance and Economic Development of the North West Province. The applicant sought a declarator that the entry, search and seizure violated section 65 of the Act or in the alternative that provisions of section 65 were unconstitutional. [6] He also sought the return of the seized property. [7] The High Court dismissed the application with costs. [8]
- [7] As a preliminary matter, the respondents objected to the failure of the applicant to join the Board itself as a party. They contended that joinder was necessary as the applicant sought a declaration of invalidity for statutory provisions that the Board depends on to pursue its statutory function. The respondents claimed that this failure was fatal to the application. The High Court overruled this objection. Relying upon section 23(1) of the Act, which provides that service on the chairperson of the Board constitutes service on the Board, the Court held that there existed no need to cite both the chairperson and the Board as separate parties. [9]
- [8] The applicant asserted that the second respondent had exceeded his powers under section 65 of the Act by (1) utilising the section to “raid” the premises rather than to inspect, examine or investigate, (2) seizing money from a safe and (3) seizing every piece of equipment found on the premises. The High Court rejected each assertion in turn, holding that: (1) the second respondent was authorised by section 65 to enter the premises without prior notification, to require the production of a licence or other authorisation to conduct gambling activities and to seize objects used for gambling; (2) the statute permits the seizure of cash and a cash box, which would include a safe; and (3) the second respondent did not seize and remove all the gambling machines and equipment.
- [9] In the alternative, the applicant raised three constitutional arguments. Firstly, he submitted that section 65(1)(b)(ii) and (c)(iii) violated his right to remain silent, as it empowered Mr Erasmus to question him and to require him to provide certain information. He pointed to the absence of a proviso rendering information obtained or gathered in this manner from being used against him in an ensuing criminal proceeding.
- [10] The High Court held that section 65(1)(b)(ii) and (c)(iii) does not violate the right to remain silent. The two subsections concern the procurement of evidence or information, not the admissibility of evidence. The issue of whether any information provided under section 65 could be admitted in a criminal trial should be determined in each case by the trial judge with reference to the right to a fair trial.

- [11] Secondly, the applicant argued that section 65(1)(b) and (d) violated his constitutional right to privacy in that these provisions permitted Mr Erasmus to conduct a search and seizure without a warrant.
- [12] The High Court found that the applicant had failed to prove that his personal right to privacy, in the sense of his inner sanctum, was breached. Therefore, it was not necessary to consider the constitutional challenge grounded on the breach of the applicant's right to privacy. However, the Court proceeded to enquire into whether the breach of the right to privacy would be justified in terms of section 36 of the Constitution and concluded that it would. The Court reasoned that the regulatory inspections authorised by the Act, including the powers to search and seize, are necessary to promote the public purpose of regulating gambling activities and are bounded sufficiently by the Act.
- [13] Thirdly, the applicant challenged the constitutionality of section 65(3) of the Act, which provides that "[a]n inspector shall . . . be deemed to have been appointed a peace officer in accordance with section 334 of the Criminal Procedure Act 1977 ". The applicant argued that the provincial legislature had no authority to enact such a provision and consequently that Mr Erasmus' actions as a peace officer were invalid.
- [14] The High Court declined to address the substance of this argument. The Court held that the issue was irrelevant, because Mr Erasmus did not arrest or attempt to arrest the applicant. Rather, a police officer arrested the applicant.
- [15] The High Court and the Supreme Court of Appeal refused to grant the applicant leave to appeal. The applicant now applies to this Court for leave to appeal against the decision of the High Court on the constitutional issues only. The respondents oppose the application and persist in their argument as to joinder.

The Act

- [16] The Act provides for "the strict regulation of all persons, premises, practices, associations and activities relating to gambling". [10] Chapter 2 of the Act establishes the Board to oversee gambling activities in the province [11] and delineates the powers, structures and proceedings of the Board. [12] Chapters 3 to 10 set out the rules and requirements relating to licensing and the registration of certain personnel. Chapter 11 contains section 64, which governs the appointment of inspectors, and section 65, the subject of this appeal, which details the powers and functions of inspectors. The remainder of the Act sets out laws relating to gambling machines and devices; [13] general restrictions relating to gambling, including section 82 which establishes offences and penalties; [14] rules concerning gambling levies, fees, penalties and interest; [15] and additional provisions relating to the Board, including the issuance of regulations, publication of information and review of Board decisions. [16]

- [17] Section 65(1)(a) instructs an inspector to enter any licensed or unlicensed premises occupied or used for gambling activities, or on which it is suspected that such activities are being conducted or allowed, or on which any of numerous specified gambling related items are present. The provision authorises the inspector to investigate or inquire as he or she thinks necessary, provided that the inspector first informs the person in charge of the premises of the purpose of the visit.
- [18] Section 65(1)(b) instructs the inspector to perform a wide range of tasks on the premises referred to in section 65(1)(a). This includes requiring the person in control of the premises to produce a licence, written permission or authorisation to conduct gambling activities; [17] questioning any person on the premises; [18] inspecting any activities, objects or records connected with the conduct of gambling or located on or around the premises and any person and personal effects present on a licensed gambling facility; [19] seizing, removing and impounding any equipment or supplies for the purposes of examination and inspection; [20] and seizing, impounding or assuming physical control over any records, cash box, equipment or gambling operations. [21]
- [19] Section 65(1)(c) states that the inspector shall require a person who is deemed or appears to be in charge to point out any item or produce all records referred to in section 65(1)(a) that is in his or her possession, custody or control and to provide any information in connection with those items or records.
- [20] Section 65(2) provides that the inspector may be accompanied by other personnel, including any police official. In addition section 65(3) provides that, for the purpose of the Act, the inspector is deemed to have been appointed a peace officer in accordance with section 334 of the Criminal Procedure Act 51 of 1977 .
- [21] The remainder of the section governs administrative inspections for compliance with the Act. Section 65(4) authorises administrative inspections, [22] and section 65(5) details the inspector's powers and functions in conducting such inspections. Section 65(6) provides that the inspector "in accordance with constitutional requirements" and "to effectuate the purpose of this Act" may obtain administrative warrants to inspect and seize property during administrative inspections. Subsections (7) to (12) of section 65 govern the procedure for obtaining and for employing the warrant.

The issues

- [22] The applicant raises three issues in this Court:
1. Does section 65(1)(b)(ii) and (c)(iii) of the Act, read with section 82, violate the applicant's right to remain silent by requiring him to answer questions that could be used against him in future criminal proceedings?
 2. Does section 65(1)(b) and (d) violate his right to privacy by authorising inspectors to search his commercial premises and to seize items without a warrant?

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3. Does section 65(3) exceed the constitutional competence of the North West provincial legislature by deeming an inspector to have been appointed a peace officer in accordance with section 334 of the Criminal Procedure Act?
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