CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 15/08
[2008] ZACC 20

MICHAEL WEARE	First Applicant
BETTING WORLD (PTY) LTD	Second Applicant
and	
MR JOEL SIBUSISO NDEBELE NO	First Respondent
KWAZULU-NATAL GAMBLING BOARD	Second Respondent
KWAZULU-NATAL BOOKMAKERS CONTROL COMMITTEE	Third Respondent
MR MANDISI BONGANI MABUTO MPAHLWA NO	Fourth Respondent
NATIONAL GAMBLING BOARD	Fifth Respondent

Heard on : 19 August 2008

Decided on : 18 November 2008

JUDGMENT

VAN DER WESTHUIZEN J:

Introduction

[1] This is an application for confirmation of an order of constitutional invalidity made in respect of section 22(5) of the Kwazulu-Natal Regulation of Racing and Betting Ordinance 28 of 1957 (the Ordinance) by Rall AJ in the Pietermaritzburg

High Court.[1] The section provides that – in the province of KwaZulu-Natal – a juristic person may not hold a licence to carry on the business of bookmaking. Only natural persons may hold bookmaking licences in the province. Juristic persons in other provinces may do so. The High Court held that this constituted an irrational and arbitrary differentiation and thus declared the section unconstitutional for contravening section 9(1) of the Constitution, which provides for equality before the law.[2] The High Court also found that section 9(3), which prohibits unfair discrimination,[3] was violated by section 22(5).

[2] The case raises questions regarding the enjoyment by juristic persons of the right set out in section 9 and the application of that section to a legislative differentiation which the applicants allege is obsolete. It also raises the question whether the invalidation of provincial ordinances has to be confirmed by this Court.

Background

[3] Gambling in KwaZulu-Natal is currently regulated by two pieces of provincial legislation. Racing, betting and bookmaking are regulated by the Ordinance. Casinos, gaming machines, bingo and lotteries are regulated by the KwaZulu-Natal Gambling Act 10 of 1996. These operate concurrently with the National Gambling Act 7 of

[1] *Michael Weare and Another v Mr Joel Sibusisio Ndebele NO and Others*, Case no 8337/06, handed down on 29 February 2008, unreported.

[2] Section 9(1) states: "Everyone is equal before the law and has the right to equal protection and benefit of the law."

[3] Section 9(3) states:

> "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

2004. Gambling is an area of concurrent national and provincial competence under the Constitution.[4]

[4] For some time the executive in the province has been preparing draft legislation to replace the Ordinance and the 1996 provincial Gambling Act and to bring the regulation of all gambling in the province under a single statute. Bills were prepared in 2003 and 2007; the 2007 Bill is currently under consideration in the provincial legislature.

[5] Section 22(5) of the Ordinance restricts the category of persons who may hold bookmaking licences in the province. It provides:

> "No bookmaker's license shall be issued in the name of any partnership or any company or other association of persons, or to the representative or agent or officer of any partnership, company or association, or to the representative or agent of any individual on behalf of that individual: Provided that nothing hereinbefore contained shall be deemed to prevent the carrying on of a bookmaker's business in partnership by two or more persons each of whom is the holder of a valid bookmaker's license issued to him in terms of the Ordinance."

[6] By contrast, both Bills contain explicit provisions for juristic persons to hold bookmaker's licences in KwaZulu-Natal.[5] However, this proposed change has not yet been enacted and section 22(5) still regulates the position.

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[4] Gambling appears in Part A of Schedule 4 of the Constitution. Matters listed therein fall within the authority of both the national and provincial spheres of government, in terms of sections 44(1)(a) and 104(1)(b) respectively of the Constitution. See also *National Gambling Board v Premier, KwaZulu-Natal, and Others* [2001] ZACC 8; 2002 (2) SA 715 (CC); 2002 (2) BCLR 156 (CC) at para 3.

[7] The first applicant, Mr Michael Weare, holds a bookmaking licence under the Ordinance and owns a bookmaking business in KwaZulu-Natal under the name "The Betting Shop". In 2001 Mr Weare was offered the position of managing director of the second applicant, Betting World (Pty) Ltd, a position he accepted and continues to hold. Betting World, a juristic person, carries on the business of bookmaking in the other eight provinces of South Africa but, as a result of the prohibition in section 22(5) of the Ordinance, does not do so in KwaZulu-Natal.

[8] The parties concluded an agreement in terms of which Betting World undertook to provide managers for Mr Weare's business. The parties also concluded a conditional contract of sale, providing that Mr Weare would sell his business to Betting World, subject to various suspensive conditions. This agreement was to lapse if the conditions were not fulfilled before the end of December 2002. Among the conditions was the stipulation that KwaZulu-Natal's legislation had to change in that time to permit juristic persons to hold bookmaking licences. Since this legislative change did not occur, the agreement fell through.

[9] In August 2006 the Office of the Premier addressed a letter to Mr Weare, expressing the view that the agreement possibly contravened the provisions of the Ordinance. Disciplinary proceedings then commenced. These were suspended after

[5] See clause 34(4) of the KwaZulu-Natal Racing and Betting Bill (2003) and clause 94(4) of the KwaZulu-Natal Gambling and Betting Bill (2007).

the applicants had launched their challenge to section 22(5) in the High Court and remain so pending finalisation of this case.

[10] The applicants cited five respondents before the High Court. The application was opposed by only two: the first, Mr Ndebele, cited in his capacity as the Premier of KwaZulu-Natal; and the third, the KwaZulu-Natal Bookmakers Control Committee, the body created in terms of section 21A of the Ordinance to control bookmaking operations in the province. The Premier and the Committee both appealed to this Court against the confirmation of the order of the High Court. The fourth respondent, Mr Mpahlwa, was cited in his capacity as the Minister of Trade and Industry, who is responsible for gambling at the national level. The Minister indicated his intention to abide the decision of the High Court and the decision of this Court. The other two respondents, the National Gambling Board and the KwaZulu-Natal Provincial Gambling Board, did not respond to the litigation at any stage.

Issues

[11] Five issues arise for consideration. First, the applications for condonation filed by the applicants and the third respondent must be considered. Second, the present case concerns the constitutional validity of a provincial ordinance. The question is whether the invalidation by the High Court must be confirmed by this Court, as the invalidation of an Act of Parliament and a provincial Act must be. Third, can juristic persons be bearers of the right set out in section 9 of the Constitution? Fourth, does section 22(5) of the Ordinance violate section 9(1)? And fifth, was the High Court

correct in its further finding that, in addition to violating section 9(1), the differentiation in section 22(5) constituted unfair discrimination contrary to section 9(3) of the Constitution?

Condonation

[12] The applicants seek condonation for the late filing of their application for confirmation, conditional on it being found that the filing was indeed late. The applicants filed on 31 March 2008. Judgment was handed down in the High Court on 29 February 2008. However, the applicants state that the judgment was only certified by the High Court Registrar and sent to the applicants' attorneys on 7 March. Rule 16(4) of this Court's Rules provides that a party who wishes to apply for confirmation of an order of invalidation has 15 days from the date on which the order is made to seek confirmation. If this period is taken to run from 29 February, it expired on 25 March and the applicants would have filed six days late. Alternatively, if the period is taken to run only from 7 March when the judgment was certified, it expired on 1 April and the applicants' filing would be in time.

[13] In my view the need for certainty requires that time periods should run from the date of the order that is the subject of the application, rather than from the date of certification. The matter must therefore be approached on the basis that the applicants filed late.

[14] The applicants state that they waited to determine whether there would be any appeal against the High Court decision and that there was some uncertainty in this regard. This explanation is not entirely convincing. The applicants also note that the respondents suffered no prejudice as a result of the very short delay, while the applicants would suffer considerable prejudice if their application were refused. In view of this factor, as well as the shortness of the period involved and the fact that the certification took some time, it is in the interests of justice to grant condonation.

[15] The first respondent, the Premier, filed a notice of appeal in time on 25 March 2008. However, the third respondent, the Committee, only filed their notice of appeal on 5 June 2008. They state that a decision on whether to participate in the litigation had to be taken by the members of the Committee. The Committee could apparently only meet on 3 April – after the time for filing had expired. Since there had been several changes in personnel during February 2008 and the members of the Committee were new and unfamiliar with the litigation, it was decided to obtain the opinion of senior counsel before deciding whether or not to join the appeal. This opinion was received on 24 April. The committee then met again, over a month later, on 27 May, and decided to appeal against the order, filing on 5 June.

[16] This explanation is inadequate. Even if the difficulties caused by the change in personnel are taken to explain the delay between 3 April and 24 April while opinion was received, no explanation is given for the other delays. In particular, it is not explained why on two occasions it took the Committee more than a month to meet.

This shows a disregard for the time frames set out in the Rules of this Court. Furthermore, the third respondent associated itself entirely with the argument of the first respondent and was represented by the same counsel, so no prejudice follows from their exclusion. Taking the interests of justice into account, there is no reason to grant condonation.

[17] In view of this finding, the third respondent plays no further part in the consideration of this matter. For clarity, I refer to the first respondent (the first appellant before this Court) as "the Premier".

Does the invalidation of a provincial ordinance have to be confirmed by this Court?

[18] Section 172(2)(a) of the Constitution provides:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[19] Section 167(5) of the Constitution provides:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

[20] We are not here concerned with an Act of Parliament or conduct of the President. The question is whether the Ordinance is a "provincial Act" for the

purposes of sections 167(5) and 172(2)(a). This question arose in *Zondi v MEC for Traditional and Local Government Affairs* but was not decided by this Court.[6] I regard it as appropriate and desirable to address the question in this case.

[21] The parties agree that the Ordinance should be treated as a "provincial Act" and that a finding of constitutional invalidity must be confirmed by this Court. For the reasons that follow, I am of the view that this is correct.

[22] The term "provincial Act" is not defined in the Constitution. Its ambit, as used in sections 167(5) and 172(2)(a), should be determined against the background of the purpose of those sections. Not all orders of invalidity made by the High Court fall under the sections and thus require confirmation by this Court. For example, the invalidation of regulations does not.[7] The reason why some matters are subject to this Court's ultimate jurisdiction has been expressed as follows:

> "Counsel for the applicants submitted that the effect of s 172(2) is to give this Court exclusive jurisdiction to make orders of invalidity that are binding upon Parliament, Provincial Legislatures and the President. The purpose of these provisions, so it was contended, is to preserve the comity between the judicial branch of government on the one hand and the legislative and executive branches of government on the other, by ensuring that only the highest court in constitutional matters intrudes into the domains of the principal legislative and executive organs of State. In my view this submission correctly reflects the purpose of section 172(2). Our Constitution makes

[6] *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at paras 29-30.

[7] *Minister of Home Affairs v Liebenberg* [2001] ZACC 3; 2002 (1) SA 33 (CC); 2001 (11) BCLR 1168 (CC) at para 9; *Booysen and Others v Minister of Home Affairs and Another* [2001] ZACC 20; 2001 (4) SA 485 (CC); 2001 (7) BCLR 645 (CC) at para 1; *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 11.

> provision for the separation of powers and vests in the Judiciary the power of declaring statutes and conduct of the highest organs of State inconsistent with the Constitution and thus invalid. It entrusts to this Court the duty of supervising the exercise of this power and requires it to consider every case in which an order of invalidity has been made, to decide whether or not this has been correctly done. This Court has a duty to assume this supervisory role."[8] (footnote omitted.)

[23] The rationale for confirming the invalidation of acts of the national and provincial legislatures and the conduct of the President is based on institutional respect and comity. It follows from a recognition of the status of the legislatures and the President in our constitutional order. The question of how the Ordinance is to be handled must be addressed with this in mind.

[24] Under the 1910 Constitution and the 1961 Constitution – the period in which the present Ordinance was passed – provincial ordinances were passed by entities known as provincial councils.[9] Provincial councils were seen at this time as bodies exercising original legislative discretion, analogous in this respect to Parliament. In *Middelburg v Gertzen*, they were described as follows by Innes CJ:

> " . . . I entertain no doubt that a Provincial Council is a deliberative legislative body, and that its ordinances duly passed and assented to must be classed under the category of statutes, and not of mere bye-laws or regulations."[10]

[8] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1998] ZACC 21; 1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC) at para 29.

[9] South Africa Act (1909) at sections 70 and 85; Republic of South Africa Constitution Act, 1961 at sections 68 and 84.

[10] *Middelburg Municipality v Gertzen* 1914 AD 544 at 550.

[25] The position at that time is reflected in the fact that ordinances, like Acts of Parliament, were not subject to review on substantive, as opposed to procedural or formal, grounds.[11] The significance of this is that review for substantive unreasonableness was seen as appropriate, conceptually, in relation to delegated legislation only. The legislature was presumed not to have intended to authorise unreasonable rules, and so unreasonable rules made under delegated legislative authority stood to be invalidated as ultra vires. By contrast, under the doctrine of parliamentary sovereignty, Parliament could pass unreasonable laws if it wished. That provincial councils were viewed the same way and that their ordinances were not subject to review for substantive unreasonableness confirms that ordinances were seen as original legislation.[12]

[26] When the 1983 Constitution came into effect, the provisions of the 1961 Constitution dealing with provinces were retained as the Provincial Government Act 32 of 1961, separate to the Constitution.[13] Provincial councils remained original legislative bodies under this Act. This changed with effect from 1 July 1986 when the new Provincial Government Act 69 of 1986 (the 1986 Act) came into effect. The 1986 Act abolished the provincial councils and transferred their legislative authority

[11] *Joyce and McGregor Ltd v Cape Provincial Administration* 1946 AD 658 at 669; see also Id at 554.

[12] See *Kruse v Johnson* [1898] 2 QB 91 at 99, as interpreted by our courts during this period; see for example *Feinstein v Baleta* 1930 AD 319 at 325-6; *Sinovich v Hercules Municipal Council* 1946 AD 783 at 787-92 (and also the discussion in the dissenting judgment of Schreiner JA at 801-3); *R v Abdurahman* 1950 (3) SA 136 (A) at 150C-E; *R v Lusu* 1953 (2) SA 484 (A) at 489E-G; *Mandela v Minister of Prisons* 1983 (1) SA 938 (A) at 960A-B. See also Hahlo and Kahn *The South African Legal System and its Background* (Juta & Co, Cape Town 1968) at 53-4, 148-9, 158; Baxter *Administrative Law* (Juta & Co, Cape Town 1984) at 192, 490-4; and Wiechers *Administrative Law* (Butterworths, Durban 1985) at 239-42 and the cases there cited.

[13] Du Plessis *Re-Interpretation of Statutes* (LexisNexis-Butterworths, Durban 2002) at 43; 25(1) *LAWSA* (reissue) at para 285.

to the provincial administrators, who were members of the executive.[14] What had been the power to pass ordinances became the power to issue proclamations; and as these were issued by officials in the executive branch in terms of the Act, they had the status of delegated and not original legislation.[15]

[27] The 1986 Act provided that all ordinances then in existence remained in force. However, they could now be amended, repealed or replaced by the executive authorities in the province.[16] The Ordinance here under discussion was amended in this way nine times between 1987 and 1992. The status of ordinances, which were now freely subject to amendments that amounted to delegated legislation, therefore became somewhat uncertain. This remained the position until 1994.

[28] With the onset of the constitutional era, ordinances were preserved as "law existing when the Constitution took effect", initially under section 229 of the interim Constitution and then under Item 2 of Schedule 6, read with section 241, of the 1996 Constitution. Nothing in either document provides that the status of ordinances should change. Indeed, the effect of the interim and 1996 Constitutions is, if anything, the opposite. As this Court has held, the purpose of the continuation provisions is to preserve the existing legal order: considerations of practicality made it unavoidable to hold the pre-constitutional law in place until such time as the necessary changes could

[14] Sections 2 and 14 of the 1986 Act.

[15] See Du Plessis above n 13 at 34-5, 42-3; Basson et al *South African Constitutional Law* (Juta & Co, Cape Town 1988) at 288-9; 25(1) *LAWSA* (reissue) at paras 284-6.

[16] Sections 4 and 14 of the 1986 Act.

be made, notwithstanding that this legislation was the product of democratically illegitimate authorities.[17]

[29] Although no specific provision is made for the status of ordinances, we were referred to a decision of the Durban High Court which found that the Constitution does give a decisive answer to the question whether the Ordinance should be considered to be a "provincial Act". In *Gold Circle v Premier, KwaZulu-Natal*[18] it was held that the same 1957 Ordinance is not a "provincial Act" on the basis of a close reading of section 239 of the Constitution. Section 239 does not define the term "provincial Act", but it does provide, in relevant part:

> "In the Constitution, unless the context indicates otherwise—
>
> . . . .
>
> "provincial legislation" includes—
>
> (a) subordinate legislation made in terms of a provincial Act; and
>
> (b) legislation that was in force when the Constitution took effect and that is administered by a provincial government."

[30] The Court in *Gold Circle* held that the omission of "provincial Act" from this section was significant. The term "provincial legislation" must, obviously, include provincial Acts. But it is not limited to provincial Acts: it also includes the legislation set out in (a) and (b). What this means, according to the judgment, is that the drafters

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[17] *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) at para 106 (separate concurring judgment of Chaskalson CJ); *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* [1999] ZACC 8; 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at para 2; *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* [1998] ZACC 9; 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 44; *Ynuico Ltd v Minister of Trade and Industry and Others* [1996] ZACC 12; 1996 (3) SA 989 (CC); 1996 (6) BCLR 798 (CC) at para 7; *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) 391 (CC); 1995 (6) BCLR 665 (CC) at para 32.

[18] *Gold Circle (Pty) Ltd and Another v Premier, KwaZulu-Natal* 2005 (4) SA 402 (D).

clearly saw the term "provincial Act" – obviously included in the definition of "provincial legislation" – as something different to the categories of legislation set out in (a) and (b), which were not so obviously "provincial legislation". Provincial ordinances are clearly part of (b): legislation that was in force when the Constitution took effect and which is administered by the provincial government. The conclusion is that the drafters must have seen ordinances as something different to "provincial Acts", and therefore ordinances are not part of that term in the Constitution.[19]

[31] It is true that a provincial ordinance and a provincial Act are different things, and, although I express no definite view on the point, *Gold Circle* may be correct that this fact is reflected in the drafting of the definition of "provincial legislation" in section 239. However, I do not believe this consideration is determinative of the question before us, namely whether the order of invalidation made in respect of the Ordinance must be confirmed by this Court under sections 167(5) and 172(2)(a).

[32] On the reasoning of *Gold Circle*, section 239 implies that "provincial Act" and "provincial Ordinance" are different terms for the purposes of the Constitution and this means that a provincial ordinance does not fall within the meaning of "provincial Act" as used in sections 167(5) and 172(2)(a). However, another consideration is also relevant. Section 239 provides that the definitions it contains apply "unless the context indicates otherwise". As was said earlier, the application of this Court's confirmation power under sections 167(5) and 172(2)(a) is based notionally on the

[19] Id at 415F-417B.

status of the law or authority reviewed. It must therefore be asked whether, considering "provincial Act" in this context, the present Ordinance should be seen to have status such that it should be treated as a provincial Act for the purposes of these sections.

[33] In this regard, the treatment of the Ordinance by the KwaZulu-Natal provincial legislature in the years following 1994 is relevant. The Ordinance was incorporated by reference into the KwaZulu-Natal Gambling Act, which, as noted above, only applies to those forms of gambling not covered by the Ordinance.[20] The Ordinance was also amended by the legislature twice in 1994 and once again in 1998, to make minor changes to provide for its continued functioning and to update references to pre-constitutional authorities.[21] Section 22(5) itself has not been altered by the legislature.

[34] The court in *Gold Circle* appears to have been alive to this history. It stated that, if the particular section of the Ordinance there invalidated had itself been substituted by the KwaZulu-Natal provincial legislature, post-1994, different considerations might have applied.[22] In its view, therefore, a particular provision of an Ordinance might have the status of a provincial Act for confirmation purposes, in virtue of its treatment by a provincial legislature. If, however, a provision remained as

[20] Sections 1 and 3 of the KwaZulu-Natal Gambling Act 10 of 1996.

[21] See the KwaZulu-Natal Horse Racing and Betting Control Consolidation Amendment Act 4 of 1994; the KwaZulu-Natal Horse Racing and Betting Control Consolidation Second Amendment Act 5 of 1994; and the KwaZulu-Natal Regulation of Racing and Betting Ordinance Amendment Act 8 of 1998.

[22] Above n 18 at 841A-B.

it was before the Constitution took effect, the textual considerations in section 239 are decisive: the provision is "legislation in force when the Constitution took effect", it therefore falls under part (b) of the definition in section 239, and it is therefore something other than a "provincial Act" for purposes of the Constitution.

[35] In my view, the treatment of the Ordinance by the provincial legislature is of broader significance that this: it should be seen to affect the status of the whole ordinance and not, as *Gold Circle* held, only such provisions as the legislature has altered or substituted. This is so for two reasons. The first relates to the effect of incorporation. By providing in the KwaZulu-Natal Gambling Act that the Ordinance is to regulate forms of gambling not covered by the Act, the legislature expressed a clear intention that the provisions – all the provisions – of the Ordinance be operable in the province. Secondly, that the provincial legislature has not amended or substituted a provision could mean that it has not considered that provision or expressed a view on it. However, it could also mean that the legislature accepts the law as it is. Legislative provisions are not read in isolation. A change in one provision often reflects consideration and approval by the Legislature of a particular regulatory scheme brought about by a piece of legislation. The scheme is typically comprised of multiple provisions read together, and not just the provisions that are altered, to an extent impossible to determine from a simple consideration of which provisions have been altered and which not. For this reason, it is in my view sound to consider amendments of some provisions to affect the status of the whole.

[36] Therefore, the effect of the amendment and incorporation is that the Ordinance as a whole should be seen as an expression of the legislative will of a provincial legislature and treated accordingly. Following from the notion of respect and comity articulated in *SARFU*, its invalidation should be subject to confirmation by this Court.[23] I do not agree with the finding in *Gold Circle* that the invalidation of a provision which has not itself been amended or substituted by a provincial legislature does not fall to be confirmed. I conclude that "provincial Act" in sections 167(5) and 172(2)(a) of the Constitution includes the Ordinance. The finding of constitutional invalidity of any of its provisions by the High Court must accordingly be confirmed by this Court.

[37] This does not necessarily mean that ordinances in respect of which the legislature has not acted – which have not been incorporated into a statute or amended – do not fall within the ambit of sections 167(5) and 172(2)(a). It is not necessary to express a view in this judgment on these ordinances, and I leave the question open, even though some of the arguments dealt with above apply to them also.

[38] The finding in respect of this Ordinance does, however, potentially have wider consequences for ordinances that have been treated similarly by the provincial legislatures. As indicated, there has until now been no ruling by this Court on whether the invalidation of provisions of a provincial ordinance has to be referred to this Court. Ordinances comparable to the present Ordinance might have been found to be constitutionally invalid by other courts and the invalidation might not have been

[23] See above [22].

referred to this Court. The order made in *Gold Circle* indeed dealt with the same Ordinance here at issue.[24]

[39] The question of constitutionality is an objective one. The effect of the Constitution applies as from the date on which it came into operation. As was explained in *Ferreira v Levin,* in the context of an order of invalidity:

> "The Court's order does not invalidate the law, it merely declares it to be invalid. It is very seldom patent, and in most cases is disputed, that pre-constitutional laws are inconsistent with the provisions of the Constitution . . . This does not detract from the reality that pre-existing laws either remained valid or became invalid upon the provisions of the Constitution coming into operation. In this sense laws are objectively valid or invalid depending on whether they are or are not inconsistent with the Constitution. The fact that a dispute concerning inconsistency may only be decided years afterwards, does not affect that objective nature of the invalidity."[25]

[40] The objective theoretical effect of the finding in this judgment would thus be that all orders of invalidity made by other courts in respect of ordinances similar to the present Ordinance are not and have never been of any force, because they have not been confirmed by this Court in terms of sections 167(5) and 172(2)(a). In principle, it would therefore be necessary that the orders of invalidity that have not been referred to this Court now be referred to this Court for confirmation. However, this would not be unproblematic.

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[24] Above n 18.

[25] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 27-8.

[41] Rule 16 of this Court's Rules and section 8 of the Constitutional Court Complementary Act 13 of 1995 set out the procedure to be followed when an order of invalidity is made by another court. The time periods there provided will almost certainly have expired in respect of orders invalidating provisions of ordinances that have not been referred to this Court.

[42] The question therefore arises whether this Court should make a general ruling on past orders of constitutional invalidity regarding ordinances comparable to the present Ordinance which have not been referred to this Court. This Court may make any order that is just and equitable. The duty to give just and equitable relief recognises that the position dictated by the objective doctrine may not always be a feasible one in practice. A decision as to what is just and equitable involves a balancing of the interests of the individuals affected with the interests of good governance and the smooth administration of justice.[26]

[26] Section 172(1)(b) of the Constitution states:

> "When deciding a constitutional matter within its power, a court—
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of an order of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

See in this regard *S v Steyn* [2000] ZACC 24; 2001 (1) SA 1146 (CC); 2001 (1) BCLR 52 (CC) at para 38; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at paras 94-7; *S v Ntsele* [1997] ZACC 14; 1997 (2) SACR 740 (CC); 1997 (11) BCLR 1543 (CC) at paras 12-4; *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32; *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 43. These findings, in the criminal context, are applicable more broadly to all cases where the retrospectivity of an order is at issue: see *Brink v Kitshoff NO* [1996] ZACC 9; 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 55. See also *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) at para 74.

[43] We heard no argument in this matter on the question of a possible backlog of orders invalidating provisions of ordinances which were not referred to this Court. We do not have information as to the number of ordinances affected, nor was argument presented as to the consequences for the administration of justice and other considerations which may bear on the proper approach to these orders.

[44] It is significant in this regard that, in every case in which a provision of an ordinance was found to be constitutionally invalid but not referred to this Court, it would have been open to parties to appeal the decision and challenge any order if they wished to do so. Citizens and the state alike may have treated the orders as binding, it may now be years since the orders were made, and the ordinances might have become irrelevant. New legislation may have replaced them. This Court held in *Brink v Kitshoff* that there are cogent reasons of good government against making an order that may render proceedings which to all intents and purposes have been concluded, subject to further challenges and investigation.[27]

[45] In light of these considerations, no general ruling is made as to court orders in connection with the constitutional validity of ordinances that have not been confirmed by this Court. Should the special circumstances of a specific case mean that any injustice or uncertainty does result, parties are of course free to approach this Court or

[27] *Brink* above n 26 at para 56; see also the judgment of Ackermann J in *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at paras 104-5 and *Manamela and Another v S* 1999 (2) SACR 177 (W); [1999] 4 All SA 161 (W) at para 80. Compare *National Coalition* above n 26 at para 98.

the High Court to seek relief. Any possible application for declaratory or other relief would be better dealt with in the fact-specific context of the case, than in the abstract.

Section 22(5) of the Ordinance and section 9(1) of the Constitution

[46] I turn to the merits of the present application. The order we are asked to confirm in this case held that section 22(5) of the Ordinance violated section 9(1) of the Constitution. Section 9(1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law. The test for determining whether section 9(1) is violated was set out by this Court in *Prinsloo v Van der Linde* and *Harksen v Lane*.[28] A law may differentiate between classes of persons if the differentiation is rationally linked to the achievement of a legitimate government purpose. The question is not whether the government could have achieved its purpose in a manner the court feels is better or more effective or more closely connected to that purpose. The question is whether the means the government chose are rationally connected to the purpose, as opposed to being arbitrary or capricious.[29]

[47] Before this Court, the applicants raise three main arguments to show that section 22(5) violates section 9(1). The first is that the section impermissibly differentiates between natural and juristic persons in KwaZulu-Natal, in that the

[28] See *Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 24-6, interpreting section 8(1) of the interim Constitution. This interpretation was adopted and applied to section 9(1) in *Harksen v Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC) at para 43; 1997 (11) BCLR 1489 (CC) at para 42.

[29] See *Jooste v Score Supermarkets Trading (Pty) Ltd (Minister of Labour Intervening)* [1998] ZACC 18; 1999 (2) SA 1 (CC) at para 17; 1999 (2) BCLR 139 (CC) at para 16; *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council and Others* [1997] ZACC 19; 1998 (2) SA 61 (CC); 1998 (1) BCLR 1 (CC) at para 24; *Prinsloo* above n 28 at para 25.

former may apply for and hold bookmaking licences and the latter may not. The second is that the section impermissibly differentiates between partnerships and other forms of business entities, in that partnerships may carry on the business of bookmaking if all their members are licensed, but other entities may not. The third is that the section impermissibly differentiates between natural persons in KwaZulu-Natal, who may not engage in the business of bookmaking via the vehicle of a juristic person, and natural persons in the rest of South Africa, who may. I consider these three arguments in turn.

Can a juristic person be the bearer of the right to equality before the law?

[48] Two of the three kinds of differentiation relied upon affect juristic persons. The argument that these forms of differentiation violate section 9(1) requires it to be shown that juristic persons can be bearers of the section 9(1) right, under section 8(4) of the Constitution.[30] The High Court found that juristic persons were entitled to rely on the section 9(1) right.[31] In view of the conclusion I reach on the applicants' section 9(1) challenge, it is not necessary to consider the correctness of the High Court's interpretation of sections 8(4) and 9(1). For purposes of this judgment, I assume in favour of the applicants that a juristic person could indeed be the bearer of the right guaranteed in section 9(1).

The differentiation between natural and juristic persons

[30] Section 8(4) states: "A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."

[31] Above n 1 at paras 30-43.

[49] The first form of differentiation complained of is the obvious one: natural persons may apply for and hold bookmaking licences in KwaZulu-Natal; juristic persons may not. The applicants argue that the differentiation is not rationally linked to the legitimate government purpose of regulating gambling and furthermore that it no longer serves a legitimate government purpose.

[50] On behalf of the Premier, it is argued that the regulation of gambling is a legitimate government purpose. It is more expensive and difficult to monitor juristic persons and to hold them accountable, than it is with regard to natural persons.[32] The policy of restricting licences to natural persons is a rational way to ensure that, given these practical realities, gambling activities are properly regulated. The Ordinance does not provide for the more complicated mechanisms necessary to regulate juristic persons, nor does it provide for the collection from the holders of licences of the greater resources needed to fund such enhanced regulatory mechanisms.

[51] The High Court did not accept this argument. It held that if the aim of section 22(5) of the Ordinance was to ensure that one identifiable person could be held accountable, nothing prevented the legislature from requiring that one person, together with the juristic licensee, be responsible to the authorities. The court noted that this is one of the measures contained in the 2007 Bill.[33]

[32] The Premier refers in this regard to the decisions of this Court in *Ferreira v Levin* n 25 above at 151 and *Bernstein and Others v Bester and Others NNO* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 50.

[33] Above n 1 at paras 47-50.

[52] Before this Court the applicants contend that section 22(5) is obsolete. Annual Reports of the KwaZulu-Natal Bookmakers Control Committee lodged before this Court reflect the view that the Ordinance is "outdated". The applicants note that the Premier apparently accepts that there are good reasons for a change that permits juristic persons to hold bookmaking licences, as these are set out in the Explanatory Memorandum to the 2003 Bill. They note in particular that one effect of the restriction is to make it more difficult for new people, especially previously disadvantaged people, to enter the industry, because of the difficulties they experience in securing capital by methods other than share capital, such as loans from banks. We were referred to a National Gambling Board Report on the difficulties experienced by new entrants in this regard. The applicants therefore contend that the method adopted by the province – restricting licences to natural persons – has become outdated. It is no longer rationally linked to the goal of regulation, and thus no longer serves a legitimate government purpose.

[53] The Premier contends that the fact that a new policy is being developed is irrelevant to the present enquiry. The only question is whether the policy choice that section 22(5) represents is rationally linked to the aim of regulating gambling. The most relevant characteristics of a juristic person are its separate legal personality and the limited liability of the natural persons involved. The fact that the corporate veil can only rarely be pierced means that it is difficult to hold individuals responsible. Juristic persons are therefore harder to regulate, and it is rational to respond to this problem by providing that only natural persons may hold licences.

[54] The Premier also argues that the High Court exceeded the bounds of the rationality enquiry by examining alternative ways in which juristic persons could be regulated if licensed. Its conclusion that the section was irrational was reached on the basis that, if a different regulatory policy were followed, juristic persons could be licence-holders without sacrificing the ability of the provincial government to regulate gambling. This, it is argued, shows that the High Court was improperly substituting its views for those of the legislature, contrary to the rationality test set by this Court.

[55] The thrust of the challenge to this differentiation is that section 22(5) is outdated and obsolete and that even the Premier agrees with this. Specific denials were made by the Premier and the Bookmakers Control Committee before the High Court in response to averments that the industry had received assurances that the Ordinance would be replaced. That said, it does appear that the executive in KwaZulu-Natal has for some time been of the view that the Ordinance should be replaced. However, even if that is accepted, the applicants' argument cannot be correct, for the reasons that follow.

[56] The argument purports to make views expressed by organs of the executive arm of the provincial government determinative of the rationality of an ordinance kept in place by the provincial legislature. No argument was made to explain why the executive's views should be taken to prevail in this manner. But there is a deeper problem. For the applicant's argument to succeed, it would have to be accepted that,

once the executive declares that a piece of legislation should be replaced or substantially amended, that legislation becomes irrational. To state the proposition is to see the flaw: any piece of "old" legislation would be unconstitutional as soon as reform is proposed. This result is not only absurd, but confuses a better or worse policy with a rational or irrational one, contrary to this Court's rationality jurisprudence. The Premier is therefore correct that the nature of the proposals in the Bills and other possible alternative policies, as well as the fact that there is a planned change and that this change has been in the pipeline for some time, are irrelevant to the section 9(1) rationality enquiry.

[57] The remaining issue to be addressed is whether the policy choice embodied in section 22(5) is rationally linked to the aim of regulating gambling. The decision to exclude juristic persons reflects a legislative judgment about the relative difficulties of holding accountable natural persons and juristic corporate structures. Once the argument that the provision is obsolete is rejected, the applicants do not provide any reason to suggest that this legislative judgment was arbitrary or capricious, but only that it was arguably unsatisfactory in some respects. This is not sufficient to show that section 9(1) is breached.

[58] The applicants' argument therefore fails to show that the policy decisions made and being made in KwaZulu-Natal fall outside the bounds of legitimate legislative choice. It is for the legislature to select the means to achieve the objectives of government. It is also for the legislature to decide when the moment has arrived to

change methods and reform legislation. If it is not shown that the duty to uphold the Constitution requires courts to interfere, these choices are the legislature's to make. It is the failure to appreciate this that makes the applicants' contention unacceptable.

[59] Before this Court the applicants also argued that the Ordinance no longer serves a legitimate government purpose. Insofar as this was an argument that section 22(5) embodied an inadequate or outdated form of regulation, it is the same argument as the one just rejected. But as expressed in oral argument, the contention was a different one. It was argued that the purpose or aim of section 22(5) was in fact to exclude juristic persons from the bookmaking industry and that, given modern business realities and the new constitutional value of equality, this is no longer a legitimate government purpose.

[60] This argument confuses the end with the means, but for the purposes of the section 9(1) enquiry, it is actually beside the point. Regulation of gambling is a legitimate government purpose. As already stated, it has not been shown that the differentiation between natural and juristic persons is not rationally linked to the achievement of this purpose. That is the end of the section 9(1) enquiry. The applicants' perceptions about the aim of the section do not alter the conclusion that the differentiation is rationally linked to the achievement of what is objectively a legitimate government purpose. That is all that the Constitution requires. The legislature exercised a legitimate legislative choice, both in relation to the form of

differentiation and in respect of the timing of its repeal. The challenge to the first kind of differentiation therefore has to fail.

The differentiation between partnerships and other business entities

[61] Section 22(5) provides that no licence may be issued in the name of any partnership, association of persons or juristic person. The proviso in the second part of the section states that this prohibition does not prevent persons from carrying on the business of bookmaking in partnership, provided that each individual partner is the holder of a valid licence.[34]

[62] The High Court found that this showed that the exclusion of juristic persons is arbitrary. The differentiation in section 22(5) excludes juristic persons on the basis of the difficulty of holding an individual accountable for the actions of the business, yet permits partnerships to engage in the business even though they could be complex structures of up to 20 partners.[35]

[63] The Premier states that one aim of section 22(5) is to be able to hold individual licence-holders accountable and to avoid the difficulties of regulating juristic persons whose shareholders and management are difficult to hold personally liable. In that regard, there is an undeniable distinction between partnerships and other business

[34] The proviso reads:

> "Provided that nothing hereinbefore contained shall be deemed to prevent the carrying on of a bookmaker's business in partnership by two or more persons each of whom is the holder of a valid bookmaker's licence issued to him in terms of this Ordinance."

[35] Above n 1 at paras 50-1.

entities. Partnerships are not juristic persons with separate legal identity and their members are personally accountable for the actions of the partnership. Juristic persons are corporate structures with a separate legal personality and limited liability. This shows not only that the differentiation between the two is not arbitrary, but also that it is consistent with the regulatory purpose of the section, the Premier argues.

[64] The proviso to section 22(5) does not provide that licences may be issued to partnerships. It only provides that natural persons who are licence-holders may operate in partnership. It is not therefore the case that partnerships may hold licences while juristic persons may not, and so there is no differentiation in this regard.

[65] There is differentiation in that partnerships may be part of the bookmaking industry but juristic persons may not. The High Court's view was that, if it is possible to hold a single person accountable in the case of a partnership which may have as many as 20 members, it is possible to do the same for a juristic person, and so it is arbitrary to exclude the one but not the other on regulatory grounds. This argument overlooks the legal differences between partnerships and juristic persons. Juristic persons are separate legal persons and their members have limited legal liability. Those who control their operations are only exceptionally held personally liable for the actions of the juristic person. In all these respects, juristic persons are different to partnerships, and may need to be regulated in different ways. The fact that partnerships are treated differently, therefore, is not arbitrary. It is a legitimate legislative choice reflecting the different nature of partnerships and juristic persons.

[66] The proviso in section 22(5) permitting natural persons who are licensed to operate in partnership is therefore not inconsistent with the achievement of the legitimate government purpose of regulating gambling. The differentiation is rationally linked to the achievement of this purpose. The second challenge to section 22(5) must fail.

The differentiation between natural persons in KwaZulu-Natal and other provinces

[67] The applicants raised for the first time before this Court the argument that section 22(5) differentiates between natural persons in KwaZulu-Natal and the rest of the country, because only natural persons in KwaZulu-Natal are prevented from engaging in the business of bookmaking through the vehicle of a juristic person.

[68] This submission amounts to a challenge to the *national* gambling regime. The complaint is that there is a differentiation between the legal regime in one province and that in other provinces. However, the challenge before this Court is only to the constitutionality of the 1957 KwaZulu-Natal Ordinance.

[69] Gambling is an area of concurrent national and provincial legislative competence.[36] This is not a situation, as provided for in section 146 of the Constitution, where there is a conflict between national and provincial legislation. The National Gambling Act does not require that juristic persons be entitled to

[36] It appears in Part A of Schedule 4 of the Constitution. See above n 4.

bookmakers' licences. It is permissive on the point. The Act provides that each provincial licensing authority has exclusive jurisdiction, to the extent provided in provincial law, to issue licences[37] and obliges provincial boards to refuse licences to those disqualified from holding them in terms of provincial law.[38]

[70] Provinces have the right to regulate their own gambling industries. There can be no objection in this case to the KwaZulu-Natal legislative regime simply on the ground that it is different to that in other provinces. This is not to say that the situation in other provinces may not be referred to when challenging provincial legislation. But the fact that there are differences between the legal regimes in provinces does not in itself constitute a breach of section 9(1). The third challenge must accordingly also fail.

Unfair discrimination

[71] The High Court held that, in addition to breaching section 9(1), section 22(5) of the 1957 Ordinance also breached section 9(3) of the Constitution. It found that section 22(5), objectively speaking, treats different categories of persons differently and that, in view of its finding that this differentiation was not rationally connected to

[37] Section 30(1)(a) provides:

> "Each provincial licensing authority has exclusive jurisdiction within its province, to the extent provided in provincial law, to investigate and consider applications for, and issue provincial licenses in respect of casinos, racing, gambling and wagering . . . ".

[38] Section 50(3) provides, inter alia, that a provincial licensing authority must refuse to issue a licence to a person who is disqualified from holding that licence in terms of provincial law.

the control of gambling, this amounted to unfair discrimination.[39] The applicants did not rely on this argument before this Court.

[72] The argument presupposes that juristic persons can be bearers of the section 9(3) right not to be unfairly discriminated against. It is less easy to assume that juristic persons are bearers of the section 9(3) right than the right protected in section 9(1). While it is probably undesirable to separate wholly the one from the other,[40] the content of the two aspects of the right is different.[41] Whereas the core of section 9(1) is the idea that no-one is above or beneath the law and that all persons are subject to law impartially applied and administered,[42] the core of the right against discrimination in section 9(3) is dignity. Differentiation becomes unfair discrimination when it is based on grounds that have the potential to impact upon the fundamental dignity of human beings.[43] As this Court has held, these are grounds that—

> "have the potential, when manipulated, to demean persons in their inherent humanity and dignity . . . . In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual,

[39] Above n 1 at para 54.

[40] *Prinsloo* above n 28 at para 22.

[41] According to section 8(4) of the Constitution – quoted above n 30 – whether a juristic person is the bearer of a right depends on the nature of the right and the nature of the juristic person. That is chiefly an interpretative exercise: see *Ex parte: Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 57. See also *City of Cape Town v Ad Outpost (Pty) Ltd and Others* 2000 (2) SA 733 (C) at 743F-744A; 2000 (2) BCLR 130 (C) at 138-9.

[42] *Prinsloo* above n 28 at para 22.

[43] *National Coalition* above n 26 at paras 15-26 (and also the concurring judgment of Sachs J at paras 120-9); *Dawood* above n 7 at para 35; *Harksen* above n 28 at paras 43-53 (SA); paras 42-52 (BCLR); *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 41; *Brink v Kitshoff* above n 26 at paras 40-1; *Prinsloo* above n 28 at paras 26-33.

> expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features."[44]

[73] It is not easy to conceptualise the application of a right of this nature to juristic persons separately from the natural persons involved in them. However, the point was only briefly argued before us and it is not desirable to decide the matter finally in this case. I therefore assume, for the purposes of this judgment, that juristic persons can be bearers of the right protected in section 9(3).

[74] For it to be found that section 22(5) of the Ordinance is unfairly discriminatory, it would need to be shown that the kind of differentiation it embodies is based on attributes or characteristics that have the potential to impair the fundamental dignity of persons as human beings or to affect them in a comparably serious fashion.

[75] There is no suggestion here that the differentiation contained in section 22(5) has this kind of effect. The applicants did not contend that it does and there is nothing in the High Court judgment to suggest this. It is also not the case that the differentiation is on a ground listed in section 9(5), in which case there would be a presumption of unfair discrimination. As the High Court noted, none of the kinds of differentiation raised in this case is based on a listed ground.[45] There is accordingly no basis for a finding of unfair discrimination and the High Court's conclusion in this regard must be rejected.

[44] *Harksen* above n 28 at para 50 (SA); para 49 (BCLR).

[45] Above n 1 at para 54.

Conclusion

[76] The High Court's finding that section 22(5) of the Ordinance breaches sections 9(1) and 9(3) of the Constitution was therefore incorrect. The forms of differentiation imposed by section 22(5) are not arbitrary and are rationally linked to a legitimate government purpose. The appeal must succeed and the application for confirmation of the order of invalidity has to fail.

Costs

[77] The first and third respondents were ordered to pay the applicants' costs before the High Court.[46] That order now has to be set aside. Before this Court, the applicants initially accepted that if the appeal succeeded, the respondents would be entitled to their costs, but revised this stance in response to questioning from the Bench and asked that no order as to costs be made. The Premier indicated that he had no objection to each party paying their own costs if the appeal was successful.

[78] Costs are ultimately a matter for the discretion of the Court. The ordinary rule in this Court is that where litigants unsuccessfully raise important constitutional issues against the state, costs will not be awarded against them. There is an exception to this rule; this is when the litigation is pursued for private commercial gain.[47] The Court

[46] Id at para 60.

[47] See *South African Commercial Catering and Allied Workers Union (SACCAWU) and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* [2000] ZACC 10; 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC) at para 51, with reference to *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 116.

has also held that a litigant should not be mulcted in costs associated with the High Court litigation where a substantial constitutional issue is raised.[48]

[79] The present litigation was embarked upon by a businessman and a company seeking to engage in a commercial venture which is allegedly prohibited under the current laws of KwaZulu-Natal. However, I do not think sight should be lost of the fact that the litigation is a challenge to a law which it is alleged the applicants have contravened. Any person contravening the Ordinance is guilty of an offence and subject to a fine of up to R5000 or two years' imprisonment or both.[49] In my view, this Court should be careful not to dissuade litigants from challenging the constitutionality of laws of the state under which they face statutory penalties. The rationale for this caution lies in the rule of law and applies equally to all legal actors, in the commercial sphere or otherwise. I conclude that the High Court costs order should be set aside and that there should be no order as to costs in the High Court or this Court.

Order

[80] The following is therefore ordered:

(a) The applicants' application for condonation is granted.

(b) The third respondent's application for condonation is refused.

(c) The appeal is upheld.

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[48] See *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC) at para 44 and *African National Congress and Another v Minister of Local Government and Housing, KwaZulu-Natal, and Others* [1998] ZACC 2; 1998 (3) SA 1 (CC); 1998 (4) BCLR 399 (CC) at para 34.

[49] Section 43(2)(c) of the Ordinance.

(d) The Court declines to confirm the order of unconstitutionality made by the Pietermaritzburg High Court on 29 February 2008 and, accordingly, the order of constitutional invalidity made by the High Court is set aside.

(e) There is no order as to costs in the High Court or in this Court.

Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J and Yacoob J concur in the judgment of Van der Westhuizen J.

For the First and Second Applicants:	Advocate Norman Arendse SC and Advocate Max du Plessis instructed by Garlicke & Bousfield Inc.
For the First and Third Respondents:	Advocate AJ Dickson SC and Advocate AA Gabriel instructed by JH Nicolson Stiller & Geshen.