

# IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Phumelela Gaming and Leisure Limited v André Gründlingh and Others

Case CCT 31/05

Decided on 18 May 2006

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## MEDIA SUMMARY

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

A person who wishes to wager money on the outcome of a horserace may choose to place a bet with a bookmaker or on a totalisator. The two systems are different in that the bookmaker quotes odds in advance while the totalisator does not fix odds in advance but pays out “dividends” in proportion to the amount of money wagered. Some bookmakers also deal in ‘open bets’ where the odds are not fixed in advance (‘fixed odds bets’) but are determined by some external factor. To the extent that both rely for their business on the betting money of the public, they are in competition.

This case concerns a delictual claim by a totalisator (Phumelela) against two bookmakers (Mr André Grundlingh and Mr Ulrich Osmond Schuler) on the grounds that they are exploiting its dividend results in a manner that constitutes unlawful competition. It also included a claim for direct access to this court to challenge the constitutional validity of certain provisions of the National Gambling Act particularly the definition of ‘open bets’.

The totalisator operated by Phumelela is a national computerised system for betting on horseracing and other sports, operating on and off racecourses throughout the country. The results of the races and the totalisator dividends to be paid out are publicised widely by Phumelela at the racecourse, on television, over a phone-in service, in the press and on certain radio channels. The bookmakers used these published results as the basis for their ‘open bets’.

Phumelela approached the Pretoria High Court seeking an interdict, which the High Court granted, prohibiting the bookmakers from unlawfully taking bets which were not “fixed odds bets”; and engaging in conduct that amounts to unlawful competition by using Phumelela’s published results or dividends derived from its totalisator pool, as a basis on which to offer or take bets.

The bookmakers appealed to the Supreme Court of Appeal which overruled the High Court’s decision. It held that ‘exotic bets’ were fixed odds bets and the bookmakers were entitled to deal in them. It also held that the use of Phumelela’s published results

was not unlawful competition. The court held that while Phumelela's business system was protectable property, legislation had for a long time permitted the complained of conduct. Conduct that was legislatively sanctioned could not be unfair or dishonest and therefore could not amount to unlawful competition.

Phumelela appealed the finding on unlawful competition to this court. It asked this court to develop the common law in light of the spirit, purport and objects of the Bill of Rights especially the right not to be arbitrarily deprived of property – an argument it had not made in the High Court or the Supreme Court of Appeal. It also complained that the judgment of the Supreme Court of Appeal itself amounted to an arbitrary deprivation of property.

Chief Justice Langa, writing for a unanimous court, first considered whether leave to appeal should be granted. He found that the case raised a constitutional matter and that this Court therefore had jurisdiction to hear the matter. He also held that the failure to raise the constitutional aspects of the case in the previous courts should not bar Phumelela from pursuing those arguments in this court. Courts always have an obligation to view legislation, common law and customary law through the prism of the Bill of Rights. As the application also had substantive merit, the court granted leave to appeal.

The court then turned to the question of whether, in light of the Constitution, the bookmakers' actions were unlawful. The delict of unlawful competition is meant to protect a person's goodwill. However, not every interference with goodwill is unlawful as many interferences are a natural result of healthy competition. This must be determined on the broad test of what the legal convictions of the community deem unlawful.

When evaluating the impact of the Bill of Rights a litigant cannot rely only on certain provisions, it must use the Bill of Rights as a whole. So while the right to property certainly protects Phumelela's goodwill, the right to freedom of trade is not inconsistent with the promotion of competition. The Bill of Rights as a whole neither promotes nor discourages competition principles. Apart from the impact of the Bill of Rights, it is not possible to fault the reasoning or conclusion of the Supreme Court of Appeal. The actions of the bookmakers did not constitute unlawful competition.

In light of that finding, Phumelela's claim that the Supreme Court of Appeal's decision was an arbitrary deprivation of its property also had to be rejected.

With regards to the direct access challenge to the National Gambling Act the Court held that direct access would only be granted when it was in the interests of justice to do so. It would only be in the interests of justice for this court to sit as a court of first and last instance without any chance of appeal if compelling circumstances required it. There were no such circumstances present in this case and the claim for direct access therefore had to be dismissed.