

THE LEGALITY OF BANNING ONLINE GAMBLING IN SOUTH AFRICA: IS ONLINE GAMBLING NOT A COMPONENT OF GAMBLING?

Segoane Lawrence Monnye*

I. INTRODUCTION

Gambling has undergone a metamorphosis from being immoral, to becoming amoral,¹ and from being a leisure activity, to becoming an income-generating recreational activity. In South Africa, the regulation of gambling is no longer based on morality, but on a set of principles ranging from income-generation through taxes, job creation, and economic empowerment², as well as promotion of tourism and other recreational activities.³ That legalization of gambling has become, and still is, motivated by its revenue-generating capability is evident from the amounts exchanging hands in this industry. In the fiscal year 2009-2010, the total amount of money wagered in South Africa-including money wagered from winnings-amounted to almost US \$375 million (an equivalent of 2.8 billion ZAR).⁴ In the European Union the annual revenues generated in 2008 by the gambling service sector, measured on the basis of

* Senior Lecturer of Law, University of South Africa and Attorney of the High Court of South Africa. LLB (University of Limpopo), LLM (University of Witwatersrand) & LLM (University of Wisconsin-Madison). I wish to thank Professor Dana van der Merwe for his insightful comments and the editors of *UNLV Gaming Law Journal* for their intelligent edit of this work.

¹ See I. Nelson Rose, *Gambling and the Law: The International Law of Remote Wagering*, 40 J. MARSHALL L. REV. 1159, 1160 (2006) (a US professor in trademark regards gambling as a morally suspect industry. He described it as one area in which a state can unilaterally change its mind—if it has enough good reason thereby abandoning its moralist approach).

² These principles, which have been incorporated into the National Gambling Act No. 7 of 2004 (S. Afr.), are summarized by the Gambling Rev. Comm'n, Review of the South African Gambling Industry and its Regulation – Final Report Submitted to the Minister of Trade and Industry 8-9 (2010), available at <http://thedti.gov.za/news2011/Gambling-review.pdf/Appendix.pdf>. The principles setting out the current gambling policy originated from the Lotteries and Gambling Board, Main Report on Gambling in the Republic of South Africa (Pretoria: Mar. 1995) also known as the Wiehahn Commission.

³ See *Casino Enter. (Pty) Ltd (Swaziland) v. Gauteng Gambling Bd. & Others* 2010 (6) SA 38 (GNP) 46 at para. 44 (S. Afr.) [hereinafter *Casino Enter.-North Gauteng High Court*], wherein the learned Judge Tuchten said, “The industry is held to have the potential to contribute to tourism and thus promote the economy. No doubt legislative policy holds that many tourists like to gamble when they are on holiday, and that for many people, tourists and otherwise, gambling represents a pleasant recreational activity.”

⁴ See Nat'l Gambling Bd., National Gambling Statistics 2009/2010 Financial Year (2010) (casinos alone account for a lion's share of 91.2%, followed by betting at 4.7%, Limited Pay-out Machines (LPM) at 3.2% and bingo at 0.9%).

gross gambling revenue (that is, stakes less prizes, but including bonuses), were estimated to be €75.9 billion.⁵ The European Union members giving legal recognition to online gambling derive a fraction of this amount (constituting 7.5% or €6.16 billion) from online gambling.⁶ In the United States, figures for online gambling are non-existent due to its prohibition. However, with respect to all other forms of permitted gambling in the United States, revenue for 2010 was estimated to be above \$24 billion.⁷ Elsewhere, gambling revenues are hailed as almost entirely responsible for the economic existence of Macau, also known as the gambling capital of China.⁸ In 2007, the gross gambling revenue of Macau's casinos was reported to be US \$10.5 billion.⁹ Just like Macau, which is economically dependent on gambling taxes and levies, the provincial governments in South Africa consider gambling to be one of their important sources of revenue with combined tax and levy collections of almost US \$200 million (an equivalent of 1.5 billion ZAR) for fiscal year 2008-2009.¹⁰

There is discernible evidence of growth of the online gambling market in the European Union,¹¹ which has prompted many Member States to review their gambling legislation with an eye toward benefiting from the expected growth. However, little is known regarding the market and potential growth for online gambling in South Africa owing to prohibition. Figures for online gambling in South Africa are essentially estimates,¹² regardless of the credibility of the authority producing such figures. In its interim report prepared for the National Gambling Board, the National Centre for Academic Research into Gaming alleges that South Africa accounts for only one million of the 140 million international Internet users.¹³ Because this is a general figure for Internet users, rather than online gambling participants, the implication is that

⁵ Eur. Comm'n, Green Paper on On-Line Gambling in the Internal Market 8 (2011), available at <http://ec.europa.eu/internal-market/consultations/docs/2011/online-gambling/com2011-128-en.pdf> [hereinafter Eur. Comm'n, Green Paper].

⁶ *Id.*

⁷ Lorraine Harrington, Note, *Loaded Dice: Do National Internet Gaming Statutes Violate World Trade Organization Fair Trade Access Standards?*, 24 ARIZ. J. INT'L & COMP. L. 769, 769-70 (2007) (citing Christiansen Captial Advisors, LLC, Internet Gambling Estimates, Jun. 6, 2004, http://grossannualwager.com/Primary%20Navigation/Online%20Data%20Store/internet_gambling_data.htm). It is not clear how the recession of 2009-2010 has affected Internet gambling in the United States of America.

⁸ Luis Pessanha, *Gaming Taxation in Macau*, 12 GAMING L. REV. & ECON. 344, 344 (2008) (12).

⁹ Zhonglu Zeng & David Forrest, *High Rollers from Mainland China: A Profile Based on 99 Cases*, 13 UNLV GAMING RES. & REV. J. 29, 29 (2009). The gross gambling revenue of Macau in 2007 is reported to be 52% higher than the corresponding figure for casinos in Las Vegas. It is by no surprise that Macau is judged by the global gambling audience as "the Las Vegas of the East," even though it has bypassed Las Vegas in revenue.

¹⁰ Gambling Rev. Comm'n, *supra* note 2, at 42.

¹¹ Eur. Comm'n, Green Paper, *supra* note 5, at 3 (confirms the online gambling market as the fastest growing segment of the overall gambling market).

¹² See Christine Rodrigues, *The Gaming Spider Spins its Web*, 8 WITHOUT PREJUDICE 24 (2008) (The author alleges that thousands of South Africans enjoy online gambling as a form of entertainment. The author offers no authority for arriving at this figure. It is merely estimates not based on scientific research.).

¹³ Nat'l Centre for Acad. Res. into Gaming, Internet Gaming and South Africa: Implications, Costs and Opportunities, Interim Report for Nat'l Gambling Bd. 3 (1999).

the figure may be too low to describe accurately the number of online gambling participants. Interestingly, in the same report, the National Centre for Academic Research into Gaming had this to say regarding the growth of online gambling:

In parallel with the proliferation of Internet usage internationally, and in South Africa, gambling on the net is growing at a high rate. Because the industry is at present illegal in most parts of the world and inadequately regulated in most of the others, accurate statistics of its size are difficult to come by.¹⁴

With regard to South Africa, nothing has changed as there is neither legal regulation, nor further research on the growth of online gambling, though there is a growth of Internet usage with more than 5.3 million Internet users recorded in 2009.¹⁵ In its presentation to the South African Gambling Review Commission, Betfair estimates that South African online gambling will be worth more than US \$450 million in gross revenue in the year 2012.¹⁶ On the other hand, IT Web Financial estimates that legal online gambling could rake in US \$1.3 million in taxes for the South African government.¹⁷

In light of the potential income generating capability of online gambling and its perceivable threat to location based gambling, this Article examines the legality of banning online gambling despite the promulgation of the National Gambling Amendment Act,¹⁸ which is intended to legalize online gambling, and the constitutional implications of such ban. Part II examines the definition of gambling to argue that online gambling is a mere component of gambling. Part III provides the current legal framework governing gambling and its application to online gambling. Parts IV and V focus on the overall purpose of this Article, i.e. to scrutinize the legality of the non-fulfilment of the legislative mandate requiring regulation of online gambling, and to investigate the constitutional implication, if any, of outlawing online gambling. Finally, Part VI provides a brief synopsis of international approaches toward online gambling regulation. This Article concludes by arguing that while the North Gauteng High Court's decision,¹⁹ confirmed by the Supreme Court of Appeal,²⁰ to prohibit online gambling should be respected, the legal framework for the review of gambling generally, so as to encapsulate online gambling specifically, is irremovable. The National Gambling Act expressly and unambiguously envisages development of online gambling policy and legislation.²¹ Fear of the potential risks posed by online gambling can no longer be used as a reason for banning online gambling.

¹⁴ *Id.* at 6.

¹⁵ See *SA Internet Growth Accelerates*, WORLD WIDE WORX (Jan. 14, 2010), <http://www.worldwideworx.com/?p=234>.

¹⁶ Betfair, Presentation for the South Africa Gambling Review Commission at Betfair Offices in U.K. (July 12, 2010). The author of this Article accompanied the South Africa Gambling Review Commission to this presentation.

¹⁷ Nicola Mawson, *Don't Bet on Online Gambling*, IT WEB FINANCIAL (Jan. 31, 2011), http://www.itweb.co.za/index.php?option=com_content&view=article&id=40619:don.

¹⁸ See generally National Gambling Act No.7 of 2004 (S. Afr.).

¹⁹ *Casino Enter.-North Gauteng High Court*, 2010 (6) SA 38 (GNP) at 38 (S. Afr.).

²⁰ *Casino Enter. (Pty) Ltd v. Gauteng Gambling Bd. & Others* 2011 (6) SA 614 (SCA) (S. Afr.) [hereinafter *Casino Enter.-SCA*].

²¹ National Gambling Act No. 7 of 2004 ch. 6 (S. Afr.). The Transitional Provisions are discussed in detail in Part III (b) of this Article.

II. ONLINE GAMBLING AS A COMPONENT OF GAMBLING

According to the *Britannica Online Encyclopaedia*, gambling is defined as the “betting or staking of something of value, with consciousness of risk and hope of gain, on the outcome of a game, a contest, or an uncertain event whose result may be determined by chance or accident or have an unexpected result by reason of the bettor’s miscalculation.”²² There are certain games of which outcomes may be influenced by the actions of a gambler, such as blackjack or poker, thereby signalling that the skill level of a gambler is becoming an element of gambling.²³ For this reason, the *Canadian Encyclopedia*²⁴ has added the element of skill in its definition of gambling. It defines gambling as the “betting of something of value on the outcome of a contingency or event, the result of which is uncertain and may be determined by chance, skill, a combination of chance and skill, or a contest.”²⁵ Often the term “gambling” is used interchangeably with “gaming” to mean the playing of a game in order to win money or anything else of value.²⁶ The distinction between “gambling” and “gaming” is not universally observed and applies similarly to South African literature, though legislation there references “gambling.”

As reflected above, the definition of gambling is almost universal. What differ normally are the types of gaming classified as gambling activities. In the European Union, “gambling activities . . . involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.”²⁷ In South African parlance, an activity is considered a gambling game “if it is played upon payment of any consideration, with the chance that the person playing the game might become entitled to, or receive pay-out; and the result might be determined by the skill of the player, the element of chance, or both.”²⁸ Such gaming activities include bingo games, amusement games (provided they are licensed under provincial laws), and activities involving placing or accepting a bet or wager.²⁹ “Lottery” and “sport pools” do not fall within the legal definition of gambling in South Africa as they are expressly governed by the Lotteries Act.³⁰ The Lotteries Act defines lottery as “includ[ing] any game, scheme, arrangement, system, plan, promotional competition or device for distributing prizes by lot or chance and any game, scheme, arrangement, system, plan, competition or device, which the Minister may by notice in the *Gazette* declare to be a lottery.”³¹

It may be said that online gambling refers to all gambling activities capable of being played online, and this applies to lotteries, sports pools and various

²² *Gambling*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/224836/gambling> (last visited Jan. 27, 2012).

²³ See Roger Clarke & Gillian Dempsey, *The Feasibility of Regulating Gambling on the Internet*, 22 *MANAGERIAL & DECISION ECON.* 125, 126 (2001).

²⁴ 2 *THE CANADIAN ENCYCLOPEDIA* 717 (James H. Marsh ed. 1985).

²⁵ *Id.*

²⁶ A *CONCISE DICTIONARY OF LAW* 178-79 (Elizabeth A. Martin ed. 1990).

²⁷ Eur. Comm’n, Green Paper, *supra* note 5, at 14.

²⁸ National Gambling Act No. 7 of 2004 § 5 (S. Afr.).

²⁹ *Id.* § 3.

³⁰ Lotteries Act No. 57 of 1997 § 1 (S. Afr.).

³¹ *Id.*

forms of gambling.³² Therefore, online gambling is a modification of all these gambling activities to be played over the Internet, thereby making it a component of gambling. For legal certainty, the European Union defines online gambling services as “any service which involves wagering a stake with monetary value in games of chance, including lotteries and betting transactions that are provided at a distance, by electronic means and at the individual request of a recipient of services.”³³ South African law uses the term “interactive gambling” for online gambling. It defines interactive game as “a gambling game played or available to be played through the mechanism of an electronic agent accessed over the Internet other than a game that can be accessed for play only in licensed premises, and only if the licensee of any such premises is authorised [sic] to make such a game available for play.”³⁴

III. LEGAL REGULATION OF GAMBLING IN SOUTH AFRICA

A. Constitutional Framework for Gambling

Entrenching the constitutional principle espoused in the Interim Constitution creating three tiers of government, the Constitution of the Republic of South Africa (“the Constitution”)³⁵ conferred upon both national and provincial governments concurrent legislative powers to pass legislation³⁶ relating to casinos, racing, gambling and wagering.³⁷ To ensure cooperation among these tiers of government, the Constitution sets principles of cooperative government and intergovernmental relations that all spheres of government must observe.³⁸

In fulfillment of the constitutional obligations to regulate gambling, among other things, the provincial governments passed legislation regulating gambling activities within their respective areas of jurisdiction.³⁹ However,

³² See I. NELSON ROSE & MARTIN D. OWENS, JR., *INTERNET GAMING LAW* 27 (2d ed. 2009) (“lotteries, wagers and gaming . . . are all particularly adaptable to the use of computer software and online communication—in other words—the Internet”).

³³ Eur. Comm’n, Green Paper, *supra* note 5, at 14.

³⁴ National Gambling Act No. 7 of 2004 § 1 (S. Afr.). Section 1 of the National Gambling Act No.7 of 2004 already contained the definition of interactive game or online gambling even though it was not included in its Section 3 as one of its gambling activities. Therefore, the amendment introduced by Section 5 of the National Gambling Amendment Act No. 10 of 2008 is only intended to bring interactive games or online gambling within the purview of the definition of gambling activities in Section 3. See also Wendy Rahamim & Tebogo Mthiyane, *Regulation of Interactive Gambling in South Africa*, WERKSMANS, Aug. 2008.

³⁵ S. AFR. CONST., 1996.

³⁶ *Id.*

³⁷ *Id.* (Part A of Schedule 4 of the Constitution specifies functional areas of concurrent national and provincial legislative competence).

³⁸ *Id.*

³⁹ For a complete discussion of such provincial legislation, see HENDRIK BRAND, *GAMBLING LAWS OF SOUTH AFRICA* 3-25, 4-25, 5-29, 6-27, 7-21, 10-23 (1996) (Gauteng passed the Gauteng Gambling and Betting Act No. 4 of 1995; the Eastern Cape adopted the Eastern Cape Gambling and Betting Act No. 5 of 1997; Free State adopted the Free State Gambling and Racing Act; Kwa-Zulu Natal adopted the KwaZulu-Natal Gambling Act No.10 of 1996; Mpumalanga adopted the Mpumalanga Gaming Act No.5 of 1995; North West adopted the North West Casino, Gaming and Betting Act No. 13 of 1994; Northern Cape adopted the Northern Cape Gambling and Racing Act No. 5 of 1996; and the Western Cape adopted the Western Cape Gambling Act No. 4 of 1996).

none of the provincial legislation makes provisions for regulation of online gambling.

B. Legislative Framework Regulating Gambling: Does the National Gambling Act Prohibit Online Gambling?

In August 2004, the National Gambling Act⁴⁰ was signed into law to regulate gambling in South Africa. At that time, online gambling was already evident in South Africa with foreign online gambling sites making their services or websites available to South Africans with a lust for online gambling. The National Gambling Act was framed in a manner to allow for the regulation of traditional forms of gambling while at the same time laying a foundation for a comprehensive development of an online gambling framework. This is apparent from its inclusion of “interactive gambling” in its definitional sections⁴¹ and a transitional provision for the development of online gambling policy and law. Section 5 of the transitional provision provides:

- (1) The [National Gambling] [B]oard must establish a committee to consider and report on national policy to regulate interactive gambling within the Republic, and may include with its report any draft national law that the committee may consider advisable.
- (2) Despite section 71(2), the committee constituted in terms of this item may include-
 - (a) representatives of provincial licensing authorities; and
 - (b) other persons, whether or not those persons are members of the board.
- (3) Sections 71(3) and (4) apply to the committee constituted in terms of this item.
- (4) The committee constituted in terms of this item must report jointly to the [National Gambling] [B]oard and the [National Gambling Policy] Council within one year after the effective date.
- (5) Within two years after the effective date . . . the Minister, after considering the report of the committee and any recommendations of the [National Gambling] [B]oard or the [National Gambling Policy] Council, must introduce legislation in Parliament to regulate interactive gambling within the Republic.⁴²

As required by the National Gambling Act, the Minister introduced the amendments or legislation for regulation of online gambling to Parliament. While the President assented to the National Gambling Amendment Act,⁴³ its commencement date was deferred with the President given the power to announce such date by means of proclamation in the Government Gazette.⁴⁴

Whereas the reasons for deferring the commencement date of the National Gambling Amendment Act remain unclear, the then Minister of Trade and Industry-Mandisa Mpahlwa-indicated in his address to Parliament the need for

⁴⁰ National Gambling Act No. 7 of 2004 (S. Afr.).

⁴¹ *Id.*

⁴² *Id.*

⁴³ National Gambling Amendment Act No. 10 of 2008 (S. Afr.).

⁴⁴ National Gambling Amendment Act No. 10 of 2008 (GG) No. 31245 (S. Afr.) (§ 44 provides, “This Act is called the National Gambling Amendment Act, 2008, and comes into operation on a date fixed by the President by proclamation in the Gazette.” It is now common knowledge that the President has not yet proclaimed the commencement date.).

enactment of regulations giving effect to the provisions of the National Gambling Amendment Act prior to its commencement.⁴⁵

Despite the development of the proposed Interactive Gambling Regulations⁴⁶ by the then Minister of Trade and Industry, Parliamentary reservations have since transpired regarding the socio-economic impact of gambling and the positive spin-offs, if any, that were to arise from online gambling.⁴⁷ This prompted the Parliament to persuade the current Minister of Trade and Industry to institute the Gambling Review Commission to review the legislative framework governing gambling with particular focus on the proliferation of gambling activities in the country, assessment of the socio-economic effects of gambling and available measures for protection of vulnerable gamblers.⁴⁸ As a result, both the National Gambling Amendment Act and the proposed Interactive Gambling Regulations remain in limbo.

The central purpose of the National Gambling Amendment Act is to introduce regulation of online gambling in South Africa, which in turn, will provide protection to society against the negative effects of gambling, as well as protect against unnecessary demands placed upon gambling.⁴⁹ Such regulation will provide for the issuing of online gambling licenses, registration of players, opening of gambling accounts, and compliance with crime prevention-related legislation. As the old adage advises, the “devil is in the details,” and what follows is a summary of the salient details introduced by the National Gambling Amendment Act read in conjunction with the applicable National Gambling Act. The latter has not been repealed but merely amended to provide for online gambling.

By providing the legal basis for the regulation and control of all gambling activities inclusive of online gambling, the government seeks to preserve the integrity of the country as a responsible global citizen with a gambling regulatory regime.⁵⁰ Indeed, numerous countries have gambling regulatory regimes, but few have introduced or widened their regulations to cover the phenomenon of online gambling. By regulating online gambling, South Africa has curbed the operation of illegal online gambling, which is sometimes feared as a potential source of crime, including money laundering. With this legislation, minors and vulnerable persons will be protected from the negative effects of gambling; pathological gamblers will be identified and excluded from online gambling. So, in all, the industry will be encouraged to develop and promote measures for responsible gambling.

Generally, the provincial governments, through their gambling boards, exercise jurisdiction on the issuing and granting of gambling licenses for loca-

⁴⁵ Mandisi Mpahlwa, Minister of Trade and Industry, Second Reading Debate of the National Gambling Amendment Bill, National Assembly (Sept. 17, 2007), available at <http://www.info.gov.za/speeches/2007/07092014151002.htm>.

⁴⁶ The proposed Interactive Gambling Regulations were published in Government Gazette No. 31956 dated Feb. 27, 2009. Government Notice (GN) 211/2009 (S. Afr.).

⁴⁷ See Audra Mahlong, *Interactive Gambling Legislation Lags*, ITWEB, Jan. 4, 2010, http://www.itweb.co.za/index.php?option=com_content&view=article&id=29017:interactive-gambling-legislation-lags&catid=147:internet&Itemid=68.

⁴⁸ Gambling Rev. Comm'n, *supra* note 2, at 8.

⁴⁹ National Gambling Amendment Act No. 10 of 2008 (S. Afr.).

⁵⁰ *Id.* § 2A.

tion-based gambling sites. However, with the advent of online gambling legislation in South Africa, the National Gambling Board has exclusive jurisdiction to investigate, consider and issue national licenses for online gambling. As the issuer of online gambling licenses, the National Gambling Board will have its own army of inspectors conducting inspections aimed at ensuring compliance with the amended National Gambling Act.⁵¹ The inspections will be directed at the websites licensed to offer online gambling in the country or operating within the country.⁵² The development in this regard is not without controversy, as provincial governments are deprived of the levies, taxes and fees associated with the issuing and renewing of online gambling licenses. These levies, taxes and fees associated with online gambling are payable to the National Gambling Board.⁵³ On a positive note, the administration and regulation of online gambling by the national government through the National Gambling Board has averted potential conflicts and inconsistencies that would have arisen had the provincial authorities been given the power to regulate this form of gambling.

The borderless location of online gambling operations can be credited with swaying the decision to vest control of online gambling with the centrally located National Gambling Board. Overall, the National Gambling Board assumes the role and responsibilities that would have otherwise devolved to provincial gambling boards. It is responsible for the registration of all websites licensed to offer online gambling in the country or operating within South African shores⁵⁴ and is responsible for the resolution of all disputes arising out of online gambling.⁵⁵ More importantly, it is responsible for the prevention, detection, and prosecution of unlawful activities relating to online gambling.⁵⁶

The National Gambling Amendment Act applies to online gambling operators based within or outside the borders of the Republic. This is evident from its licensing regime, which provides for the issuing of such licenses by the National Gambling Board only and the issuing of online gambling employment licenses by the relevant provincial licensing authority.⁵⁷ The latter license applies where the online gambling operator is based or has located its activities within the Republic.⁵⁸ Nowhere in the National Gambling Amendment Act is there a requirement that online gambling operators must be located or based in the Republic for the issuance of such licenses. This is strengthened by a provision granting the Minister the right to set the maximum number of online gambling licenses. The provision requires the Minister to consider, among other things, the number and the geographical location of additional interactive gambling licenses available and utilized.⁵⁹

⁵¹ *Id.* § 21.

⁵² *Id.* § 22.

⁵³ *Id.*

⁵⁴ *Id.* § 18A.

⁵⁵ *Id.* § 6B.

⁵⁶ *Id.* § 22.

⁵⁷ *Id.* § 38.

⁵⁸ Section 39A(2) of Act 10 of 2008 states as follows: “A provincial licensing authority may . . . issue an interactive gambling employment licence [sic] to an employee or a member of the management staff of an interactive provider.”

⁵⁹ *Id.* § 37A.

The National Gambling Act's legislative amendment incorporating online gambling⁶⁰ did not necessarily result in its legalization; it remains illegal until the President proclaims its date of commencement. However, the President proclaiming the commencement of the National Gambling Amendment Act in its current form remains unlikely for the foreseeable future. This high unlikelihood is confirmed by the recent statement of the Minister of Trade and Industry alluding to the need for overhaul of the existing gambling framework before any new form of gambling is permitted, including online gambling.⁶¹ As if that were not enough, the courts have also not shied away from throwing a wrench into the possibility of operating and conducting online gambling in the Republic.

C. Judicial Pronouncement for Prohibition of Online Gambling

The decision of the North Gauteng High Court in *Casino Enterprises (Pty) Ltd (Swaziland) v. Gauteng Gambling Board and Others*,⁶² confirmed by the Supreme Court of Appeal,⁶³ proscribed online gambling in South Africa and threw the future of online gambling into legal turmoil. Based in Swaziland, Casino Enterprises owns and operates a land-based casino under its Swaziland-issued license. The company also operates an online casino. In expanding its market to South Africa, it advertised its online casino on three radio stations based in the province of Gauteng.⁶⁴ It did not obtain, nor did it seek the Gauteng Gambling Board's approval of the advertisements and availability of its online casino to the inhabitants of the province. Armed with the Gauteng Gambling and Betting Act,⁶⁵ the Gauteng Gambling Board issued an order to the three unnamed radio stations to desist from airing the advertisements of Casino Enterprises.⁶⁶ The Gauteng Gambling Board relied on the provisions of Section 71, which state:

- (1) No person shall, by way of advertisement or with intent to advertise, publish or otherwise disseminate or distribute any information concerning gambling in the Province in respect of which licence [sic] in terms of this Act is not in force.
- (2) The advertising of gambling shall be subject to such restrictions and prohibitions as may be prescribed.
- (3) Any person who contravenes a provision of subsection (1) shall be guilty of offence [sic].⁶⁷

⁶⁰ See *supra* notes 49-50.

⁶¹ Anna Majavu, *Fahfee Gamble not a Good Bet*, TIMES LIVE (Jun. 30, 2011), <http://www.timeslive.co.za/thetimes/2011/06/30/fahfee-gamble-not-a-good-bet> ("Online casinos, greyhound racing and "fahfee" are not going to be legalised immediately . . . [U]ntil a new gambling law is in place, illegal gambling, which includes "bush-racing" on retired racehorses and playing online poker, remain illegal). The Minister of Trade and Industry is quoted as saying: "I am not prepared to approve a single additional gambling activity in this country until we have established a new framework [about what kind of gambling will be allowed]." *Id.*

⁶² *Casino Enter.-North Gauteng High Court*, 2010 (6) SA 38 (GNP) (S. Afr.).

⁶³ *Casino Enter.-SCA*, 2011 (6) SA 614 (SCA) (S. Afr.).

⁶⁴ *Casino Enter.- SCA*, (91/07) ZASCA 31 (2008) at para. 2 (S. Afr.), available at <http://www.saflii.org/za/cases/ZASCA/2008/31.html>.

⁶⁵ Gambling and Betting Act No. 4 of 1995 (Gauteng Province) (S. Afr.).

⁶⁶ *Casino Enter.-North Gauteng High Court*, 2010 (6) SA, at 39 para. 2.

⁶⁷ Gambling and Betting Act No. 4 of 1995 § 71 (Gauteng Province) (S. Afr.).

It further invoked the National Gambling Act's provisions, which declare unauthorized interactive gambling unlawful.⁶⁸ In addition to prohibiting online gambling generally, the National Gambling Act further prohibits the advertisement or promotion of any gambling activity in a false or misleading manner, or in any other manner considered unlawful under the terms of the Act or applicable provincial law.⁶⁹

The radio stations obliged and withdrew all Casino Enterprises related advertisements promoting online casinos in South Africa.⁷⁰ It is this forced withdrawal of advertisement that culminated into three related court cases—*Casino Enterprises v. Gauteng Gambling Board*.⁷¹ Infuriated by the Gauteng Gambling Board's action, Casino Enterprises sought an order declaring that when Gauteng gamblers patronize the casino their gambling occurs in Swaziland, so neither the associated gambling nor advertising contravenes South African legislation.⁷² Ultimately, Casino Enterprises argued that the entire transaction took place where the online gambling server was located, in this case Swaziland.⁷³

One cannot deny that this matter required careful interpretation of the meaning of "gambling" as defined in the applicable legislation. Presiding over the matter, the North Gauteng High Court focused on the Gauteng Gambling and Betting Act's definition of "gambling": the "wagering of . . . money . . . on the unknown result of a future event . . . irrespective of whether any measure of skill is involved . . . and encompasses all forms of gaming and betting."⁷⁴ The court further emphasized that to carry out such envisaged gambling activities, a gambling license is required.⁷⁵ Ultimately, the court had no difficulty finding that the online casino of Casino Enterprises constituted gambling and was accordingly in contravention of provincial legislation.⁷⁶

The court effectively rejected Casino Enterprises' argument that the transaction took place where the gambling server was located.⁷⁷ According to the court, gambling takes place at the online gambler's computer terminal, in this case Gauteng.⁷⁸ It therefore follows that the online gambling activities of

⁶⁸ National Gambling Act No. 7 of 2004 § 11 (S. Afr.).

⁶⁹ *Id.* § 15.

⁷⁰ See *Casino Enter.-SCA*, 2011 (6) SA 614 (SCA) 39 para. 4 (S. Afr.).

⁷¹ See *supra* notes 63-65, and 70.

⁷² *Casino Enter.-SCA*, 2011 (6) SA 614 (SCA), at 40 para. 7. In essence, Casino Enterprises argued that the provisions of the Gauteng Gambling and Betting Act did not apply to its online casino and advertisements as they related to the gambling activity taking place in Swaziland, and not South Africa. *Id.* at para. 18. Casino Enterprises sought further advantage of the non-regulation of online gambling in South Africa in seeking to escape the provisions relating to licensing requirements and advertisements. *Id.* It argued that its online casino did not constitute interactive/online game/gambling as contemplated by the National Gambling Act simply because it did not take place in South Africa. *Id.* Therefore, it could not be unlawful under either the National Gambling Act, or the Gauteng Gambling and Betting Act. *Id.*

⁷³ *Casino Enter.- North Gauteng High Court*, 2010 (6) 38 (GNP) 40 para. 3 (S. Afr.).

⁷⁴ Gambling and Betting Act No. 4 of 1995 § 1 (Gauteng Province) (S. Afr.).

⁷⁵ *Casino Enter.-North Gauteng High Court*, 2010 (6) 38 (GNP), at 52 para. 35.

⁷⁶ *Id.* at 59 para. 49.

⁷⁷ *Id.* at 54 para. 39.

⁷⁸ *Id.*

Casino Enterprises in South Africa constituted an illegal gambling activity as prohibited by the National Gambling Act and the Gauteng Gambling and Betting Act.⁷⁹ These illegal gambling activities included the advertisement of online casinos without gambling licenses in the provincial radio stations.⁸⁰

The decision in *Casino Enter.–North Gauteng High Court* outlawing online gambling has been confirmed by the Supreme Court of Appeal (“SCA”).⁸¹ The SCA was called upon to decide “whether the activities of the internet casino contravene the gambling laws of this country, being for present purposes, the National Gambling Act . . . and the Gauteng Gambling [and Betting Act] . . . when gamblers in South Africa gamble on-line [sic].”⁸² This requires consideration of the supposition by Casino Enterprises that its gambling activities took place where its server is located, in this instance Swaziland, and not Gauteng in any manner that contravenes either Act.⁸³ If this supposition were to be accepted or proved, that would imply that Casino Enterprises was not in contravention of the South African law. Casino Enterprises further propositioned that neither statute, i.e. the National Gambling Act or the Gauteng Gambling and Betting Act, was designed with online gambling in mind.⁸⁴ Its online casino operations “were not foreseen by the [lawmakers] or catered for in the [existing] legislation; [it] operates . . . in cyberspace and does not have a terrestrial presence in South Africa.”⁸⁵ With this proposition, Casino Enterprises seeks to argue that its online casinos or gambling are activities falling beyond the purview of the aforesaid statutes.

These propositions, as raised by the Casino Enterprises, required the SCA to examine the play of online casinos and determine which activities take place in South Africa and which activities take place in Swaziland, where the server is hosted. The SCA found the following activities to be taking place in South Africa, as put by Heher JA:

I believe that the following actions occur in the province: (a) The player may initiate the moving of money between his “wallet” in the casino and his bank account; (b) The player decides which game to play, which bets to make, and what stakes to play; (c) The player presses (in this case) “Spin” (other games require other actions). This initiates a sequence of actions which includes the sending of the data packet to the server and the spinning wheels being displayed on the screen.⁸⁶

The activities or actions found to be taking place in Swaziland included: the verification of players’ credentials, recording of monetary transactions, keeping of players’ wallets, the state of the current game and keeping of the history of games played, offering of games, playing of the game by the game server which interprets player instructions, determination of the outcomes of the games; and the effect of the outcome on the players’ balance and status.⁸⁷

⁷⁹ *Id.* at 63 para. 63.

⁸⁰ *Id.*

⁸¹ *See Casino Enter.–SCA*, 2011 (6) SA 614 (SCA) para. 1 (S. Afr.).

⁸² *Id.* at para. 3.

⁸³ *Id.* at para. 7.

⁸⁴ *Id.* at para. 18.

⁸⁵ *Id.*

⁸⁶ *Id.* at para. 20.

⁸⁷ *Id.*

The grand purpose of outlining these activities was to determine when gambling could be said to take place, which would then allude to the location where it took place. Gambling was accepted by the SCA to start in this case when “the stake is irrevocably placed on the outcome of the player’s chosen gambling game,” followed by the moment when the “spin” button or its equivalent is activated.⁸⁸ This, according to the SCA, takes place where the player is located and therefore, in this case, undoubtedly in South Africa.⁸⁹

Having established the main elements of gambling—payment of a consideration (stake, bet, or wager) and the chance (contingency) of becoming entitled to or receive a pay-out (the uncertain event),⁹⁰ all of which were found to take place in the location of the player—the legal question for determination was whether these elements fell within the definition of the Gauteng Gambling and Betting Act. The Gauteng Gambling and Betting Act defines gambling as the

[w]agering of a stake of money or anything of value on the unknown result of a future event at the risk of losing all or a portion thereof for the sake of a return, irrespective of whether any measure of skill is involved or not and encompasses all forms of gambling and betting, but excludes the operation of a machine.⁹¹

Reliance had to be made to the Gauteng Gambling and Betting Act solely because the crafters of the National Gambling Act did not deem it necessary to define gambling, but instead outlined gambling activities permitted through licensing. Indeed the SCA correctly found that the online casinos provided by Casino Enterprises contravene the South African statutes outlined above. Delivering judgment for SCA, Heher JA, had this to say, “The conclusions at which I have thus arrived have the effect that persons in South Africa who gamble with the appellant as well as the appellant in its interactive participation contravene the provisions of [National Gambling Act] and [Gauteng Gambling and Betting Act].”⁹² According to this judgment, anyone who engages in or makes available the online gambling activities contravenes the provisions of the aforesaid Acts.

IV. LEGALITY OF THE NON-IMPLEMENTATION OF THE NATIONAL GAMBLING AMENDMENT ACT

Now that the legal position of online gambling has been clarified, it then begs the question whether such prohibition is in line with the National Gambling Act as carried out in the National Gambling Amendment Act. Note that the National Gambling Act mandates that the Minister of Trade and Industry—also responsible for gambling—present Parliament with legislation regulating online gambling within a period of two years from the date of the Act’s passage into law.⁹³ Such legislation passed in the form of the National Gam-

⁸⁸ *Id.* at para. 34.

⁸⁹ *Id.*

⁹⁰ *Id.* at para. 29.

⁹¹ Gambling and Betting Act No. 4 of 1995 § 1 (Gauteng Province) (S. Afr.).

⁹² *Casino Enter.-SCA*, 2011 (6) SA 614 (SCA), at para. 40.

⁹³ Transitional Provisions of National Gambling Act No. 7 of 2004 § 5.5 (S. Afr.).

bling Amendment, signed into law by the President on July 10, 2008.⁹⁴ The President has yet to proclaim the commencement date for this legislation, and there are no indications of plans to bring the National Gambling Amendment Act into force.

This is not the first time legislation has been assented to but not enforced,⁹⁵ nor is this unusual course of action likely to end. There is always a reason for not putting the legislation into force immediately upon approval by the President. Such reasons include affording time to the enforcement agencies for promulgation of regulations pursuant to the law and providing reasonable notice to the public so they may bring their acts in line with the law. There is always an expectation that the legislation will come into force unless repealed by Parliament. Writing on this issue, Bennion suggests by conferring upon the executive (in this case the President) the power to proclaim the commencement date for an Act of Parliament, the legislature impliedly intends that its Act will be brought into force within a reasonable time by the executive.⁹⁶ As in this case, where the President fails to exercise his power to bring into force the National Gambling Amendment Act, can it be said that the President is contravening his constitutional mandate?

The President's mandate to assent bills arises from the Constitution, which lays down the legislative process for enactment of bills approved by the Parliament. The President's power to assent bills of Parliament is set out as follows:

79 (1) The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.

...

(4) If after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not the President must either

(a) assent to and sign the Bill; or

(b) refer it to the Constitutional Court for a decision on its constitutionality.

(5) If the Constitutional Court decides that the Bill is constitutional, the President must assent to and sign it.⁹⁷

Upon signature of the President, a bill becomes an Act of Parliament. Its commencement date will depend on its expressed wording. As in the case of National Gambling Amendment Act, it will come into operation on the date to be fixed by the President.⁹⁸

Nowhere in the Constitution is the President's power to proclaim the commencement date of an Act of Parliament addressed, thus giving rise to an apparent constitutional vacuum with respect to presidential proclamations of an Act of Parliament. But what is not apparent is whether the President's failure or

⁹⁴ National Gambling Amendment Act No. 10, 2008 (GG) No. 31245 (S. Afr.) (published on July 14, 2008).

⁹⁵ See Competition Amendment Act No.1 of 2009 (S. Afr.) (signed by the President and published on Aug. 28, 2009 in the Government Gazette No. 32533 of 2009).

⁹⁶ RUTH SULLIVAN, SULLIVAN AND DRIEDGER ON THE CONSTRUCTION OF STATUTES 524 (LexisNexis, 4th ed. 2002) (quoting F. BENNION, STATUTORY INTERPRETATION 208 (3d ed. 1997)); see also Anne Twomey, *The Refusal or Deferral of Royal Assent*, PUB. L. 579, 584 (2006).

⁹⁷ S. AFR. CONST., 1996.

⁹⁸ National Gambling Amendment Act No. 10 of 2008 § 44 (S. Afr.).

omission in bringing the National Gambling Amendment Act into force is a violation of the Parliament's mandate and implicitly a constitutional infringement.

The judiciaries in Canada and the United Kingdom have had the opportunity to unravel this legal challenge. The leading case in Canada arose in *Reference re Criminal Law Amendment Act*,⁹⁹ a case referred to the Supreme Court of Canada by the Governor-General in Council. The case concerned the coming into force, or operation date, of Section 16 of the Canadian Criminal Law Amendment Act.¹⁰⁰ Section 16 of the Canadian Criminal Law Amendment Act "was proclaimed with the exception of three subsections."¹⁰¹ The proclaimed subsections,

[i]mpose[d] a new requirement whereby a person, believed to be impaired, in control of motor vehicle, could be required to provide a sample of his breath for analysis; is to create a new offence [sic] of refusing to give such sample of breath; and to create a rebuttable evidentiary presumption that the chemical analysis of an accused's breath is proof of the proportion of alcohol in the blood The three subsections not proclaimed laid down the requirements that the accused must be offered a sample of his breath in an approved container.¹⁰²

The Governor-General in Council's power to bring into operation (proclaim) the Criminal Law Amendment Act or any of its provisions emanate from Section 120, which stated that "this Act or any of the *provisions of this Act* shall come into force on a day or days to be fixed by proclamation."¹⁰³ Thus, the issue before the Supreme Court of Canada was the constitutionality of the proclamation and, in particular, whether the Court had the power to enforce or bring into force the provisions for which the Governor-General in Council had yet to proclaim a commencement date. Writing for the court, Judson, J. said:

Once it has been ascertained that Parliament has given the executive a certain power, as it has done in this instance by virtue of s[ection] 120, then it is beyond the power of Courts to review the manner in which the executive exercises its discretion. Courts cannot examine policy considerations animating the executive.¹⁰⁴

He continued:

In the present case, if we accept, as I do, that s[ection] 120 gives the Privy Council the power to proclaim or not to proclaim various sections and sub-sections, then that is an end of the matter; this Court cannot examine the way in which this power is exercised.¹⁰⁵

Similarly, Hall, J. wrote:

Notwithstanding that in my view the Order in Council proclaiming parts of only s[ection] 16 of the Criminal Law Amendment Act . . . may indicate on the part of the executive a failure to live up to the spirit of what was intended by Parliament, I am nevertheless bound to hold that the remedy does not lie with the Courts . . . [T]he

⁹⁹ *Criminal Law Amendment Act, Reference*, [1970] S.C.R. 777 (Can.); *see also* SULLIVAN, *supra* note 96, at 525.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* (quoting *Criminal Law Amendment Act*, S.C. 1970, c. 38 (Can.)) (emphasis added).

¹⁰⁴ *Id.* at 783.

¹⁰⁵ *Id.* at 784.

responsibility for result rests with Parliament which has the power to remedy the situation if the executive has actually acted contrary to its intention.¹⁰⁶

The Supreme Court of Canada went to great lengths to avoid the question of whether the proclamation for commencement of some, but not all, of the provisions of Section 16 of the Criminal Law Amendment were constitutional or not. Instead, the Court pointed to its lack of authority to direct the Governor-General in Council, or the Privy Council, to carry out the mandate of the legislature. According to the Court, the legislature can by way of amendment, remove the clause empowering the President to proclaim the commencement, thereby making the legislation applicable immediately upon the President's assent. One thing is clear: the Court would be loath to review the President's refusal or omission to proclaim the commencement date of an Act of Parliament.

In the United Kingdom, the House of Lords also had an opportunity to scrutinize the omission or failure to proclaim the commencement date of Acts of Parliament in the case of *R v. United Kingdom (Secretary of State for the Home Department)*.¹⁰⁷ The United Kingdom's Criminal Justice Act 1988 empowered the Secretary of State to proclaim the commencement date for certain sections of the Act. It provided that certain sections of the Act "shall come into force on such day as the Secretary of State may . . . appoint."¹⁰⁸ The Secretary of State, instead of bringing into force the sections of the Act dealing with statutory compensation for victims of crime, opted to introduce a non-statutory scheme under the Crown's prerogative. As the name suggests, the Secretary's non-statutory scheme fell outside the provisions and scope of the Act. The question was whether the Secretary acted lawfully by ignoring a clear mandate of the legislature to bring the Act into force or not.

Writing for the majority of the House of Lords, Lord Browne-Wilkinson said:

In my judgment it would be most undesirable that . . . the court should intervene in the legislative process by requiring an Act of Parliament to be brought into effect. That would be for the courts to tread dangerously close to the area over which Parliament enjoys exclusive jurisdiction, namely the making of legislation.¹⁰⁹

Indicating his disapproval for using the courts to force the Secretary of State to pronounce the commencement date, Lord Nicholls of Birkenhead wrote, "[A] court order compelling a [m]inister to bring into effect primary legislation would bring the courts right into the very heart of the legislative process. But the legislative process is for the legislature, not the judiciary."¹¹⁰

Bringing the effect of this debate back to South Africa—where there is not absolute clarity on the matter—it appears that the President's failure to bring the National Gambling Amendment Act into operation is not unconstitutional. Fur-

¹⁰⁶ *Id.* at 784-85.

¹⁰⁷ [1995] 2 A.C. 513 (H.L.).

¹⁰⁸ Criminal Justice Act, 1988 c. 33, § 171 (U.K.).

¹⁰⁹ *Sec'y of State for the Home Dep't*, [1995] 2 A.C. at 550; see also Philip Kaye, *When Do Ontario Acts and Regulations Come into Force?*, Research Paper B 31, LEGIS. LIBR. 1, 7 n.28 (2007), available at http://www.ontla.on.ca/bills/general-information/files_pdf/files_en/rp_b31.pdf.

¹¹⁰ *Sec'y of State for the Home Dep't*, [1995] 2 A.C. at 575.

thermore, the President's failure to adhere to the mandate of the legislature expressed in the National Gambling Amendment Act is also not unlawful. As the above two cases suggest, the courts are hesitant to interfere in the relationship between the legislature and executive. Where the legislature feels aggrieved by the executive or the President's non-implementation of its bills, the legislature is at liberty to ensure that its bills come into force upon assent by the President. In this case, if the President fails or omits to assent its bills, then one could have recourse to the Constitution under the theory that the President has breached his constitutional obligations.

V. CONSTITUTIONALITY OF THE PROHIBITION OF ONLINE GAMBLING

With greater clarity of the issues arising under non-implementation of the National Gambling Act, the second issue warranting consideration is the constitutionality of banning online gambling in South Africa. The decision to ban online gambling affects both the gambling operator and the gambler (the consumer). At issue is whether there is any constitutional recourse available to the affected parties. Does the decision to ban online gambling affect the constitutional rights of the gambling operator and gambler, and if so, which rights are implicated?

The debate on whether the prohibition of a particular gambling activity is constitutional or not, emerged during the era of the Interim Constitution in the case of *Soundprop Casino v. Minister of Safety and Security and Others*.¹¹¹ Soundprop Casino operated a casino in contravention of legislation then governing gambling in South Africa. The Gambling Act of 1965 prohibited all forms of gambling in the Republic, including inside casinos.¹¹² The Interim Constitution ushered in an era that enshrined the bill of rights as the cornerstone of South Africa's democracy. Soundprop Casino took advantage of these newly granted freedoms by launching an interdict preventing the Minister of Safety and Security (now called Minister of Police) from seizing its gaming tables and, more importantly, to restrain the Minister from prosecuting Soundprop Casino for its operation of the casino, which contravened the Gambling Act of 1965.

Soundprop Casino invoked the Interim Constitution arguing that the Gambling Act of 1965 is "unconstitutional . . . in as far as it offends against the fundamental right contained in Section 26 of the Interim Constitution, entitling persons to freely engage in economic activity."¹¹³ By challenging the constitutionality of the Gambling Act, Soundprop sought for an order permitting it to carry on operating gaming machines and equipment as its constitutional right to freely engage in an economic activity.

¹¹¹ *Soundprop 1239 CC t/a "777 Casino" v. Minister of Safety & Sec. & Others* 1996 (4) SA 1086 (C) (S. Afr.).

¹¹² Gambling Act No. 51 of 1965 § 6 (S. Afr.) states that, "No person shall permit the playing of any . . . game [of chance for stakes] at any place under his control or in his charge and no person shall play any such game at any place or visit any place with the object of playing any such game."

¹¹³ *Soundprop 1239 CC t/a "777 Casino,"* 1996 (4) SA at 1089; S. AFR. (INTERIM) CONST., 1993 ("every person shall have the right freely to engage in economic activity to pursue a livelihood anywhere in the national territory[.]").

Delivering his judgement, Selikowitz, J. had this to say:

[I]t is clear that the total ban on lotteries and on games of chance other than in a non-habitual private sphere does, indeed, offend section 26(1) of the [Interim] Constitution in that it prevents people who wish to engage in the business of casinos and gambling houses from carrying on and freely engaging in that particular economic activity.¹¹⁴

However, Selikowitz, J. added that such a finding does not automatically mean the infringement is unconstitutional. The judge had to consider legislative measures in place, which included the fact that there was a bill tabled before Parliament intending to legalize gambling. He then opted not to strike down the Gambling Act of 1965 to avoid leaving a legislative vacuum, which would allow uncontrolled, unregulated and unlicensed gambling.¹¹⁵

Much has changed since the handing down of the judgment in the *Soundprop Casino* case. In 1996, the Interim Constitution was replaced by the current Constitution of the Republic of South Africa Act of 1996.¹¹⁶ The right to economic activity was replaced by freedom of trade, occupation and profession.¹¹⁷ It now provides, “Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”¹¹⁸

Under the Interim Constitution, the right was available to every person, which presumably includes any juristic person.¹¹⁹ It is therefore not surprising that a juristic person such as Soundprop Casino was able to raise and rely on this right. This has however changed dramatically under the current Constitution of the Republic of South Africa. This right currently no longer applies to corporations, but instead, only to citizens of the country. The replacement of *person* with *citizen* has the effect of excluding all corporations (juristic persons) and non-residents as observed in the constitutional jurisprudence developed by South African courts.

*City of Cape Town v. AD Outpost (Pty) Ltd and Others*¹²⁰ involved the displaying of a billboard sign within the municipal area of Cape Town. The AD Outpost, which had not obtained a license for such billboards, sought to rely on Section 22 of the Constitution.¹²¹ The City of Cape Town’s municipal bylaws provided for a limitation on information that could be contained on the billboard sign.¹²² The plaintiffs argued that this was an infringement on its consti-

¹¹⁴ *Soundprop 1239 CC t/a “777 Casino,”* 1996 (4) SA at 1091.

¹¹⁵ *Id.* at 1096.

¹¹⁶ S. AFR. CONST., 1996 Schedule 7 – Laws Repealed.

¹¹⁷ S. AFR. INTERIM CONST. ACT NO. 200, 1993 § 26.

¹¹⁸ S. AFR. CONST., 1996 § 22 (emphasis added).

¹¹⁹ *Id.* § 26 (“Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.”). This right was invoked by juristic person in *Soundprop 1239 CC T/A Casino v Minister of Safety and Security and Others* 1996 (4) SA 1086 (C) (S. Afr.).

¹²⁰ 2000 (2) SA 733 (C) (S. Afr.).

¹²¹ *Id.* at 744-45.

¹²² *Id.* at 738. Section 3(1) of the City of Cape Town bylaw required that any person intending to display a new sign should make written application in accordance with the provisions of this bylaw. Section 5(1) of the bylaw provided that any person who displays or attempts to display a new sign without the prior approval of the City of Cape Town is guilty of an offence. Section 5(5) provides that City of Cape Town may serve upon any such

tutional rights guaranteeing freedom of trade and occupation.¹²³ The court summarily dismissed such claim by relying on Section 22 on the basis that the section protects individual citizens and not juristic bodies.¹²⁴ According to the court, the section ensures that citizens are afforded protection in choosing how to employ their labor or utilize their skills.¹²⁵ It is not a “provision that should be extended to the regulation of economic intercourse as undertaken by economic enterprises owned by juristic bodies which might otherwise fall within the description of economic activity.”¹²⁶

Again, in the matter of *New Clicks South Africa (Pty) Ltd and Pharmaceutical Society v. Tshabalala Msimang*, New Clicks and Pharmaceutical Society sought to challenge the regulations issued by the Minister of Health, which set the capped dispensing fee levied by pharmacies.¹²⁷ They sought to have the Minister’s regulation declared invalid on the basis that it violated pharmacists’ right to freedom of trade enshrined in Section 22 of the Constitution.¹²⁸ They argued that the capped dispensing fee would drive pharmacies out of business and discourage future potential pharmacists from pursuing this profession.¹²⁹ In dismissing this application of law, the court held that “none of the applicants, being entities as they are, claim that they are citizens that are entitled to the rights conferred upon citizens in terms of section 22 of the Constitution.”¹³⁰

If there was any lingering doubt regarding the non-application of this constitutional provision to juristic persons or legal entities, such doubt should be laid to rest following the decision of the Constitutional Court in the matter between *Affordable Medicines Trust and Others v. Minister of Health and Others*.¹³¹ Again, in this case, Affordable Medicines Trust took issue with the regulations issued by the Minister of Health requiring medical practitioners licensed to dispense medicines to do so from licensed premises.¹³² The regulation would require such medical practitioners to undergo training for good dispensing practice, including the keeping of suitable premises from which dispensing will take place.¹³³ Affordable Medicines Trust argued that this additional training created limitations on potential medical practitioners who would otherwise freely chose the profession.¹³⁴ Accordingly, Affordable Medicines Trust argued that the regulation offended their constitutional rights under Section 22 of the Constitution.¹³⁵

person an order in writing requiring such person to remove or begin to remove such sign and to complete such removal by a date specified in the order.

¹²³ *City of Cape Town*, 2000 (2) SA at 744-45.

¹²⁴ *Id.* at 747.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ 2005 (2) SA 530 (C) (S. Afr.).

¹²⁸ *Id.* at 578.

¹²⁹ *Id.*

¹³⁰ *Id.* at 579.

¹³¹ 2006 (3) SA 247 (CC) (S. Afr.).

¹³² *Id.* at 258.

¹³³ *Id.* at 264.

¹³⁴ *Id.* at 276-77.

¹³⁵ *Id.* at 274.

The manner in which Ngcobo, J. explained the right and its historical origin is worthy of note. Ngcobo, J. pointed to the history of job reservation, restrictions on employment imposed by the laws, and the exclusion of women from many occupations as examples of issues driving the rationale underlying the right.¹³⁶ The right, therefore, is properly intended to restore and protect the dignity of the historically marginalized members of society while equally preventing any possible recurrence of exclusion of any citizen from economic participation.¹³⁷ In emphasizing this right, Ngcobo, J. left no doubt that the right is directed at natural persons and not legal entities. He said:

One's work is part of one's identity and is constitutive of one's dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole. 'It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is a foundation of a person's existence.'¹³⁸

The consequence of the restriction of the right to natural persons is that legal entities such as Casino Enterprises are constitutionally excluded from relying on it in their pursuit of legalized online gambling. The uncertainty created by the Interim Constitution, if any, have been cleared and the application of Section 22 is unambiguous, at least in regard to legal entities owned or controlled by natural persons.

The remaining constitutional issue requiring attention focuses on a gambler as a consumer of online gambling services. The existence of a possible infringement of constitutional rights of a gambler was alluded to by Tuchten, J. in *Casino Enter.-North Gauteng High Court*. Tuchten, J. considered the constitutional justification of such right and had this to say:

I do not overlook the high value our Constitution places on *personal privacy*, which would include the right to engage in recreational activities The more a person moves from his or her innermost core and interacts with other people, the more the right to privacy is attenuated. *To restrict gambling to licensed premises, or to regulate the conduct of persons who gamble from within their own homes* on a basis broadly equivalent to the regulation of the conduct of persons who travel to licensed premises to enjoy the gambling experiences seems to me legitimate legislative choices which, moreover, are entirely appropriate given the clear purposes of the [p]rovincial and [n]ational Acts.¹³⁹

It would have been interesting to examine this right to privacy within the context of engaging in recreational activities. However, such exercise would be futile, as the learned judge has already *suggested in passing* that such a right to gamble, as part and parcel of engagement in recreational activities, is constitutionally limited by the National Gambling Act and other existing provincial laws.¹⁴⁰ Pursuing this right to advocate for online gambling within the current legal framework will lead to nowhere.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 274-75 (quoting DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 274 (2d ed. 1997)).

¹³⁹ *Casino Enter.-North Gauteng High Court* 2010 (6) 38 (GNP) 47-48 para. 50 (S. Afr.) (emphasis added).

¹⁴⁰ *Id.*

VI. INTERNATIONAL REGULATION OF ONLINE GAMBLING

By expressly prohibiting online gambling through the pronouncement of the judiciary, South Africa has inadvertently joined the ranks of the United States (“U.S.”) where online gambling is prohibited through the Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”).¹⁴¹ The U.S. has traditionally allowed its states to regulate gambling without congressional interference.¹⁴² UIGEA was also crafted to give assurance of its intent not to interfere in the states’ regulation of gambling.¹⁴³ UIGEA prohibits online gambling by primarily preventing financial institutions from authorizing or allowing the transfer of funds to online gambling services or operators.¹⁴⁴ By preventing financial institutions from honoring transfer requests of bankers to gambling sites, the sites are effectively shut out of their primary mode of business in the U.S. jurisdiction.¹⁴⁵ Further, UIGEA directly forbids online gambling operators from accepting funds from online gamblers.¹⁴⁶

South Africa and the U.S. are not alone in prohibiting online gambling to all who reside there. Australia has a somewhat unique legal framework regulating the provision of online gambling in its territorial jurisdiction. The Australian Interactive Gambling Act of 2001 (AIGA) does not *per se* forbid the operation of online gambling in its territory; rather, it prohibits the offering of online gambling to its citizens. To its credit, the AIGA endeavours to permit online gambling provided it is offered in traditional location-based gambling sites having license to provide gambling games.¹⁴⁷ Despite this prohibition of online gambling in the US, the State of Nevada has taken progressive steps to pave the way for regulation of online gambling within its territorial jurisdiction.¹⁴⁸ The State adopted Assembly Bill No. 258, which effectively requires the Nevada Gaming Commission to adopt regulations to license interactive gaming in Nevada.¹⁴⁹

¹⁴¹ 31 U.S.C. §§ 5361-5367 (2006).

¹⁴² See Alan D. Smith, *Controversial and Emerging Issues Associated with Cybergambling (E-Casinos)*, 28 ONLINE INFO. REV. 435, 438 (2004).

¹⁴³ I. Nelson Rose, *Viewpoint: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, 10 GAMING L. REV. 537, 537 (2006).

¹⁴⁴ Eric J. Carlson, Note, *Drawing Dead: Recognizing Problems with Congress’ Attempt to Regulate the Online Gambling Industry and the Negative Repercussions to International Trade*, 32 SUFFOLK TRANSNAT’L L. REV. 135, 139-40 (2008); see also 31 U.S.C. § 5364 (“The Secretary and the Board of Governors of the Federal Reserve System, in consultation with the Attorney General, shall prescribe regulations (which the Secretary and the Board jointly determine to be appropriate) requiring each designated payment system, and all participants therein, to identify and block or otherwise prevent or prohibit restricted transactions through the establishment of policies and procedures reasonably designed to identify and block or otherwise prevent or prohibit the acceptance of restricted transactions”).

¹⁴⁵ See Carlson, *supra* note 140, at 141.

¹⁴⁶ Harrington, *supra* note 7, at 776.

¹⁴⁷ *Interactive Gambling Act 2001* (Cth) § 4(e), 8B (Austl.).

¹⁴⁸ See A.B. 258, 2011 Leg., 76th Sess. (Nev. 2011).

¹⁴⁹ *Id.* § 2 (“The Legislature hereby finds and declares that: (1) The State of Nevada leads the nation in gaming regulation and enforcement, such that the State of Nevada is uniquely positioned to develop an effective and comprehensive regulatory structure related to interactive gaming; (2) A comprehensive regulatory structure, coupled with strict licensing standards, will ensure the protection of consumers, prevent fraud, guard against underage and

The United Kingdom (“UK”) is at the forefront of major nations embracing online gambling. The UK Gambling Act of 2005 removes any uncertainty, if there was any, regarding the legality of online gambling within and outside its jurisdictions.¹⁵⁰ The influence of the UK on the liberation of the gambling market, including the market for online gambling, has spread to Alderney, one of the small countries located within the Greater Britain. Recently in 2009, the Alderney Gambling Control Commission issued forty-four online gambling licenses.¹⁵¹

Austria has also not been left behind in recognizing online gambling.¹⁵² In Austria, both land-based and online gambling services are regulated by the federal law on the organization of games of chance entitled *Glucksspielgesetz-GSpG* of 1989,¹⁵³ which translated means “games of chance.” It is one of the requirements of *Glucksspielgesetz-GSpG* that the licensee or holder of gambling license must be domiciled in Austria.¹⁵⁴

While various countries may be undecided regarding the legalization of online gambling, one thing is clear: online gambling is capable of regulation. Only history will tell whether its prohibition is sustainable or not.

VII. CONCLUSION

The future of legalized online gambling in South Africa lies in the ability of Parliament to develop a framework capable of seizing security risks associated with the Internet. Unlike location-based gambling, online gambling offers more regulatory challenges than solutions. It brings with it all types of problems associated with Internet regulation: control of problem gamblers, protection of vulnerable players, potential money laundering, and tax avoidance.¹⁵⁵ As the European Court of Justice pointed out in *Liga Portuguesa de Futebol Profissional v. Departamento de Jogos da Santa casa da Misericordia de Lisboa*, lack of direct contact between online gambling operators and consumers exposes the latter to different risks of fraud by unscrupulous online gambling operators when compared with the traditional location-based gambling establishments.¹⁵⁶ The European Court of Justice further found in *Carmen Media Group Ltd v. Land Schleswig-Holstein*, that the relative ease with which online gambling is accessible in an environment characterized by isolation of the player and absence of social control constitutes many factors

problem gambling and aid in law enforcement efforts; (3) To provide for licensed and regulated interactive gaming and to prepare for possible federal legislation, the State of Nevada must develop the necessary structure for licensure, regulation and enforcement”).

¹⁵⁰ See Carlson, *supra* note 140, at 143.

¹⁵¹ Alderney Gambling Control Comm’n, Annual Report & Accounts 3 (2009).

¹⁵² Eur. Comm’n, Study of Gambling Services in the Internal Market of the European Union, Final Report (2006) at 4.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ See Allan D. Smith, *supra* note 138, at 435 (“Is online gambling the major addictive channel of all forms of gambling, and should the government do something to stop it?”).

¹⁵⁶ Case C-42/07, *Liga Portuguesa de Futebol Profissional v. Dep’t de Jogos da Santa Casa da Misericordia de Lisboa*, 2009 EUR-Lex CELEX LEXIS 62007J0042, at 70 (Sept. 8, 2009) (case dealing with the freedom to provide services as guaranteed by Article 49 of the European Commission Treaty).

likely to foster development of gambling addiction, squandering of money, and many other negative consequences.¹⁵⁷ The potential risks inherent in online gambling have prompted the European Union Commission to launch an online gambling consultation with the key focus on consumer protection, prevention of fraud, incitement to squander on gaming, and the general need to preserve public order.¹⁵⁸

The Department of Trade and Industry has launched and completed its review of the gambling industry and regulations in South Africa which, among other things, was intended to assess the viability of regulating online gambling.¹⁵⁹ Though regulation of online gambling is recommended, the recommendation is not without problems as the Gambling Review Commission somehow concedes that it has no idea what the social impact of online gambling will ultimately be.¹⁶⁰ Key questions persist: is online gambling going to expose more youth to gambling; will it lead to proliferation of gambling; and how will the gambling regulator ensure protection of vulnerable groups such as the youth and the elderly? Compounding this problem is that South Africa is not only faced with calls for regulation of online gambling, but also, for the regulation of greyhound racing.¹⁶¹

A foundation for regulation of online gambling has been laid. The pronouncement of the judiciary describing the involvement or offering of online gambling as illegal does not operate to prevent the South African Parliament from developing an efficient framework for regulation of online gambling. The judiciary was merely applying the law, which excluded the amendments giving recognition to online gambling. In all probability, the judiciary is not at all times the most appropriate avenue to test the legality of online gambling.

Online gambling will dawn in South Africa. What is required is the safety net legislation proactively dealing with threats arising from online gambling. The policy of outlawing online gambling under the pretext that it threatens the survival of location-based gambling is unsustainable. A policy approach balancing the interest of location-based gambling and the emergence of online gambling will provide solutions to address the fears harbored by investors of location-based gambling. Instead of prohibiting online gambling, the focus should be geared toward developing the smart regulatory practices that will address the socio-economic ills associated with online gambling.

¹⁵⁷ Case C-46/08, *Carmen Media Group Ltd v Land Schleswig-Holstein*, 2010 EUR-Lex CELEX LEXIS 62008J0046, at 103 (Sept. 8, 2010) (similarly, the case also touched on freedom to provide gambling services as guaranteed by Article 49 of the European Commission Treaty).

¹⁵⁸ Eur. Comm'n, Green Paper, *supra* note 5, at 6.

¹⁵⁹ Dep't of Trade & Indus. Rep. of S. Afr. Gambling Rev. Comm'n, *Gambling Review Report* (2011) at 8, available at http://www.dti.gov.za/news2011/Gambling_review.pdf.

¹⁶⁰ *Id.* at 12.

¹⁶¹ Marita Carnelly, *Betting on Dog Racing: The Next Legalized Gambling Opportunity in South Africa? A Cautionary Note from the Regulation of Greyhound Racing in Britain*, 1 UNLV GAMING L.J. 73, 75-76 (2010).