THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 152/04
REPORTABLE

In the matter between

André Gründlingh	**First Appellant**
Ulrich Osmund Schüler	**Second Appellant**
Turfsport CC	**Third Appellant**
and	
Phumelela Gaming and Leisure Limited	**Respondent**

Before: Howie P, Farlam, Conradie, Lewis JJA et Comrie AJA

Heard: 10 March 2005

Delivered: 1 June 2005

Summary: Bookmakers and totalizator – Gauteng Gambling Act 4 of 1995 – Bookmakers accepting 'exotic' bets – winnings dependent on tote's published dividends for same bets – whether 'fixed odds bets' as defined – whether unlawful competition. Order in paragraph [44].

JUDGMENT

COMRIE AJA

[1] Litigation in this country about the totalizator goes back to 1887: *Day v Cloete* 5 SC 139. See too *Brady v SA Turf Club* 23 SC 385. It reached this court in 1914 in the leading case of *R v Williams* 1914 AD 460. There this court adopted the principle that a power conferred to the Cape Provincial Council to regulate horse-racing and betting did not empower the Council to prohibit betting in a partial but most substantial manner. The Council was consequently not empowered to prohibit bookmaking on horse-racing or to confine betting to the totalizator.

[2] The same is true of England, starting with *Tollett and another v Thomas* 6 QBD 518, decided in 1871. Many of the decided cases are collected in the comprehensive judgment of Ogilvie Thompson AJ in *Rex v Sportspools (Pty) and others* 1949 (2) SA 202 (C). These include the decision of the House of Lords in *Attorney-General v Luncheon and Sports Club Ltd* 1929 AC 400; 151 LTR 153 (HL). The litigation continues. See eg *Queens Bookmakers Ltd v Commissioner of Customs and Excise* 1975 SLT 207; *Tote Investors Ltd v Smoker* [1968] 1 QBD 509; *Christie NO v Mudalier* 1962 (2) SA 40 (N).

[3] Now bookmaking and the totalizator once again feature in an appeal to this court. The first and second appellants are licensed

bookmakers who carry on business from premises, called a Tattersalls, inter alia in Silverton, Pretoria, Gauteng. The respondent is a public company which owns and carries on the business of operating a computerised totalizator and also running thoroughbred horserace meetings. It operates nationally under the brand name Saftote. Gold Circle (Pty) Ltd is licensed to operate a totalizator in Kwa-Zulu Natal and the Western Cape. Its totalizator betting pools are commingled with those of the respondent under the name Saftote, for which service Gold Circle pays the respondent a fee. Saftote has some 2 600 betting terminals, on and off course, throughout the country. The turnover is about R150 million per month. In the Pretoria High Court, at the instance of the respondent, Mynhardt J granted with costs an interdict (in amended form) restraining the appellants from:

‘1.1 Breaching Section 55 of the Gauteng Gambling Act 4 of 1995 by offering or receiving bets which are not “fixed odds” bets.

1.2 Prohibiting the respondents from offering bets to the public or taking bets from the public in terms whereof or on the basis whereof bets are offered to be paid or are paid out on the basis of result and/or dividends derived or obtained from the applicant’s totalisator pool.’

[4] The first and second appellants appeal to this Court with limited leave granted by the court *a quo*. An interdict was also

granted (para 2 of the order) against the third appellant (Turfsport CC) which is owned by the first and second appellants. That part of the order is not the subject of appeal and nothing further need be said about it. For convenience I shall refer in this judgment to the first and second appellants as the appellants.

[5] As licensed bookmakers in terms of the Gauteng Gambling Act 4 of 1995 the appellants are authorised to accept 'fixed odds bets' on sporting events (s 55), in this case horse races. To carry on unlicensed bookmaking is an offence (ss 54, 87). The definition of such bets (s 1), as it stood when this matter was decided *a quo*, read:

'**'Fixed odd bets'** [1]means a bet taken by a licensed bookmaker on one or more events or contingencies where odds are agreed upon when such bet is laid, but excludes a totalisator bet;'

A totalizator bet was not defined, but a 'totalisator' was:

'**'totalisator'** means a system of betting on a sporting event in which the aggregate amount staked on such event or combination of events, after deduction from such aggregate amount of any amounts which may lawfully be deducted therefrom, whether under this Act or by agreement, is divided

[1] The spelling in the statute is anything but consistent. Except for quotations I shall spell totalizator with a 'z' (see the Shorter Oxford English Dictionary), and I shall refer to fixed odds in the plural. The accepted abbreviation of totalizator is 'tote', which I shall use from time to time.

amongst those persons who have made winning bets on that event or combination of events in proportion to the amounts staked by such persons in respect of such winning bets, and includes any scheme, form or system of betting, whether mechanically operated or not, which is operated on similar principles.'

[6] An obvious example of a fixed odds bet with a bookmaker would be 5 to 1 for a win on the celebrated race horse Appeal Court. The odds (5 to 1) would be fixed at the moment when the bet is laid, and the payout in the event of Appeal Court winning would be calculable at the same moment. We know from the evidence that the odds given by bookmakers may shorten or lengthen as the race approaches and that different bookmakers may offer different odds. In the event of Appeal Court winning, the bookmaker must pay all the winning bets on that horse from his own resources – save to the extent that he may have 'laid off' such bets. He takes the betting risk. There is no pool of bets to be divided among successful punters. The agreed odds rule.

[7] As the definition indicates, the totalizator operates on principles different from those described in the preceding paragraph. All the bets (tote bets) on a particular race (eg all the bets for a win in race no 1) are pooled. From the resulting (gross) pool or total, tax

and administration expenses (which include the profit of the tote operator) are deducted. The net pool is divided equally between all the successful punters in proportion to their respective stakes. There is no betting risk to the totalizator or its operator. Subject to lawful deductions, the tote pays out in winnings (or dividends) what it has received in bets. As it was succinctly put in the papers (in lay terms) punters on the tote bet against each other; (whether that is the correct legal position is unnecessary to decide – cf *Tote Investors Ltd v Smoker* supra); whereas a punter placing a bet with a bookmaker bets against that bookmaker. It is also clear that the odds on a tote bet are not fixed when the bet is laid because no odds are agreed. On the contrary, everything depends on how much money is wagered on the race, via the tote, and on how many winning tickets there are. The dividend can only be calculated after the race has been run.

[8] The essence of a tote bet – ie a bet on the totalizator – is the pool system, namely that each pool is divided among the successful punters. That essence is reflected in the definition of a totalizator set out above. It also accords with the descriptions and analyses of the totalizator to be found in several of the decided cases cited in the

opening paragraphs of this judgment and in the judgments referred to therein.

[9] The totalizator has long since moved from straightforward bets for a win or a place. So-called ‘exotic’ bets are offered. One such is the ‘trifecta’ in which the punter selects three horses to finish first, second and third in the correct order. In a ‘trio’ bet, the punter selects the first three horses to finish in any order. There are other permutations such as the dupla, the exacta, the jackpot, the pick 6, the place accumulator, the quartet and the swinger. The dividends on such tote bets are likely to be higher than for a simple place or win. These exotic bets also operate on the pool system which I have described.

[10] Once the race has been run, the totalizator calculates the dividends and these are announced. In respect of a bet which spans more than one race (eg the jackpot), the calculation takes place after the last relevant race. The respondent publishes these results widely: on the course, in the press, on some radio channels, and on a dedicated television channel. The development and operation of its totalizator, and the publication of its results, have involved the respondent in considerable effort, expertise and expense. The

system is now so sophisticated that it even forecasts some dividends *before* the race.

[11] It came to the notice of the respondent that the appellants were offering and accepting 'exotic' bets, the stake formula being the tote dividends or results to be published by the respondent. Thus the dividend per rand on a trifecta bet laid with the appellants would be precisely the same as the dividend on the identical trifecta bet laid with the respondent's tote. There is this difference, however: with the appellants there is no pool of bets to be divided among winning punters. The appellants are on risk and must pay all winning bets from their own resources. Resolving to put a stop to the practice of bookmakers accepting such exotic bets, the respondent brought the present application in the court *a quo*.

[12] Para 1 of the order granted by Mynhardt J was premised on his conclusion that the exotic bets laid by the appellants were not fixed odds bets and that the appellants were accordingly not authorised by their licence to accept them. Para 2 of the order was premised on the conclusion that by using the respondent's published dividends or results as ingredients of such bets, the appellants were guilty of unlawful competition. Both conclusions are challenged on appeal.

[13] While this appeal was pending the National Gambling Act 7 of 2004 came into force. Its provisions were urged upon us by counsel for the appellants, Mr Puckrin, in two ways. First, he submitted that certain definitions and other provisions relating to the permissible activities of licensed bookmakers override any contrary stipulation in the Gauteng law. He referred us to the definitions of 'bookmaker', 'fixed-odds bet', and 'open bet'. He also referred us inter alia to ss 4, 8, 30, 37 et seq, 44, and the schedule (transitional provisions), more particularly s 2(2). In the view which I take of the first leg of this appeal, the fixed odds bet question, it is unnecessary to resolve the contention. I shall content myself with the prima facie dictum that Act 7 of 2004 relates to a concurrent legislative competence and is largely permissive, and that the provinces can continue to grant or refuse bookmaking licences as before, provided certain minimum standards are observed. Second, Mr Puckrin submitted that the apparent endorsement by the national legislature of the type of betting now under review was relevant to this court's assessment of the *boni mores* of the community in relation to leg 2 of the appeal, viz the unlawful competition issue. I will weigh this contention later. I turn now to consider in turn the two legs of the appeal.

Fixed Odds Bets

[14] It is clear to me that the exotic bets under review are not tote bets. This is because the appellants do not operate a 'totalisator' as defined. They maintain no pools of bets to be divided among winning punters, nor do any actual divisions of this kind take place. As I have already recorded, the appellants are on risk and must pay all winning bets from their own resources. On any given race or combination of races, they may show a profit or a loss. That is quite different to a totalizator which runs no betting risk and which shows no betting loss or profit. It follows that the bets under review are not outlawed by the concluding words of the definition of fixed odds bets: 'but excludes a totalisator bet'. Indeed, the presence of these words of exclusion seems to suggest, at least prima facie, that tote bets, or some tote bets, are fixed odds bets, hence the legislative wish to exclude them for one or other reason of policy.

[15] Turning to the rest of the definition of fixed odds bet, the critical words are: 'odds are *agreed upon* when such bet is laid'. (My emphasis). Earlier in this judgment I gave as an obvious example of a fixed odds bet, a bet for a win at 5 to 1. I observed that the odds (5 to 1) would be fixed at the moment when the bet is laid, and that the payout in the event of a win would be calculable at the same

moment. But immediately calculable winnings are not expressly required by the definition. In the course of argument Mr Puckrin offered a betting example drawn from the game of cricket. I would prefer one drawn from a different sport, golf. Suppose the following wager: in return for a stake of R30, the bookmaker promises to pay the punter R10 for each birdie scored by a well known professional golfer in the third round of a specified tournament. In such a wager the odds in my view are indubitably agreed or fixed (R10 per birdie) when the bet is laid. The potential winnings (or loss) are not immediately calculable, but they can be readily calculated on a permutation basis. So I do not think that my hypothetical wager would fall foul of the definition.

[16] With the appellants' exotic bets, the odds are not known, or in that sense fixed, when such bets are laid. From that moment until the race or combination of races is run, the odds fluctuate according to the amounts of money which are wagered (on the tote) and the horses which are selected. Thus the appellants' exotic bets do not fix the odds; they provide formulae in terms of which the odds will be determined or ascertained later. Such a formula arguably, in my view, constitutes an *agreement* upon the odds, at the moment when the bet is struck, even though the actual odds are determined later

(in terms of the formula). I think that is a permissible interpretation of the definition of a fixed odds bet, which insists on agreed odds when the bet is laid rather than known odds. I conclude therefore that the definition is ambiguous.

[17] I mention in passing that a difference between an immediately calculable payout in the event of a win, and an ascertainable payout in due course, is not unknown to foreign legislators. In the Scottish case of *Queens Bookmakers Ltd v Commissioner of Customs and Excise*, supra, the statutory definition of a fixed odds bet (for tax purposes) expressly acknowledged the difference. Section 10(2) of the Betting and Gaming Duties Act 1972 defined a fixed odds bet, as distinct from a pool bet, as follows:

> '(2) A bet is a bet at fixed odds within the meaning of this section only if each of the persons making it knows or can know, at the time he makes it, the amount he will win, except in so far as that amount is to depend on the result of the event or events betted on, . . . or on the starting prices . . . for any such event . . . .
>
> In this sub-section –
>
> "starting prices" means, in relation to any event, the odds ruling at the scene of the event immediately before the start.'

That is not the definition employed by the Gauteng legislature, but it does tend to show that an immediately calculable payout, in the event of a win, is not necessarily a *sine qua non* of a fixed odds bet.

[18] The foregoing ambiguity brings me to the history of the legislation, to which courts may look for interpretative aid in this event: *Nissan SA (Pty) Ltd v Commissioner for Inland Revenue* 1998 (4) SA 860 (SCA). When this matter was decided *a quo* Act 4 of 1995 defined a fixed odds bet in the terms quoted in para [5]. The definition had earlier been amended by the deletion of the following:

‘or any bet for which the dividend is to be calculated or otherwise determined by reference to, or any other basis which depends upon, a totalisator bet of any kind.’

I pause here to observe that these additional words would appear to have prohibited the appellants’ exotic bets. The clear interpretative inference to be drawn from the deletion, it seems to me, is that the Gauteng legislature’s intention has vacillated; and that under the present definition the appellants’ exotic bets are to be regarded as fixed odds bets, although during the period when the first amendment was in force they were otherwise regarded.

[19] The court *a quo* held that the definition of fixed odds bets was clear and that it meant that the odds had to be determined (ie the potential payout determined) when a bet is struck. For the reasons given above I disagree. The court below declined to be deflected from its view by reference to the rules made in terms of s 85 of the Act. Rule 14 contemplates that a number of exotic bets constitute fixed odds betting. It also refers to a 'starting price bet', where the odds cannot be known, or the potential winnings calculated, until the race starts. However, I too arrive at my interpretation without reliance on the rules. On the first leg of the appeal, therefore, I conclude that the court *a quo* erred and that para 1 of the order should not have been granted.

Unlawful Competition

[20] In view of the division of opinion in this Court it is as well to begin this part of the judgment with a succinct analysis of what it is, in relation to exotic bets, the appellants are actually doing. At first blush it may appear that they are simply borrowing the respondent's much published dividend results which, once disseminated, may well pass into the public domain. It was so argued by Mr Puckrin. In reality, however, the appellants in my opinion are doing more than borrowing the published dividends. They borrow much of the

respondent's business system. The exotic bets under review have to be struck in advance of the race(s) being run. They are struck with express reference to the respondent's tote dividends which can only be calculated and announced after punters have placed their tote bets and after the running of the race(s). In a telling admission the appellants conceded that:

'Dit is egter geriefliker om Saftote se dividende as riglyn te gebruik. Die publiek dring oor die algemeen daarop aan om ooreenkomstig Saftote se dividende uitbetaal te word.'

Inherent in the admission is the trust placed by the betting public in the respondent's tote. Some other tote, less well known, less reliable, might not invite the betting public's custom.

[21] The exotic bets in question thus depend not just on the published tote dividends. They depend on the very existence and operation of the respondent's totalizator, and its acknowledged reliability. Without the respondent's tote, its proper operation and its published dividends, the appellants' exotic bets could not be laid. Nor could winnings (dividends) on exotic bets be paid by the appellants to successful punters. In this way, as it seems to me, the appellants appropriate unto themselves both the respondent's product and its performance. The appellants achieve this outcome

without any significant expense or effort on their part. The respondent may or may not retain any property or ‘quasi-property’ in its published results; but its business system is of great value and the respondent surely has property therein.

[22] Mr Cockrell, who argued the appellant’s case in reply, advanced a number of pricing analogies which, he submitted, could never be regarded as unlawful competition in a free market economy. That may well be true in some instances. But we have to concentrate on the facts of this appeal and those facts show, in my opinion, not a pricing issue but a clear case of appropriation by the appellants of the respondent’s business system with its concomitant product, performance and repute. That the parties are in competition with one another admits, to my mind, of no doubt: the tote and bookmakers compete for the business of the betting public. That the respondent suffers loss, through deflected betting and hence diminished turnover, also appears likely.

[23] I would emphasise here that we are not concerned with a case of ‘unprotected’ copying, that is unprotected by statutes relating to patents, copyright, designs and the like. This is a particularly sensitive area in the United States as Callmann on *Unfair Competition, Trademarks and Monopolies* (4 ed) records at 15-78 ff.

That difficulty arose in our own leading case, *Schultz v Butt* 1986 (3) SA 667 (A). See too the cases collected in *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd and others* 2005 (1) SA 398 (C). In *Schultz v Butt*, where the mould of a boat hull was copied, this court required (and found) something more than mere copying to render Schultz's parasitic conduct unlawful. It is interesting to note that according to Callmann, loc cit, the 'mould' cases gave no end of difficulty in the light of the doctrine in United States law which favours statutorily unprotected copying. The matter was ultimately resolved, it would seem, by federal legislation. (ibid: 15-87) In *Schultz v Butt* this court was able to resolve that difficulty on the special facts of the case. Be all that as it may, the present appeal is not a case of copying, protected or unprotected. Any copying that may occur is purely incidental. As I have sought to show, the present case is one of appropriation, not copying (or pricing).

[24] I digress briefly in order to discuss the decision of this court in *Taylor & Horne (Pty) Ltd v Dentall (Pty) Ltd* 1991 (1) SA 412 (A). An important issue in that case was whether competitor A, which under an exclusive franchise had developed a demand for an overseas product in the South African market place, could object to competitor B capitalising on the demand so created. The answer

was an unequivocal no. Seen in this light the judgment of Van Heerden JA, an acknowledged expert in the field, is with respect not open to question. Businessmen sometimes believe that markets created or materially enhanced by them, somehow belong to them. This is a fallacy in a free market economy. Subject to statutory protection, granted for legislative good reason, commercial demand is open to all competitors to supply. Supply and demand is a basic tenet of any free economy, which explains why competition is regarded as healthy and not generally to be curbed. *Non constat* that the *manner* of competition may not travel beyond what is regarded by courts as fair (and even robust), and cross the border into the realm of legal unfairness and therefore unlawfulness. *Dun and Bradsheet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C) at 216. Passing off, the original delict in this field, is the obvious example.

[25] In the present case the appellants do not accept that the demand among punters for exotic bets was created by the respondent. Even had the respondent created the demand, that would not preclude the appellants (on the authority of *Taylor & Horne*, supra) from capitalising on that demand by offering and accepting similar exotic bets, provided their licence so permits. That

is not the real objection on my approach to the matter. On my approach the appellants go further than capitalising on the demand: they appropriate the respondent's business system, and its product and performance, for such purpose. The facts are closer to the Interflora case (*Interflora African Areas Ltd v Sandton Florist and others* 1995 (4) SA 841 (T)) and the Aruba case (*Aruba Construction (Pty) Ltd and others v Aruba Holdings (Pty) Ltd and others* 2003 (2) SA 155 (C)), in both of which it was held by Kirk-Cohen J and Van Heerden J respectively that there was an improper appropriation.

[26] It may be accepted that the respondent or its predecessor (the TAB) did not invent the totalizator. The original *pari-mutuel* concept appears to have originated in France in the 1860's. Encyclopaedia Britannica (15 ed, 1980) Vol 8 s.v. Horse Racing, gives 1872. (This date cannot be right: cf *Tollett's* case, supra, where a *pari-mutuel* machine was in use on the Wolverhampton race course in 1870). The appellants in their affidavits attribute the invention of the modern tote to an Australian, Sir George Julius, in the years 1913-1917. That is incorrect, as the early litigation cited in the opening paragraphs of this judgment demonstrates. It may well be that Sir George Julius advanced the relevant technology in a material degree. The respondent does not claim invention, for what that

might be worth. It does not assert, nor can it be heard to assert, some kind of monopoly over the totalizator system in South Africa. It simply says to the appellants: if your licence permits you to accept exotic bets, so be it; but then please use your own business system, at your own expense, and not ours. Reduced to these essentials the parasitic nature of the appellants' exotic bets is in my view plainly evident. There is no fear that the parasite will kill the host. But competing on these uneven terms, there can be little doubt that in accordance with the laws of nature and business, the parasite will likely harm the host, as parasites usually do.

[27] The genesis of much of the modern law of unfair or unlawful competition is to be found in the inspired decision of the United States Supreme Court in *International News Service v Associated Press* (1918) 248 US 215. The case concerned the filching of fresh, saleable news by one news agency from another. The majority opinion of Pitney J refers, in biblically redolent terms, to a competitor reaping where it has not sown. It has had a major influence on our own law even since *Dun and Bradstreet*, supra. In my view the appellants, by their appropriation, reap where they have not sown. Van Heerden and Neethling *Unlawful Competition* at 243 distinguishes between direct and indirect appropriation. They refer to

German law. I would regard the appellants' conduct as direct appropriation, or rather misappropriation. Two contrasting American decisions, dealing with the use of another's results, deserve brief mention. They are: *National Football League v Governor of State of Delaware* 435 F. Supp 1372; 195 USPQ 803 (use of league's results for state lottery); and *Board of Trade of City of Chicago v Dow Jones & Co Inc* 218 USPQ 636 (use of Dow Jones stock market index averages for city's proposed futures exchange). Protection of the results was denied in the first case, but upheld in the second. In neither case were the parties competitors. In the present appeal, however, the parties are in direct competition with one another.

[28] The question which remains is whether the appellant's conduct is or is not to be condemned as unlawful. The answer depends on this court's assessment of the *boni mores* of the community. See *Schultz v Butt*; *Taylor & Horne's* case; and the *Aruba* case at 173H-174D; all supra. Where a competitor has directly misappropriated his rival's business system, product, performance and repute – at no significant expense to himself – I consider that right-thinking members of the community should and would condemn it without much ado. All that can be offered in defence of the practice is that it has apparently been legislatively sanctioned in Gauteng for many

years (my brethren Farlam and Conradie's researches indicate at least since 1961), and more recently in Natal, and that the national legislature *ex post facto* appears to approve of the idea. I cannot regard these as weighty considerations on their own, although I accept that legislative sanction is a factor relevant to the assessment. *Lorimar Productions Inc v Sterling Clothing Manufacturers (Pty) Ltd* 1981 (3) SA 1129 (T) at 1154-5. No doubt the legislatures have the best interests of the betting community, along with the provincial purse, at heart, but I have no reason to suppose that they have given serious thought to the various matters, and their implications, which I have debated in this part of the judgment. Thus there is no hint that the legislatures have applied their respective minds to the possibility of compensation to tote operators for the very real advantage which bookmakers obtain at the expense of the tote.

[29] As for the betting public, punters probably welcome the increased choice afforded by the appellants' exotic bets, or at least off course the convenience of being able to lay an exotic bet (on tote terms) at a Tattersalls. How much thought punters have given to Saftote's interests does not appear. At all events an indignant outcry from the betting public is hardly to be expected in the circumstances.

Its absence does not count for much in my view. Bookmakers will not complain since legislative sanction, and the distinct commercial advantages which I have indicated, operate in their favour. That leads tote operators, in this instance Saftote, to protect their own interests.

[30] I accept that had the appellants, and other bookmakers, built upon the respondent's product and performance, with significant effort and expense on their own part, and without timely challenge, then it might have been too late for the respondent, or other tote operators, to object. In those circumstances the *boni mores* of the community might suggest that the tote operators tarried too long. But those are not our facts. On our facts the appellants have contributed or added nothing of value in relation to exotic bets linked to tote dividends. Such bets remain essentially parasitical. In my judgment they reap an unrighteous competitive harvest; they are legally unfair, and hence unlawful. I would therefore confirm para 1.2 of the order granted by Mynhardt J.

[31] As this is a minority judgment on this leg of the appeal, it is unnecessary for me to consider an appropriate cost order in relation

to a partially successful appeal. The order of the court is set out at the end of the judgment of Farlam and Conradie JJA.

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R G COMRIE

ACTING JUDGE OF APPEAL

FARLAM and CONRADIE JJA

[32] We have read the judgment of Comrie AJA. On the first leg we agree that the definition of a 'fixed odds bet', and the manner in which it came to be cast in the form it has now assumed, invite the conclusion that despite its apparently restricted scope, it is intended to include ascertainable odds bets. This has been the provincial law for a long time and the position ought in our view not to be disturbed without a clear indication of an intended change from the lawgiver.

Investigation of the antecedents of the Gauteng Gambling Act 4 of 1995 reveals that starting price bets (mentioned by our brother Comrie) are no novelty. As long ago as 1961 bookmakers were permitted by the then betting regulations,[2] to take 'starting price bets', exotic bets where the odds were only determined after the commencement of the race concerned and calculated on the ruling odds on the racecourse concerned at the time of such commencement.[3]

[33] On the second, unfair competition, leg we agree that the evidence demonstrates that Saftote and its predecessors have

[2] Betting (Horse Racing) Regulations promulgated under Administrator's Notice 2944 in an Official Gazette Extraordinary for the province of Transvaal dated 29 December 1961: Reg 72(7) deals with starting price bets.
[3] Chapter V s37 of the Betting (Horse Racing) Regulations: definition of 'starting price bet'.

developed a business system of such reliability and sophistication that it has earned the trust of the betting public, a trust that is manifested by a readiness to do business with Saftote. The resulting income potential is part of its goodwill and as such a valuable asset.

[34] We also incline to the view that the appellants in the course of their business appropriate the results of the respondent's endeavour to calculate pay-out dividends, something that is fundamental to the operation of its totalizator business. The respondent is to all intents and purposes in the same position as that in which Dow Jones and Co Inc found itself. It had for years published the famous Dow Jones Average, an index of the United States stock market that by the skill of its compilation had achieved high public regard as a valuable investment tool. The Illinois Appellate Court 1st District[4] held that the unauthorised use of the Dow Jones Index by the Board of Trade of the City of Chicago brought the Board's conduct within the boundaries of the doctrine of misappropriation.

[35] We disagree, however, with Comrie AJA that such appropriation was unlawful. On 29 Dec 1961 the Betting (Horse Racing) Regulations were promulgated by the Administrator of the

[4] *Board of Trade of the City of Chicago v Dow Jones & Company Inc.* 218 USPQ 636

Transvaal.[5] Chapter IV regulated the conduct of bookmakers on racecourses. These regulations contemplated the laying of all kinds of bets, among them an 'official course double bet'. That was defined as 'a bet on whether or not a certain horse wins a certain race called the First Leg, as also whether or not a certain horse wins a certain other race, called the Second Leg, at the same race meeting, but shall only include a bet whereof the bookmaker's stake of the bookmaker or cubicle holder laying such bet is based upon the amount payable by a totalizator on the racecourse concerned.'

[36] These regulations were replaced by others made under the Horse Racing and Betting Ordinance 24 of 1978.[6] An 'official course double bet' was slightly differently defined but it was still a bet 'where the bookmaker's stake in such bet is based upon the amount payable by the totalizator on the race-course concerned.' It is worth noting that regulation 13 of the regulations promulgated under the (repealed) Natal Racing and Betting Ordinance 28 of 1957[7] envisaged starting price bets as well as 'bets at tote odds'.

[37] The Gauteng Gambling Act 4 of 1995 upon its promulgation contained no prohibition on the practice by bookmakers of using

[5] See footnote 2.
[6] Horse Racing and Betting Regulations published under Transvaal Administrator's Notice 1916 dated 22 December 1978.
[7] Provincial Notice no 244/1992 dated 17 September 1992.

totalizator dividends to determine winnings. That changed when Gauteng Act 1 of 1998 came into operation. Section 1(e) inserted a definition of ‘fixed odds bet’ reading as follows:

‘ “fixed odds bet” means a bet taken by a licensed bookmaker on one or more events or contingencies where odds are agreed upon when such bet is laid, but excludes a totalisator bet *or any bet for which the dividend is to be calculated or otherwise determined by reference to, or any basis which depends upon, a totalisator bet of any kind.’* (Our emphasis)

The amendment did not remain in force for long. By s 1(a) of Act 6 of 2001 the portion which we have emphasised was deleted so that it would appear that bookmakers were once again able to take a bet on which the winnings were to be calculated by reference to totalizator data.

[38] Any doubt that the deletion of the emphasised words may have left unresolved was laid to rest by the National Gambling Act 7 of 2004. It is, as Comrie AJA remarks, overarching and largely permissive. What it permits is not without significance for the unlawfulness debate. One of the bets it permits a bookmaker to take is an 'open bet'. Apart from being defined in section 1 to mean a bet (other than a totalizator bet) in which no fixed odds are agreed it also means –

'(b) a bet in respect of which the payout is determined after the outcome of the contingency on which such bet is struck became known, with reference to dividends generated by a totalisator.'

[39] The review of the legislation in the Transvaal, more recently in Gauteng, and also nationally shows that in regulating the racing industry the provincial (and latterly national) legislatures have not, apart from a short interval of proscription enacted by the Gauteng Provincial Legislature, considered it offensive for bookmakers to make use of totalizator dividends in calculating the pay-out on exotic bets. Under the national Act presently in force it would be lawful for a bookmaker to take a bet where the payout is based on a totalizator dividend. For many years before 1995 it was also expressly permitted in the Transvaal.

[40] The test for the unlawfulness of a competitive action is essentially public policy and the legal convictions of the community. The latter concept ordinarily includes not only right-thinking members of the community who might be expected to hold a view on the particular topic but also, as Van Dijkhorst J said in *Lorimar Productions Inc v Sterling Clothing Manufacturers (Pty) Ltd* 1981 (3) SA 1129 (T) at 1153A, those involved in the industry, 'The business ethics of that section of the community where the norm is to be

applied’. Apart from these considerations there are elements like ‘an inherent sense of fairplay and honesty; the importance of a free market and strong competition in our economic system; the question whether the parties concerned are competitors; conventions with other countries, like the Convention of Paris.' (1153B-C). While legislative provisions are obviously expressions of policy they may (and we think they do here) give expression to the community’s legal convictions.

[41] The Convention of Paris for the Protection of Industrial Property defines unfair competition as 'any act of competition contrary to honest practices in industrial or commercial matters.' The theme of honest practices raised in *Lorimar* had been explored by Corbett J in *Dun & Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C) and taken up in *Schultz v Butt* 1986 (3) SA 667 (A) where Nicholas AJA agreed with Corbett J that ‘Fairness and honesty are themselves somewhat vague and elastic terms' (at 679A-B) but that they are nonetheless valuable concepts; and that while they are 'relevant criteria in deciding whether competition is unfair, they are not the only criteria . . . questions of public policy may be important in a particular case . . .' (679E). He added that Van der Merwe en Olivier *Die Onregmatige Daad in die*

Suid-Afrikaanse Reg (5ed at 58 note 95)[8] 'rightly emphasize' that ' "die regsgevoel van die gemeenskap" opgevat moet word as die regsgevoel van die gemeenskap se regsbeleidmakers, soos Wetgewer en Regter' (679D-E).

[42] What we should decide, then, is whether the appellants, who at the time of the institution of these proceedings used totalizator dividends for the purpose of calculating their own payouts, in the eyes of their fellows and having regard to public policy, acted fairly and honestly. Public policy, as reflected in the provincial legislature's commands, has (apart from one brief interruption) for almost half a century not required bookmakers to act otherwise. It is only to be expected that during the long time that bookmakers were permitted to use totalizator data, the racing community would have come to accept that the use of such data by bookmakers was not unfair or dishonest. Indeed, while the practice was legislatively sanctioned, it could not be.

[43] The application by the respondent for an order interdicting the appellants from 'using for commercial, business or trading purposes the results of the applicant's totalizator pool' would have been assured of success if it had been launched during the time that the

[8] Note 99 in the 6th edition.

use of totalizator data by bookmakers was prohibited by the Gauteng legislature. However, it was brought after the definition of ‘fixed odds bet’ had been amended to in effect restore the situation that had prevailed under the unamended Act when there was not, as there had been under earlier legislation, express permission for the use of totalizator data by a bookmaker or (save for the short operation of the 1998 amendment in that regard) express prohibition on their use. The respondent’s case therefore had to be that, despite the removal of the 1998 prohibition on the use of totalizator data, the racing community nevertheless continued to regard the use of such data as unfair and dishonest. In the light of the fact that the practice that bookmakers were now free to resume had extended over decades, there does not appear to be any warrant for the conclusion that a brief period of prohibition would have caused the legal convictions of the racing community on this issue to change so dramatically. We think that on the 'broad equitable approach' espoused by Nicholas AJA in *Schultz v Butt* the better conclusion is that the appellants' use of the totalizator data for their own commercial purposes is not actionable.

[44] The appeal is accordingly allowed with costs that include the costs of two counsel. For the orders of the court below there is

substituted an order reading: 'The application is dismissed with costs which are to include the costs of two counsel.'

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I G FARLAM

JUDGE OF APPEAL

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J H CONRADIE

JUDGE OF APPEAL

CONCUR:

HOWIE P

LEWIS JA