CASE NO.175/99

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

Vuyo Poswa Appellant

and

The Member of the Executive Council Responsible for
Economic Affairs Environment and Tourism Respondent

Before: Marais, Schutz and Mpati JJA

Heard: 12 March 2001

Delivered: 22 March 2001

Eastern Cape Gambling and Betting Board - prohibition on spouse of "public servant" being member - ordinary meaning and meaning in the national Public Service Act to be attached to it - prohibition neither absurdly wide under common law, nor over broad under Constitution

W P SCHUTZ

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J U D G M E N T

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SCHUTZ JA:

[1] In its legislation providing for the establishment of the provincial regulator of gambling, the Gambling and Betting Board of the Eastern Cape ("the board"), the Government of the Province of the Eastern Cape has resolutely set its face against the potential for corruption. Section 6 of the Act setting up the board (Act 5 of 1997 of that province - "the Act"), among a long list of persons disqualified from being members of the board, included any person who:

> "(b) at the relevant time is, or during the preceding 12 months was, a *public servant* other than . . .
> . . .. [and any person who]
> (k) is a *family member*, partner or associate, of a person contemplated in paragraph 6 (b) . . ."

[2] Section 1 of the Act defined a "family member" as:

> "(a) a *husband* or a wife, any partner in a customary union according to indigenous law or any partner in a relationship where the parties live together in a manner resembling a marital partnership or a customary union; and
>
> (b) any person related to either one or both persons referred to in paragraph (a) within the second degree through marriage, a customary union or a relationship referred to in paragraph (a) or the third degree of consanguinity." (Emphasis supplied.)

[3] Paragraph (b) of the definition of "family member" was replaced by s 1 (c) of Act 3 of 2000 with effect from 23 June 2000 to read:

> "(b) any person to whom one is related in the first degree of consanguinity."

[4] The appellant, Mr Vuyo Poswa ("Poswa"), an attorney, was appointed chairman of the board. In 1998 the respondent, the member of the Executive Council responsible for Economic Affairs, Environment and Tourism ("the MEC") applied to the High Court, Bisho, to have Poswa removed, on the ground

that his wife was a public servant, with the consequence that he was disqualified under s 6. Originally two other members of the board, Nonkosi Mhlantla and Mxolisi Dondashe, were cited as second and third respondents, on the grounds that the mother of one and the sister of the other were public servants. The applications against them were withdrawn during the course of the proceedings *a quo* before White J. The board was cited as the fourth respondent, and together with Poswa, had judgment given against it, but although, again together with Poswa, it was granted leave *a quo* and noted an appeal, it has since withdrawn as an appellant. There are, therefore, only two parties before us, Poswa and the MEC.

[5] The broad thrust of Poswa's resistance to his removal from the board is that the legislation is unacceptably inhibiting. This stand bifurcates into two contradictory but alternative contentions. The first is that to give the undefined expression "public servant" its literal and ordinary meaning would lead to an exclusion of such extraordinary width that the expression has to be abated by

interpretation to a more acceptable degree of exclusion. The second is that, if indeed the expression means what on its face it says it means, then it is "overbroad" and thus unconstitutional.

Construction to be placed on "public servant"

[6] The facts are that Poswa's wife is a member of the lecturing staff of the Masibulele college of education at Whittlesea, an impoverished rural centre situated between Queenstown and Fort Beaufort. The college is state funded and trains teachers under the direction and control of the provincial education department and Rhodes University, which latter is the certification authority. Mrs Poswa is remunerated by the department and is certainly a member of the "public service" within the meaning of s 8 (1) of the national Public Service Act of 1994 (Proc No 103 of 1994). Section 8 (1) reads in part:

> "(1) The public service shall consist of persons who -
> (a) hold posts on the fixed establishment -
> (i) . . .

. . . . . .

(iv) in state educational institutions . . . "

[7] Mr Quinn, counsel for Poswa, frankly conceded that he was unable to contend that Mrs Poswa is not a public servant either within the meaning of that Act or within the ordinary meaning of that expression. However, he submitted that the meaning of "public servant" in the Gambling and Betting Act was much narrower than either of those. It had to be restricted for, if it was not, absurd results would follow which could never have been intended by the legislature. He argued in accordance with his client's affidavit that:

> "While my wife . . . [is a] civil servant within the meaning of section 8 . . . it could not have been the intention of the Provincial Legislature to exclude [me] from membership of the Board for this reason. In [my] case, and in countless similar instances, this gives, and would give rise to, absurdity, inequity, hardship and a result that simply could not have been intended."

[8] His wife, he points out, has no interest whatsoever, direct or indirect, in gambling or related activities. The intention of the legislature must have been, he

contends, to refer only to public servants whose employment is reasonably related to gambling and betting activities. To so confine the meaning would be to give effect to the true intention of the legislature. So ran the argument.

[9] The difficulty, which faces any argument which claims better knowledge of what the legislature intended than what the legislature itself appears to have had in mind when it expressed itself as it did, is to establish with reasonable precision what the unexpressed intention contended for, was: cf *Standard Bank Investment Corporation Ltd v Competition Commission and Others*: *Liberty Life Association of Africa Ltd v Competition Commission and Others 2000 (2) SA 797 (SCA) at 812 G - H*. Poswa's complaint is not the mere fact that certain persons have been excluded on grounds of occupation or relationship. It is that the barrier of exclusion has been erected too far out. The argument is one of degree, notoriously an area for differences of opinion. The legislature has chosen to use a phrase with a plain ordinary meaning of considerable breadth , and although the phrase is not

mentioned in the definition section of the Public Service Act, the effect of s 8 is to provide a detailed definition. One would have thought that when the legislature chose to use the expression "public servant" in the Gambling and Betting Act it intended to use it in a sense conforming at least with the statute dealing with that subject, rather than in some other unspecified narrower sense. This makes it all the more difficult to push out a plain word in favour of its ill-bordered shade.

[10] The literal meaning of an Act (in the sense of strict literalism) is not always the true one, but escaping its operation is usually not easy, most often impossible, for:

> "The cardinal rule of construction of a statute is to endeavour to arrive at the intention of the lawgiver from the language employed in the enactment. . . . in construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some *absurdity, inconsistency, hardship or anomaly* which from a consideration of the enactment as a whole a court of law is satisfied the legislature could not have intended." (Per Stratford JA in *Bhyat v Commissioner for Immigration* 1932 AD 125 at 129). (Emphasis supplied).

[11] The effect of this formulation is that the court does not impose its notion of what is absurd on the legislature's judgment as to what is fitting, but uses absurdity as a means of divining what the legislature could not have intended and therefore did not intend, thus arriving at what it did actually intend.

[12] The board consists of eight members (s 5). The combined effect of sections s 5 (1) (e), (f) and (g) and 6 (b) is that five of the eight members will not be bureaucrats. The three who are to be, represent the departments of economic affairs, finance and safety and security. Overall the bureaucrats are not to control the board. Section 6 (k) ("family member") supplements these provisions in a manner intended to prevent indirect control. Other subsections of section 6 disqualify from membership of the board persons engaged in political activity (para (d)) and persons having "any direct or indirect interest in gambling activity" (para (e)).

[13] Opinions may differ on how strict or far-reaching the exclusions ought to be.

But although the view may legitimately be held that it is going unnecessarily far to exclude all public servants and their spouses, there is not, in my opinion, any absurdity in doing so. Impermeable rules often have advantages over porous ones. An example advanced as exemplifying absurdity is that of a driver in provincial employ. But whether absurdity exists is not to be tested by reference to individual instances, but by asking whether the choice of a broad rule of exclusion is absurd. If it is not, the very foundation for the argument that the legislature could not have meant what it said is lacking. The legislature had the choice of a wide or a more narrow exclusion. It chose the wide one. It is not difficult to understand why. Gambling, whether illegal or legalised, is a fertile field for corruption and it would be stretching judicial nescience to the limits not to acknowledge that the area now falling within the province of the Eastern Cape has had some experience of corruption associated with gambling. If one is to exclude bureaucratic control beyond the limit allowed by s 5 and if one were to limit such exclusion to particular

classes or levels of public servants, the first selections would be easy, but they would become progressively more difficult or controversial to establish as one proceeded. If the test selected were to be the one proposed by Poswa - a public servant whose employment is reasonably related to gambling and betting activities - I can foresee unending arguments arising from case to case, and much opportunity for evasion. This situation might be further complicated by the existence of departments with over-arching authority or the movement of bureaucrats from one department to another whilst retaining some measure of influence in the former.

[14] Accordingly I can see no measure of absurdity in what the legislature has chosen and the attack based solely on interpretation fails.

Overbreadth - Unconstitutionality

[15] The underlying premise is the same. The legislature should not have gone as wide as it did, and its enactment must be cut down. But the garb of reasoning put round the premise changes. The contention is that the means

adopted by the legislature for attaining its ends (once the broad interpretation of "public servant" be accepted) are too sweeping, in relation to the objective sought to be attained, and overly broad. This reasoning involves a change of gear. The object is no longer to arrive by means of interpretation at what the legislature actually intended, by acquitting it of an intention to act absurdly; but to convict it of constitutional violation by accepting that it did indeed intend to act excessively, in the court's opinion that is, with the consequence that the court will, in one manner or another, impose its will on the legislation, so as to cancel the excess. The common law method grounded in principles of statutory interpretation may be more gentlemanly, but it may also be less effective in obstinate cases.

[16] Possible ambiguity as to the sphere of operation of the concept of "overbreadth" is explained by O'Regan J in *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) at 480 D - F, para 18:

> "The first question to be asked is whether the provision in question infringes the rights protected by the substantive clauses of the Bill of Rights. If it does, the next question that arises will be whether that infringement is justifiable. At the second stage of the constitutional enquiry, the relevant questions are: what is the purpose of the impugned provision, what is its effect on constitutional rights and is the provision well tailored to that purpose? At both stages, the use of the term 'overbreadth' can be confusing, particularly as the phrase has different connotations in different constitutional contexts. Care should therefore be taken when employing the term"

Footnote 12 (at 480 H - J) expands upon the different manner in which the concept of "overbreadth" is used in the USA and in Canada. It reads:

> "In the USA, overbreadth is, effectively, a doctrine of standing. It permits litigants whose own constitutional rights are not affected by a legislative provision to rely on that provision's infringement of the rights of others. See Gunther and O'Sullivan *Constitutional Law* 13th ed (Foundation Press, 1997) at 1326-7. It is a doctrine which finds application primarily in the context of First Amendment jurisprudence. See, for example, *Village of Schaumberg v Citizens for a Better Environment et al* 444 US 620 (1979). On the other hand, in Canada, the term 'overbreadth' is a matter which applies at the limitations stage of constitutional analysis to determine primarily whether a legislative provision has an appropriate fit between means and ends, what the Canadian Supreme Court has referred to as 'the minimal impairment' leg of the limitations analysis. See, for example, *R v Heywood*

(1995) 24 CRR (2d) 189 (SCC) at 208; *R v Nova Scotia Pharmaceutical Society* (1992) 93 DLR (4th) 36 (SCC) at 50 (1992) 10 CRR (2d) 34)."

[17] Poswa alleges that his fundamental rights have been violated by unfair discrimination against him by the State because of his marital status (s 9(3) - equality) or by interference with his right to freely choose his trade, occupation or profession (s 22). A further challenge based on a violation of his right of free association with others (s 18) was dropped on appeal.

[18] It seems to me unnecessary to decide whether Poswa has succeeded in establishing a violation of one or both of the rights relied upon, because I consider that the case can be decided on the application of the limitation clause, s 36 (1), which allows a right in the Bill of Rights to be limited by a law of general application to the extent that the limitation is:

> "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
>
> (a) the nature of the right;

(b) the importance and purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose."

"The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality." (Per Chaskalson P in *S v Makwanyane and Others* 1995 (3) SA 391 (CC) at 436 C para 104, in dealing with s 33 (1) of the interim Constitution.)

"In the balancing process regard must be had to the provisions of s 33 (1) [of the interim Constitution then in force] and the underlying values of the Constitution, bearing in mind that, as a Canadian judge has said, 'the role of the Court is not to second-guess the wisdom of policy choices made by legislators'."

[19] The balancing process with which we are concerned is essentially that of

weighing the interests of Poswa (and, he adds, millions of other public servants and their spouses) to be appointed to gambling boards, against the need for effective non-porous measures for the prevention of corruption. Poswa seeks to add weight to his case by stating that an exceptionally high proportion of persons in the Eastern Province having the educational qualifications and experience to serve on gambling boards are public servants or their spouses. This may be. But there must be enough others, and I fail to see why public servants who have chosen that vocation should not devote their talents to serving the public in return for their stipend and be content that places on the board are not for them, excepting the three posts out of eight that s 5 enjoins be filled by specified public servants. The deprivation complained of, such as it is, seems to weigh lightly against the need to adopt strong means to quell corruption.

[20] But, says Poswa, it was unnecessary to adopt such extreme means. If the definition had been cut down to include only those reasonably connected with

gambling and betting activities, that would have been enough. Would it have been enough? Or can we say that the legislature was wrong to have thought that it would not have been enough? We are back to the problems associated with designing watertight compartments with holes in them, already discussed at some length under the heading of absurdity. We should be slow in a situation such as this, in my opinion, to conclude that the legislature did not know its problem, or badly over-estimated the means needed to cope with it. This is not a case to second-guess the legislature.

[21] So far I have approached the matter as if Poswa's complaint was directed only against para (a) of the definition of family member, read with s 6 (k) (husband of a public servant). In fact Poswa has also sought to rely on para (b) of the definition, read with s 6 (k) (the one which in its original form comes close to a mediaeval exposition of the prohibited degrees). This he seeks to do even though it has no direct application to his situation. The case against the two parties to

whom it might have had application was withdrawn in the court *a quo*. Poswa's application for leave to appeal against the court's allowing the MEC to withdraw against the former second and third respondents was refused and has not been renewed. The subsection no longer appears on the statute book in its original and arguably unconstitutional form. To my mind para (a) is clearly severable from it.

[22] Under these circumstances should Poswa be allowed to rely on it? I think not. As the summary of the decisions on s 38 of the Constitution in *Coetzee v Comitis and Others* 2001 (1) SA 1254 (C) at 1262 C - 1263 G, paras 17.6 and 17.7, shows, that section should be given a generous construction. But I do not think Poswa has brought himself within any of its subsections, however generous one is to be. The nearest is (d) "anyone acting in the public interest". Poswa, however, did not purport to bring an application in the public interest. The MEC brought an application against him for his removal and succeeded, basing himself on para (a). Although para (b)'s ultimate fate may be of interest to other parties,

I fail to see how its one-time existence (whether or not it was constitutionally valid) can operate to save Poswa from removal from the board, or why this court should respond to an invitation to decide a question the answer to which would be irrelevant to the real question of whether the relief sought and granted was properly sought and granted. The more so when a finding of constitutional invalidity would have to be confirmed by the Constitutional Court for it to have any effect. The prospect of that court having to devote time and attention to an issue which no longer exists, the resolution of which will have no effect upon the order granted against the appellant and which has not been shown to have any other practical relevance, is a singularly unattractive one. I do not believe that the Constitution requires this court to inflict so sterile an enquiry upon the Constitutional Court. Generosity in according standing in protection of constitutional values is one thing, profligacy in that regard is another.

[23] The appeal is dismissed with costs, such costs to include the costs of two

counsel.

W P SCHUTZ
JUDGE OF APPEAL

CONCUR
MARAIS JA
MPATI JA