CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 49/05

ISAAC METSING MAGAJANE	Applicant
versus	
THE CHAIRPERSON, NORTH WEST GAMBLING BOARD	First Respondent
JACOBUS CONRADÉ ERASMUS	Second Respondent
MEC FOR FINANCE AND ECONOMIC DEVELOPMENT, NORTH WEST PROVINCE	Third Respondent

Heard on : 23 February 2006

Decided on : 8 June 2006

JUDGMENT

VAN DER WESTHUIZEN J:

Introduction

[1] The questions raised by this case include whether, consistent with the constitutional right to privacy, legislation may authorise warrantless inspections of unlicensed premises for the purpose of obtaining evidence for criminal prosecution. The North West Gambling Act 2 of 2001 (the Act) governs the regulation of gambling activities in the North West Province and establishes and empowers the North West Gambling Board (the Board). Section 65 of the Act lists the powers and functions of

the Board's inspectors.[1] The applicant in this case, who was the subject of an inspection conducted pursuant to section 65, challenges the constitutionality of a number of the provisions of the section, alleging that they violate his rights to remain silent and to privacy and that one provision exceeds the constitutional competence of the provincial legislature.

Background

[2] Board inspector Jacobus Conradé Erasmus, the second respondent, received a report from another Board inspector that illegal gambling was taking place at an establishment known as Las Vegas Gold Lichtenburg (Las Vegas Gold). Four days later, on 30 August 2004, Mr Erasmus arranged for undercover agents to visit Las Vegas Gold and to play on gambling machines using marked "trap" money. Upon the return and report of the undercover agents, Erasmus led a team of Board inspectors and members of the South African Police Service on a "raid" of Las Vegas Gold.

[3] Mr Erasmus and the others did not seek a warrant to enter, search or seize property from Las Vegas Gold. They conducted their activities pursuant to section 65 of the Act.

[4] Section 65 of the Act, entitled "Powers and functions of inspectors", provides:[2]

[1] The text of section 65 follows below in para 4 and a description of the Act and section 65 follows below in paras 16-21.

[2] On 28 September 2005, one week before the applicant filed his application to this Court, the North West Gambling Amendment Act 5 of 2005 came into effect. See North West Extraordinary Provincial Gazette 6216, 28 September 2005. This law amended the North West Gambling Act in a variety of ways, such as prohibiting

"(1) An inspector shall for the purpose of this Act—

(a) enter upon any licensed or unlicensed premises which are occupied or being used for the purposes of any gambling activities or any other premises on which it is suspected—

(i) that a casino or any other gambling activity is being conducted without the authority of a licence,

(ii) that persons are being allowed to play or participate in any gambling game or other gambling activities or to play any gambling machine, or

(iii) that any gambling machine or any equipment, device, object, book, record, note, recording or other document used or capable of being used in connection with the conducting of gambling games or any other gambling activity may be found,

and may, after having informed the person who is deemed or appears to be in charge of the premises of the purpose of his or her visit, make such investigation or enquiry as he or she may think necessary;

(b) with regard to any premises referred to in paragraph (a)—

(i) require the production of any licence or written permission or authorisation to conduct gambling activities from the person who is in control of such premises,

(ii) question any person who is on or in such premises, and inspect any activities in connection with the conduct of any gambling activity,

(iii) examine or inspect any gambling machine, equipment, device, object, book, record, note or other document referred to in paragraph (a) found on those premises and make a copy thereof or an extract therefrom,

(iv) inspect and examine all premises referred to in paragraph (a) or any premises where gambling devices or equipment are manufactured, sold, distributed, or serviced, wherein any records of such activities are prepared or maintained,

(v) inspect all equipment and supplies, in, about, upon or around such premises,

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the possession of gambling machines without a licence. The amendment made no changes to section 65 and neither party contended that the amendment has any bearing on this case.

(vi) seize summarily and remove from such premises and impound any such equipment or supplies for the purposes of examination and inspection,

(vii) examine, inspect and audit all books, records and documents pertaining to licensed gambling operations,

(viii) seize, impound or assume physical control of any book, record, ledger, game device, cash box and its contents, conducting room or its equipment, or gambling operations, and

(ix) inspect the person, and personal effects present in any gambling facility licensed under this Act, of any holder of a licence or registration issued pursuant to this Act while that person is present in the licensed gambling facility;

(c) require any person who is deemed or appears to be in charge of any premises referred to in paragraph (a)—

(i) to point out any equipment, device or object referred to in that paragraph which is in his or her possession or custody or under his or her control,

(ii) to produce for the purpose of examination or of making copies or extracts, all books, records, note[s] or other documents referred to in paragraph (a) which are in his or her possession or custody or under his or her control,

(iii) to provide any information in connection with anything which has been pointed out or produced in terms of subparagraph (i) or (ii), and

(d) seize and remove any gambling machine, equipment, device, object, book, record, note or other document referred to in paragraph (a) which in his or her opinion may furnish proof of a contravention of any provision of this Act or mark it for the purposes of identification.

(2) When performing any function in terms of subsection (1), an inspector may be accompanied by and avail himself or herself of the services of an assistant, interpreter or any police official.

(3) An inspector shall in respect of any provision of this Act or any regulations promulgated thereunder be deemed to have been appointed a peace officer in accordance with section 334 of the Criminal Procedure Act 1977 (Act No. 51 of 1977), as amended for the purposes of section 40, 41, 44, 46, 47, 48, 49 and 50, of the said Act.

. . . .”

[5] According to Mr Erasmus' affidavit in the High Court, he and his colleagues entered the building. Erasmus introduced himself to the applicant, Mr Isaac Metsing Magajane, the manager of the Las Vegas Gold. Pursuant to section 65(1)(b)(i) of the Act,[3] Erasmus asked Magajane to produce a gambling licence or similar written authorisation. Magajane did not produce any authorisation. It is common cause that Las Vegas Gold was not licensed or otherwise authorised to be a gambling establishment. Erasmus then informed Magajane that he possessed evidence of illegal gambling and that he intended to search, inspect and seize gambling equipment, records and other items. He showed Magajane the relevant sections of the Act and handed him lists of the raiding officials and of materials that could be seized. Erasmus searched the cash register, which contained the marked money spent by the undercover agents. He seized R 4 890 from the cash register and R 24 120 from a safe. Erasmus and one of his colleagues photographed some of the gambling machines on the premises. An inventory list indicates that there were 60 machines. A police officer[4] then arrested the applicant and three employees for conducting a casino without a licence in violation of the Act.[5] Erasmus seized the gambling machines by locking the premises.

The High Court

[3] Section 65(1)(b)(i) provides that an inspector shall "require the production of any licence or written permission or authorisation to conduct gambling activities from the person who is in control of such premises".

[4] Another inspector involved in the raid confirmed in an affidavit to the High Court that the police officer carried out the arrests.

[5] The criminal charge against Mr Magajane was withdrawn for want of prosecution.

[6] Mr Magajane launched an urgent application in the High Court in Mmabatho against the chairperson of the North West Gambling Board, Mr Erasmus and the MEC for Finance and Economic Development of the North West Province. The applicant sought a declarator that the entry, search and seizure violated section 65 of the Act or in the alternative that provisions of section 65 were unconstitutional.[6] He also sought the return of the seized property.[7] The High Court dismissed the application with costs.[8]

[7] As a preliminary matter, the respondents objected to the failure of the applicant to join the Board itself as a party. They contended that joinder was necessary as the applicant sought a declaration of invalidity for statutory provisions that the Board depends on to pursue its statutory function. The respondents claimed that this failure was fatal to the application. The High Court overruled this objection. Relying upon section 23(1) of the Act, which provides that service on the chairperson of the Board constitutes service on the Board, the Court held that there existed no need to cite both the chairperson and the Board as separate parties.[9]

[6] The record contains an affidavit by the owner of Las Vegas Gold, Mr Ioannis Apostolopoulos of Greece, who declares his full support for the application by Magajane.

[7] The seized property remained locked on the premises under the control of the Board, pursuant to an agreement between the applicant and the Board. The property was returned to the applicant following the withdrawal of the criminal charge against him.

[8] *Isak Metsing Magajane v The Chairperson of the North West Gambling Board and Others* case number 1008/04, 12 December 2004, unreported. The applicant spelled his name "Isak" in the High Court, but spells it "Isaac" in this Court.

[9] The High Court also rejected the respondents' objection that the applicant had not shown that he was the owner of the seized property. The respondents do not persist in that argument before this Court.

[8] The applicant asserted that the second respondent had exceeded his powers under section 65 of the Act by (1) utilising the section to "raid" the premises rather than to inspect, examine or investigate, (2) seizing money from a safe and (3) seizing every piece of equipment found on the premises. The High Court rejected each assertion in turn, holding that: (1) the second respondent was authorised by section 65 to enter the premises without prior notification, to require the production of a licence or other authorisation to conduct gambling activities and to seize objects used for gambling; (2) the statute permits the seizure of cash and a cash box, which would include a safe; and (3) the second respondent did not seize and remove all the gambling machines and equipment.

[9] In the alternative, the applicant raised three constitutional arguments. Firstly, he submitted that section 65(1)(b)(ii) and (c)(iii) violated his right to remain silent, as it empowered Mr Erasmus to question him and to require him to provide certain information. He pointed to the absence of a proviso rendering information obtained or gathered in this manner from being used against him in an ensuing criminal proceeding.

[10] The High Court held that section 65(1)(b)(ii) and (c)(iii) does not violate the right to remain silent. The two subsections concern the procurement of evidence or information, not the admissibility of evidence. The issue of whether any information provided under section 65 could be admitted in a criminal trial should be determined in each case by the trial judge with reference to the right to a fair trial.

[11] Secondly, the applicant argued that section 65(1)(b) and (d) violated his constitutional right to privacy in that these provisions permitted Mr Erasmus to conduct a search and seizure without a warrant.

[12] The High Court found that the applicant had failed to prove that his personal right to privacy, in the sense of his inner sanctum, was breached. Therefore, it was not necessary to consider the constitutional challenge grounded on the breach of the applicant's right to privacy. However, the Court proceeded to enquire into whether the breach of the right to privacy would be justified in terms of section 36 of the Constitution and concluded that it would. The Court reasoned that the regulatory inspections authorised by the Act, including the powers to search and seize, are necessary to promote the public purpose of regulating gambling activities and are bounded sufficiently by the Act.

[13] Thirdly, the applicant challenged the constitutionality of section 65(3) of the Act, which provides that "[a]n inspector shall . . . be deemed to have been appointed a peace officer in accordance with section 334 of the Criminal Procedure Act 1977". The applicant argued that the provincial legislature had no authority to enact such a provision and consequently that Mr Erasmus' actions as a peace officer were invalid.

[14] The High Court declined to address the substance of this argument. The Court held that the issue was irrelevant, because Mr Erasmus did not arrest or attempt to arrest the applicant. Rather, a police officer arrested the applicant.

[15] The High Court and the Supreme Court of Appeal refused to grant the applicant leave to appeal. The applicant now applies to this Court for leave to appeal against the decision of the High Court on the constitutional issues only. The respondents oppose the application and persist in their argument as to joinder.

The Act

[16] The Act provides for "the strict regulation of all persons, premises, practices, associations and activities relating to gambling".[10] Chapter 2 of the Act establishes the Board to oversee gambling activities in the province[11] and delineates the powers, structures and proceedings of the Board.[12] Chapters 3 to 10 set out the rules and requirements relating to licensing and the registration of certain personnel. Chapter 11 contains section 64, which governs the appointment of inspectors, and section 65, the subject of this appeal, which details the powers and functions of inspectors. The remainder of the Act sets out laws relating to gambling machines and devices;[13] general restrictions relating to gambling, including section 82 which establishes offences and penalties;[14] rules concerning gambling levies, fees, penalties and

[10] Preamble.

[11] Sections 3 and 4.

[12] Sections 4-23.

[13] Chapter 12.

[14] Chapter 13.

interest;[15] and additional provisions relating to the Board, including the issuance of regulations, publication of information and review of Board decisions.[16]

[17] Section 65(1)(a) instructs an inspector to enter any licensed or unlicensed premises occupied or used for gambling activities, or on which it is suspected that such activities are being conducted or allowed, or on which any of numerous specified gambling related items are present. The provision authorises the inspector to investigate or inquire as he or she thinks necessary, provided that the inspector first informs the person in charge of the premises of the purpose of the visit.

[18] Section 65(1)(b) instructs the inspector to perform a wide range of tasks on the premises referred to in section 65(1)(a). This includes requiring the person in control of the premises to produce a licence, written permission or authorisation to conduct gambling activities;[17] questioning any person on the premises;[18] inspecting any activities, objects or records connected with the conduct of gambling or located on or around the premises and any person and personal effects present on a licensed gambling facility;[19] seizing, removing and impounding any equipment or supplies for

[15] Chapter 15.

[16] Chapters 14 and 16.

[17] Section 65(1)(b)(i).

[18] Section 65(1)(b)(ii).

[19] Section 65(1)(b)(ii) – (v), (vii) and (ix).

the purposes of examination and inspection;[20] and seizing, impounding or assuming physical control over any records, cash box, equipment or gambling operations.[21]

[19] Section 65(1)(c) states that the inspector shall require a person who is deemed or appears to be in charge to point out any item or produce all records referred to in section 65(1)(a) that is in his or her possession, custody or control and to provide any information in connection with those items or records.

[20] Section 65(2) provides that the inspector may be accompanied by other personnel, including any police official. In addition section 65(3) provides that, for the purpose of the Act, the inspector is deemed to have been appointed a peace officer in accordance with section 334 of the Criminal Procedure Act 51 of 1977.

[21] The remainder of the section governs administrative inspections for compliance with the Act. Section 65(4) authorises administrative inspections,[22] and section 65(5) details the inspector's powers and functions in conducting such inspections. Section 65(6) provides that the inspector "in accordance with constitutional requirements" and "to effectuate the purpose of this Act" may obtain administrative warrants to inspect and seize property during administrative inspections. Subsections (7) to (12) of section 65 govern the procedure for obtaining and for employing the warrant.

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[20] Section 65(1)(b)(vi).

[21] Section 65(1)(b)(viii).

[22] Section 65(4) provides:

> "The inspectorate is authorized to make administrative inspections to check for compliance by any applicant, licensee, registrant, subsidiary company or holding company with the provisions and regulations of this Act."

The issues

[22] The applicant raises three issues in this Court:

1. Does section 65(1)(b)(ii) and (c)(iii) of the Act, read with section 82, violate the applicant's right to remain silent by requiring him to answer questions that could be used against him in future criminal proceedings?
2. Does section 65(1)(b) and (d) violate his right to privacy by authorising inspectors to search his commercial premises and to seize items without a warrant?
3. Does section 65(3) exceed the constitutional competence of the North West provincial legislature by deeming an inspector to have been appointed a peace officer in accordance with section 334 of the Criminal Procedure Act?

Additionally, the respondents persist in their contention that the applicant was required to join the Board. I deal with the issues in reverse order.

Joinder

[23] The respondents' contention that the application must fail because the applicant did not join the Board as a party must be rejected. There is no need to join the Board as well as or instead of the chairperson of the Board.[23] The Act indicates that the

[23] In *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A), the facts of which are not entirely on all fours with this case, the High Court dismissed a suit because the plaintiff cited only the National Transport Commission as a party and failed to cite the chairperson. The Appellate Division reversed, holding at 672 that Rule 53(1) of the Uniform Rules of Court "requires the notice of motion to be directed and delivered to the chairman of the board in his representative capacity for and on behalf of the board. It does not require the separate citation of the board itself". The Court reasoned as follows at 671E-G:

> "I cannot think that this was ever the intention underlying the Rule. Admittedly the Rule does introduce a change as far as statutory boards are concerned. Whereas before it was necessary to cite merely the board *eo nomine*, now the Rule requires the citation of the chairman of the

chairperson can represent the interests of the Board. Section 23 of the Act provides that in any legal proceeding instituted against the Board, service on the chairperson constitutes sufficient service on the Board. I might also mention that the respondents have not cross-appealed against the holding of the High Court that the applicant was not required to join the Board.

Inspector as peace officer

[24] Section 65(3) of the Act provides that an inspector shall be deemed to have been appointed a peace officer in accordance with section 334 of the Criminal Procedure Act.[24] The applicant contends that section 65(3) is unconstitutional as it exceeds the competence of the provincial legislature. The High Court declined to address the constitutionality of section 65(3), because it held that a police officer arrested the applicant, not an inspector. The challenge to this provision raises a number of questions: (1) As a factual matter, did the second respondent act as a peace officer? (2) If the second respondent did not act as a peace officer, may the applicant still challenge the provision? (3) Did the provincial legislature unconstitutionally exceed its competence in passing section 65(3)?

> board. But that is a far cry from interpreting the Rule as now requiring the citation of two separate parties in place of one. For I cannot see what purpose could possibly be served by such a proliferation of parties. Taking this case as being illustrative of the general position, the chairman of the Commission has no personal interest in the matter: he is interested merely in his representative capacity. And in that capacity he has no interest separate and distinct from the Commission itself."

[24] Section 65(3) is quoted above at para 4. The National Gambling Act 7 of 2004 contains a similar provision. Section 76(3) of the National Gambling Act provides:

> "For the purpose of this Act or any other national or provincial law in respect of gambling and associated activities, an inspector is deemed to have been appointed a peace officer for the purposes of the relevant sections of the Criminal Procedure Act, 1977 (Act No. 51 of 1977)."

[25] The parties barely addressed the factual issue, despite its forming the basis upon which the High Court rejected the challenge to section 65(3). The applicant does not address the factual issue in his written arguments. In his application for leave to appeal and during oral argument, however, the applicant argued that while a police officer actually arrested him, the second respondent had declared an intention to arrest him. The second respondent admitted this in his answering affidavit in the High Court. In their papers, the respondents simply reiterate the conclusion of the High Court that the police officer arrested the applicant. They did not address the factual issue during oral argument. In view of the conclusion that follows, it is not necessary to decide the factual issue or the consequences of a finding that the second respondent did not act as a peace officer.

[26] In his written argument, the applicant contends that section 65(3) wrongly bases its authority on section 334 of the Criminal Procedure Act. Section 65(3) provides that an inspector shall "be deemed to have been appointed a peace officer in accordance with section 334 of the Criminal Procedure Act". However, section 334 of the Criminal Procedure Act only authorises the Minister of Justice and Constitutional Development to declare a person a peace officer.[25] The applicant concedes that section 65(3) may have been sound had it authorised officials to act as

[25] Section 334(1) provides:

> "(a) The Minister may by notice in the *Gazette* declare that any person who, by virtue of his office, falls within any category defined in the notice, shall, within an area specified in the notice, be a peace officer for the purpose of exercising, with reference to any provision of this Act or any offence or any class of offences likewise specified, the powers defined in the notice.
>
> (b) The powers referred to in paragraph (a) may include any power which is not conferred upon a peace officer by this Act."

peace officers using the province's own powers, without reference to national legislation. However, the applicant argues that the use of the term "deemed in accordance with" in section 65(3) indicates that the province improperly utilised the authority granted solely to the Minister by the Criminal Procedure Act.

[27] The applicant advanced a broader position at the hearing. He argues that section 65(3) exceeded the province's competence and was also unnecessary. While gambling falls within competences of both the national and provincial governments, only the national government is competent to name peace officers. For provinces to appoint peace officers, they would have to show that such appointments are reasonably necessary to achieve a purpose in an area within the province's competence. In terms of the Act there is no need to appoint the inspectors as peace officers, because police officers may accompany the inspectors.

[28] The respondents did not address the substantive issue in their papers. At the hearing they advanced a creative interpretation of section 65(3): The provision does "half the job" of making an inspector a peace officer under the Criminal Procedure Act. Section 65(3) designates and certifies the inspector. It is left to the Minister to specify the area and offences for which the inspector is a peace officer — as required by section 334 of the Criminal Procedure Act. The respondents concede that their interpretation is strained, but argue that the section cannot possibly establish inspectors as peace officers.

[29] Applications to this Court for leave to appeal are governed by section 167(6) of the Constitution and rule 19 of the rules of this Court. Section 167(6) provides for direct appeals from another court "when it is in the interests of justice and with leave of the Constitutional Court".[26] In terms of rule 19(6)(a) "[t]he Court shall decide whether or not to grant the appellant leave to appeal." It is well settled that this Court will employ its discretion to grant leave to appeal when the applicant raises a constitutional issue and when granting leave to appeal is in the interests of justice.[27] This Court determines whether it is in the interests of justice to grant leave to appeal through a careful and balanced weighing up of all relevant factors.[28] As noted in *Radio Pretoria*,[29] "[t]he considerations could be varied and are often case-specific but informed by the broad requirement of whether by hearing the case the interests of justice will be advanced."

[30] The fact that this Court would be the first court to consider the substance of the applicant's challenge to section 65(3) weighs strongly against considering the issue.

[26] Section 167(6) provides:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
>
> (a) to bring a matter directly to the Constitutional Court; or
>
> (b) to appeal directly to the Constitutional Court from any other court."

[27] See *African Christian Democratic Party v The Electoral Commission and Others* 2006 (5) BCLR 579 (CC) at paras 17-18; *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at paras 29-30; *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa and Another* 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 19; *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at paras 6-8; *S v Bierman* 2002 (5) SA 243 (CC); 2002 (10) BCLR 1078 (CC) at paras 7-9; *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at paras 10-12; *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3; *Fraser v Naude and Others* 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 7.

[28] See *Radio Pretoria* above n 27 at para 19; *De Freitas and Another v Society of Advocates of Natal (Natal Law Society Intervening)* 1998 (11) BCLR 1345 (CC) at paras 17-20; *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32.

[29] *Radio Pretoria* above n 27 at para 19.

This Court has often noted the disadvantages of considering complex constitutional issues without the benefit of another court's judgment and reasoning.[30] In *Bruce*[31] the following was stated:

> "It is, moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment."[32]

While the comments in *Bruce* were made in the context of an application for direct access, they apply equally to this case in which the substantive constitutional issue was not considered by the High Court and the case was not heard by the SCA.

[31] The Court has also not had the benefit of comprehensive argument from all concerned parties. While the issue of provincial and national competence is complex, the applicant did not properly canvass the substantive issue in his written submissions and the respondents did not discuss it at all in theirs. During oral argument, the parties advanced new arguments. Additionally, the applicant did not join other parties with an interest in this issue, such as the provincial and national governments and the South African Police Service.

[30] See, for example, *Bierman* above n 27 at para 8; *Member of the Executive Council* above n 28 at para 32.

[31] *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC).

[32] Id at para 8.

[32] My conclusion is that it is not in the interests of justice for this Court to consider the challenge to section 65(3) without the benefit of judgments from the High Court or the Supreme Court of Appeal, of extensive argument by the parties and of the opinions and reasoning of other interested parties.

Right to privacy

[33] The applicant challenges the inspections of unlicensed premises and seizures of property authorised by section 65(1)(b) and (d) as violating the right to privacy guaranteed by section 14 of the Constitution.[33] This issue requires an analysis of the application of section 14 to regulatory inspections and searches of private commercial property. I begin by summarising the submissions presented on behalf of the parties. Then I discuss this Court's precedent on regulatory inspections and the right to privacy, followed by a consideration of American and Canadian jurisprudence on the issue. I thereafter apply section 14 to section 65, first evaluating the scope of the privacy interest and whether the provisions infringe the right to privacy and then determining whether the infringement is reasonable and justifiable in an open and democratic society in terms of section 36 of the Constitution.

[33] Section 14 of the Constitution provides:

> "Everyone has the right to privacy, which includes the right not to have—
>
> (a) their person or home searched;
>
> (b) their property searched;
>
> (c) their possessions seized; or
>
> (d) the privacy of their communications infringed."

[34] The applicant argues that the High Court erred in finding that there was no infringement of the right to privacy because the search did not take place in an inner sanctum. According to the applicant, this ignores case law such as *Bernstein*,[34] which found that the right to privacy extends beyond the inner sanctum of a person.

[35] The respondents argue that the provisions do not intrude upon the right to privacy, but for different reasons than the High Court employed. They contend that the applicant's failure to challenge entry under section 65(1)(a) directly represented an admission that entry was constitutional and thus precluded a challenge to the search and seizure. This argument is not persuasive. The High Court makes it clear that the issue of the entry was before the Court.

[36] The respondents furthermore note that section 65(1)(b) does not employ the term "search" and therefore contend that the subsection does not implicate the right to privacy.[35] However, while section 65(1)(b) and (d) includes the words "inspect", "examine" and "audit", instead of "search", the semantics cannot obscure the substance. The threshold question of whether legislation authorises a search in terms of section 14 of the Constitution cannot be answered by a computer scan for the word "search". A court must evaluate the nature and context of the power authorised by the

[34] *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC).

[35] It should be noted that the respondents could not make a similar argument as to seizure. Section 65(1)(b) and (d) repeatedly employs the word "seize".

legislation. I shall return to the issue of whether inspections in terms of section 65 constitute searches.[36]

[37] As to the second stage of the analysis, the applicant acknowledges the need for close regulation of the gambling industry and that a limitation of the right to privacy might well be justified as an expected and necessary aspect of regulation. He argues, however, that the breadth of the search and seizure provisions makes them unjustifiable on the principles stated in *Mistry*[37] and that the legislation could achieve the same aim while requiring a warrant.

[38] The applicant points to two phrases in section 65(1)(a), to which 65(1)(b) and (d) refer, as very broad. Firstly, the inspector shall "enter upon any licensed or unlicensed premises which are occupied or being used for the purposes of any gambling activities *or any other premises on which it is suspected*" that gambling takes place.[38] The applicant argues that the italicised phrase is particularly broad because it employs a "suspected" standard rather than "reasonable suspicion", and furthermore because the term "premises" is defined as "any site, place or location, regardless of whether it is or forms part of any temporary or permanent structure, building, vessel, vehicle or aircraft". Similar wording was deemed too broad in *Mistry*.[39] Secondly, section 65(1)(a)(iii) refers to

[36] Below at para 59.

[37] *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC) at paras 27-30; 1998 (7) BCLR 880 (CC) at paras 20-23.

[38] Emphasis added.

[39] *Mistry* above n 37 at paras 21, 23 and 28 (SA) and paras 14, 16 and 21 (BCLR).

> "any gambling machine or any equipment, device, object, book, record, note, recording or other document *used or capable of being used* in connection with the conducting of gambling games or any other gambling activity".[40]

The term "used or capable of being used" makes this broad subsection even broader.

[39] The respondents attempt to show that the provisions are not broad. They recognise that "or any other premises" in section 65(1)(a) seems to have no purpose, and attempt to argue that it supplies the degree of proof required for a search. They also concede that section 65(1)(a)(iii) could include a person's inner sanctum. They argue, however, that the definition of licence makes it clear that the Act seeks to regulate certain activities and that the statute would not include common games bet upon in homes, such as sporting events or card games.

[40] The applicant argues that the statute could achieve its purposes while requiring a warrant. He points to the subsections in section 65 providing for a warrant to authorise administrative inspections, which he defines as inspections for the purpose of determining compliance with a licence. He contrasts these provisions with the provisions in section 65(1) relating to unlicensed premises. Inspectors can search unlicensed premises even in the absence of a reasonable suspicion.

[41] The respondents contend that it is necessary to permit warrantless searches of unlicensed premises as opposed to licensed premises, because there is a fear of flight

[40] Emphasis added.

for unlicensed operators, but not licensed ones. The respondents add that their position is that the statute authorises warrantless search and seizure, but does not permit warrantless arrest. They also argue that the Act fits into the standard for permissible warrantless regulatory searches adopted by the United States Supreme Court in *New York v Burger*.[41]

[42] The applicant is correct that the right to privacy extends beyond the inner sanctum of the home. This principle was firmly established by this Court in *Bernstein*.[42] *Bernstein* was a follow-up to *Ferreira*[43] challenging, in part, searches and seizures of people involved in the winding down of a company. The Court stated that "the scope of a person's privacy extends *a fortiori* only to those aspects in regard to which a legitimate expectation of privacy can be harboured."[44] Ackermann J described what can be seen as a series of concentric circles ranging from the core most protected realms of privacy to the outer rings that would yield more readily to the rights of other citizens and the public interest:

> "The truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of

[41] 482 US 691 (1987) at 702-03.

[42] Above n 34.

[43] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC).

[44] *Bernstein* above n 34 at para 75.

> individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly."[45]

[43] The Court stated that businesses have lower expectations of privacy as to the disclosure of relevant information to the public and authorities:

> "The establishment of a company as a vehicle for conducting business on the basis of limited liability is not a private matter. It draws on a legal framework endorsed by the community and operates through the mobilization of funds belonging to members of that community. Any person engaging in these activities should expect that the benefits inherent in this creature of statute will have concomitant responsibilities. These include, amongst others, the statutory obligations of proper disclosure and accountability to shareholders. It is clear that any information pertaining to participation in such a public sphere cannot rightly be held to be inhering in the person, and it cannot consequently be said that in relation to such information a reasonable expectation of privacy exists. Nor would such an expectation be recognised by society as objectively reasonable."[46]

The Court concluded that company officials voluntarily assumed a duty to assist in investigations related to winding up. Accordingly, there was no reasonable expectation of privacy, and, thus, no right to privacy.[47]

[44] This Court undertook its most expansive consideration of the right to privacy in the context of regulatory inspections in *Mistry*.[48] Responding to allegations of fraud in violation of the Medicines and Related Substances Control Act 101 of 1965

[45] Id at para 67.

[46] Id at para 85.

[47] Id.

[48] Above n 37.

(Medicines Act), inspectors searched the surgery of a registered medical practitioner and seized numerous items. The Court considered whether a provision of the Medicines Act that empowered inspectors to enter, examine, search and seize property from any premises reasonably suspected to contain medicine or a scheduled substance violated the right to privacy guaranteed by section 13 of the interim Constitution.

[45] The Court, per Sachs J, explicitly refrained from determining when an inspection becomes a "search", because the breadth of the statute made clear that it infringed the right to privacy.[49] The statute permitted inspectors to search "any premises, place, vehicle, vessel or aircraft" — reaching into the inner sanctum of the home — with only the limitation that there exist reasonable grounds to suspect that any medicine or scheduled substance was inside. The statute also authorised inspection of any book, record or document found and then seizure if the object appeared to provide evidence of contravention of the Medicines Act. The Court noted that these provisions permitted warrantless entry into private homes and search of intimate possessions as long as there was a reasonable suspicion of any medicine — including non-prescription medication found in all homes.[50]

[46] The Court then proceeded to the limitation analysis. After considering the nature of the privacy right and the purpose of the limitation by the Medicines Act, the Court analysed the extent of the limitation. The Court reiterated that it had not been necessary to determine whether regulatory inspections should be regarded as searches

[49] Id at para 23 (SA) and para 16 (BCLR).

[50] Id at para 21 (SA) and para 14 (BCLR).

and seizures in terms of the right to privacy. However, the Court noted that whether a regulatory inspection constituted a search and seizure must be determined on a case by case basis on an evaluation of the invasiveness of the inspection. The Court then applied *Bernstein*'s exposition of privacy to regulatory inspections and stated that regulated businesses possess a more attenuated right to privacy the more the business is public, closely regulated and potentially hazardous to the public:

> "The more public the undertaking and the more closely regulated, the more attenuated would the right to privacy be and the less intense any possible invasion. In *Bernstein* . . . Ackermann J posited a continuum of privacy rights which may be regarded as starting with a wholly inviolable inner self, moving to a relatively impervious sanctum of the home and personal life and ending in a public realm where privacy would only remotely be implicated. In the case of any regulated enterprise, the proprietor's expectation of privacy with respect to the premises, equipment, materials and records must be attenuated by the obligation to comply with reasonable regulations and to tolerate the administrative inspections that are an inseparable part of an effective regime of regulation. The greater the potential hazards to the public, the less invasive the inspection. People involved in such undertakings must be taken to know from the outset that their activities will be monitored. If they are licensed to function in a competitive environment, they accept as a condition of their licence that they will adhere to the same reasonable controls as are applicable to their competitors. Members of professional bodies, for example, share an interest in seeing to it that the standards, reputation and integrity of their professions are maintained."[51]

[51] Id at para 27 (SA) and para 20 (BCLR) (footnotes omitted). See also *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 15, in which the Court cites *Mistry* and describes *Bernstein* as providing that "the more a person inter-relates with the world, the more the right to privacy becomes attenuated." The Court emphasised the continued existence of the right to privacy outside the inner sanctum at para 16:

> "The right, however, does not relate solely to the individual within his or her intimate space. Ackermann J did not state in the above passage that when we move beyond this established 'intimate core', we no longer retain a right to privacy in the social capacities in which we act. Thus, when people are in their offices, in their cars or on mobile telephones, they still retain a right to be left alone by the State unless certain conditions are satisfied. Wherever a person has the ability to decide what he or she wishes to disclose to the public and the expectation that such a decision will be respected is reasonable, the right to privacy will come into play."

[47] Thus, periodic inspections of health professionals' business premises would have "entailed only the most minimal and easily justifiable invasions of privacy, if they had qualified as invasions of privacy at all."[52] However, the challenged provision was so broad and unrestricted in its reach as to authorise inspectors to enter any person's home upon a reasonable suspicion that any medicine was contained within.

[48] The Court concluded that the statute could have achieved its ends through other means less damaging to the privacy right, namely the requirement of a warrant. While a warrant requirement might be nonsensical if the statute had provided only for periodic regulatory inspection of the premises of health professionals, as a prior warrant could frustrate the objectives behind the search, there was no reason not to require a warrant for searches that could extend to a private home. The Court emphasised that it would be incongruous to require police officers, who are trained to search homes, to obtain warrants, but not to require the same from inspectors, who are not so trained. Additionally, the statute does not provide sufficient guidance to inspectors to know the precise framework to carry out their functions.[53]

[49] Accordingly, the Court held that the provision failed the constitutional limitation analysis. The Court concluded that the provision could not be read down and declared it invalid.

[52] *Mistry* above n 37 at para 28 (SA) and para 21 (BCLR).

[53] Id at para 29 (SA) and para 22 (BCLR).

[50] In summary, therefore, the threshold inquiry into whether the inspection infringes the right to privacy is determined by reference to the concentric circles, or, what Sachs J in *Mistry* (referring to *Bernstein*) called a continuum of privacy. The limitation analysis in terms of section 36 involves a proportionality review.[54] A court has to consider an applicant's expectation of privacy and the breadth of the legislation, among other considerations. The expectation of privacy will be more attenuated the more the business is public, closely regulated and potentially hazardous to the public. Legislation may not be so broad as to have the real potential to reach into private homes. In assessing whether legislation could have achieved its desired ends through less damaging means, a court will determine whether the legislation could have required a warrant, and a court will consider whether a warrant requirement would frustrate the state's regulatory objectives and whether in the absence of a warrant the legislation provides sufficient guidance to inspectors as to the limits of the inspections.

[51] A careful consideration of the constitutional standard for regulatory inspections of commercial premises should include a review of relevant foreign jurisprudence on the issue.[55] The Supreme Courts of the United States and Canada have given considerable attention to the issue of regulatory inspections of commercial premises, and cases from those jurisdictions, along with others, have previously been cited by

[54] This is discussed below in paras 60 to 77.

[55] Section 39(1)(c) of the Constitution provides:

> "(1) When interpreting the Bill of Rights, a court, tribunal or forum—
>
> . . .
>
> (c) may consider foreign law."

this Court.[56] What follows is a summary of the positions in the United States and Canada.

[52] The Fourth Amendment of the United States Constitution protects against both unreasonable and warrantless searches and seizures.[57] The United States Supreme Court appears to take for granted that administrative inspections constitute "searches" under the Fourth Amendment. The cases have focused on when to find an exception to the general rule requiring warrants for inspections of private commercial property. The Court has fluctuated on the scope of the exception to the warrant requirement, with its latest jurisprudence creating a broad exception for regulatory inspections.[58]

[53] The Court has held that greater latitude is given for inspections of commercial property, because the owners enjoy less of an expectation of privacy than owners of private homes and because the privacy interest of the commercial property owners

[56] The Court in *Mistry* cited cases from the Supreme Courts of the United States and Canada on regulatory inspections of commercial premises. Above n 37 at paras 27-29 (SA) and paras 20-22 (BCLR). In *Bernstein* the Court considered the approaches in Europe, the United States, Canada and Germany to the scope of the right to privacy. Above n 34 at paras 72-79.

[57] The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourth Amendment originally applied only to the federal government, but it has been incorporated through the Fourteenth Amendment to apply to state governments as well.

[58] In *Frank v Maryland* 359 US 360 (1959), the Supreme Court held that a municipal housing code provision permitting warrantless inspection touched only peripherally on the Fourth and Fourteenth Amendments' protection because the search was not for evidence of criminal activity. The Court overturned *Frank* in the companion cases of *Camara v Municipal Court* 387 US 523 (1967) and *See v City of Seattle* 387 US 541 (1967), which expanded the warrant requirement to all regulatory searches. The Court upheld regulatory statutes as exceptions to the warrant requirement in *Colonnade Corp v United States* 397 US 72 (1970) and *United States v Biswell* 406 US 311 (1972), but then refused to uphold statutes authorising warrantless searches of commercial premises in *Almeida-Sanchez v United States* 413 US 266 (1973) and *Marshall v Barlow's, Inc* 436 US 307 (1978). Finally, the Court broadened the exception to the warrant requirement in *Donovan v Dewey* 452 US 594 (1981) and *Burger* above n 41.

may adequately be protected by the regulatory schemes.[59] Whether the regulation of an industry is pervasive and regular is the key determinant for whether there is a reduced expectation of privacy that would lessen the application of the warrant and probable-cause requirements that fulfil the traditional Fourth Amendment reasonableness standard. The history of the regulation of an industry is an important factor in determining pervasiveness, but is not a necessary condition.[60]

[54] Warrantless inspections must be reasonable. The Court has articulated a three-pronged test for reasonableness: (1) there must be a substantial government interest, (2) the absence of a warrant requirement must be necessary to further the regulatory scheme and (3) the statute must serve as a constitutionally adequate substitute for a warrant. The latter part of the test requires that the statute must alert the subject of the search that the inspection is lawful and limited in scope. Additionally, the inspection must be limited in time, place and scope. Finally, the administrative inspection may not serve as a pretext to avoid the warrant requirements for criminal searches. However, the inspections may have the same ultimate purpose as parallel criminal statutes and inspectors can discover evidence of crimes.[61]

[55] When the Court finds that a warrant is required, it mandates a lower probable-cause standard for granting the warrant. Probable cause for a search warrant can be based on a showing that the specific business was chosen for inspection from neutral

[59] *Burger* above n 41 at 702; *Dewey* above n 58 at 598-99.

[60] *Burger* above n 41 at 702; *Dewey* above n 58 at 598-600, 605-06.

[61] *Burger* above n 41 at 702-13.

sources as part of a reasonable legislative or administrative plan for conducting an area inspection and that there existed a valid public interest to support the general plan.[62]

[56] As in South Africa, the Canadian Charter of Rights and Freedoms mandates a two-stage inquiry into challenges based on the right to privacy. Section 8 of the Charter provides that everyone has the right to be secure against unreasonable search or seizure. Section 1 states that the Charter guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. In *Hunter v Southam Inc*[63] the Supreme Court of Canada articulated the nature of the interests protected by section 8, the standard of reasonableness under that section and the importance of a warrant in the protection of privacy interests. Subsequent cases considering regulatory inspections and searches focus in large part on whether the case invokes section 8 and whether the search constitutes an exception to the *Hunter* standard. The Court considers administrative inspections "searches" that invoke the protections of section 8 of the Charter, deeming it undesirable to construct an arbitrary line between types of state intrusions.[64]

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[62] *Marshall* above n 58 at 320-21; *Camara* above n 58 at 539-40.

[63] [1984] 2 SCR 145.

[64] In *Comité paritaire de l'industrie de la chemise v Potash; Comité paritaire de l'industrie de la chemise v Sélection Milton* [1994] 2 SCR 406 at 416j-417b, La Forest J, writing for one of two majorities, quoted the following distinction between inspections and searches based respectively on whether the intent is to determine compliance or to seek evidence as proof of an offence from L Angers "À la recherche d'une protection efficace contre les inspections abusives de l'État: la Charte québecoise, la Charte canadienne et le Bill of Rights américain" (1986), 27 C de D 723 at 727-28:

> "An inspection is characterized by a visit to determine whether there is compliance with a given statute. The basic intent is not to uncover a breach of the Act: the purpose is rather to protect the public. On the other hand, if the inspector enters the establishment because he has

[57] In the second stage of the analysis, the Court scrutinises a search less stringently the further it moves from traditional criminal law. Where an administrative inspection approaches the type of state intrusion associated with criminal or quasi-criminal searches, the Court applies the *Hunter* standard of reasonableness, requiring a warrant.[65] The Court deviates from the *Hunter* standard only when administrative statutes authorise powers for compliance, not enforcement.[66]

> reasonable grounds to believe that there has been a breach of the Act, this is no longer an inspection but a search, as the intent is then essentially to see if those reasonable grounds are justified and to seize anything which may serve as proof of the offence." (translation)

La Forest J then reasoned at 417g-418a that both inspections and searches constitute "searches" in terms of section 8:

> "Section 8 of the *Charter*, which guarantees protection against unreasonable search and seizure, must be construed to carry out its purpose. In *Hunter* . . . this Court noted that the purpose of s. 8 was to *protect* the individual's reasonable expectations of privacy from unjustified state intrusion. Despite its less invasive nature, inspection is unquestionably an 'intrusion'. An arbitrary demarcation line drawn according to the degree of the intrusion, for purposes of determining whether the powers authorizing the state's actions are within the scope of the constitutional guarantee, is not desirable at this stage. It would be a matter of concern if the constitutional validity of an intrusion of the kind at issue in this appeal were to be placed beyond the reach of judicial review. In the circumstances, I am of the view that the inspection powers set out in the second paragraph of s. 22(e) of the Act may be assimilated to a search within the meaning of s. 8 of the *Charter*. Naturally, the scope of the constitutional guarantee may vary depending on whether a search or an inspection is involved."

See also L'Heureux-Dubé J writing for the other majority at 440c-f.

[65] *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* [1990] 1 SCR 425 at 505i-508d (La Forest J), 592h-j (L'Heureux-Dubé J) and 495f-496c (Wilson J dissenting); *R v McKinlay Transport Ltd* [1990] 1 SCR 627 at 644f-648a (Wilson J). In *Comité paritaire* above n 64 at 441a-e, L'Heureux-Dubé J stated that while administrative inspections constituted section 8 "searches" for purposes of the threshold question, administrative inspections would be subject to a lower standard of reasonableness than criminal matters:

> "The fact that these powers of inspection might constitute a 'search' within the meaning of s. 8 of the *Charter* does not, however, change their nature. They do not necessarily become powers of search similar to those found in criminal law. The term 'search' in s. 8 cannot be limited to searches of a criminal nature. It may encompass, *inter alia*, various sorts of access, in the context of administrative law or in criminal matters; this may, however, result in differences in the scope of the constitutional guarantee . . . . To conclude otherwise would amount to unduly minimize the purpose of the guarantee against 'unreasonable search or seizure', which does not seem desirable. In short, although this is an administrative inspection, nonetheless the access to work premises conferred by the *ACAD* is comparable to a 'search', and as such is subject to s. 8 of the *Charter*. This conclusion does not, however, mean that the standard of reasonableness will necessarily be as strict in a matter involving the regulation of an industrial sector as it is in criminal matters."

[66] See *Comité paritaire* above n 64 at 421a-422d (La Forest J) and 453f-454g (L'Heureux-Dubé J). L'Heureux-Dubé J noted at 453f-g that "[i]t is of the very nature of an administrative inspection in a regulated industry that

[58] In applying a lower standard of reasonableness to administrative inspections, the Court places great weight on the lower reasonable expectation of privacy (with an emphasis on the imperative of state regulation and the status of state regulation as a regular and predictable part of business).[67] The Court also stresses the diminished degree of intrusion in administrative inspections[68] and considers whether the

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it takes place *when there are no* reasonable grounds to believe that a particular offence has been committed." She held, however, at 454a-b that an inspection responding to a complaint can still be a compliance exercise:

> "In my opinion, a mere complaint is insufficient in itself to justify inspectors being subject to the requirements of *Hunter v. Southam Inc.* There is an important distinction between having reasonable and probable grounds to believe that an offence was committed and simply having an information, especially if the latter is given anonymously. An inspection will often be necessary before it is even possible to establish the existence of reasonable grounds to believe that a breach of the law has occurred."

See also Hutchison et al *Search and Seizure Law in Canada* (vol 1) (Thomson, Scarborough 2005) at 5-30.7 – 5-30.8:

> "One of the most common problems presented in the context of administrative or regulatory searches is the movement of regulatory activity between what is commonly called 'compliance' and 'enforcement.' The former is generally seen as the random, overarching supervision of an industry at large, with particular actors within that industry 'targeted' without particular regard to any pre-existing objective save the integrity of the scheme of regulation in general. Enforcement, however, is generally used to describe the notion that, at some point in the process, the focus moves from the integrity of the scheme of regulation in general to a focused investigation of a particular actor under that regime, often with a view to quasi-penal consequences.
>
> The trend in the cases had been towards a position that was more generous to inspectors involved in compliance than it was to regulatory investigators involved in enforcement. The position looked to the need to ensure that compliance was not hobbled by unnecessary limits on the unavoidable randomness of inspection powers."

[67] *Comité paritaire* above n 64 at 420g-421f (La Forest J) and 452e-f (L'Heureux-Dubé J); *Thomson Newspapers* above n 65 at 506d-507h and 517f-518b (La Forest J).

[68] In *Comité paritaire* above n 64 at 421c-d, La Forest J noted:

> "The exercise of powers of inspection does not carry with it the stigmas normally associated with criminal investigations and their consequences are less draconian. While regulatory statutes incidentally provide for offences, they are enacted primarily to encourage compliance."

inspections are "sufficiently circumscribed".[69] The interests of society in regulation are balanced against the rights of the individual.[70]

[59] The preceding analysis leads to a number of conclusions. In *Mistry* this Court refrained from deciding when a regulatory inspection would constitute a "search" in terms of the constitutional right to privacy.[71] Both the United States and Canada consider all regulatory inspections "searches" for the purpose of the threshold question of whether the inspection falls within the scope of the privacy interest. In my view this approach is sound. It recognises that "[d]espite its less invasive nature, inspection is unquestionably an 'intrusion'."[72] The notion that an inspection constitutes an intrusion, albeit a less invasive one, invoking the right to privacy is consistent with our constitutional notion of concentric circles of the privacy right. Additionally, it would be undesirable to impose at the threshold inquiry an arbitrary

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[69] Id at 424b-g (La Forest J) and 444f-445f and 449i (L'Heureux-Dubé J). In distinguishing the statute before the Court from the statute in *Hunter*, L'Heureux-Dubé J emphasised that the statute in *Hunter* "was extremely broad in that the duly authorized inspectors could 'enter *any* premises', 'examine *any thing on the premises* and . . . copy or take away for further examination or copying *any book, paper, record or other document*".

[70] *Comité paritaire* above n 64 at 422e-g (La Forest J); *Thomson Newspapers* above n 65 at 592h and 596a-d (L'Heureux-Dubé J); *McKinlay Transport* above n 65 at 649e-h (Wilson J). See also Hutchison et al above n 66 at 5-30.9 – 5-30.10. They interpret the case law as creating a three-pronged reasonableness analysis:

> "There are three relevant areas for consideration in determining how a search or search-like step will be treated under this sort of flexible approach. The first consideration is the nature of the legislative provision in question. This involves a determination of whether the impugned provision is criminal (or quasi-criminal) or administrative (or regulatory). The second consideration is the degree of privacy that can reasonably be expected in the situation. The third, and final, consideration is the degree of intrusion by the state. Once the privacy interest and the 'state intrusiveness' have been determined these factors must be weighed, one against the other. Where there is a balance, where the intrusion . . . does not outweigh the privacy interest, the search is reasonable.
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> . . . .
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> If the provision is criminal or quasi-criminal in nature, then the *Hunter* criteria will almost invariably apply. If the provision is regulatory, then the extent and necessity of the state's intrusion must be weighed against the individual's expectation of privacy to determine whether the intrusion was reasonable."

[71] Above n 37 at para 23 (SA) and para 16 (BCLR).

[72] *Comité paritaire* above n 64 at 417g-h (La Forest J).

demarcation line between degrees of intrusion that would invoke the constitutional right to privacy. Such line drawing would have the negative effect of placing certain administrative inspections beyond the reach of judicial review.[73] I therefore conclude that section 65(1) limits the right to privacy entrenched in section 14 of the Constitution. It is now necessary to consider whether the limitation passes constitutional muster.

[60] Section 36 of the Constitution provides a structure for our analysis of administrative inspections[74] and governs the situations in which constitutional rights may be limited:

> "(1) The rights in the Bill of Rights may be limited only in terms of 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—
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> (a) the nature of the right;
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> (b) the importance of the 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.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[73] See id. The conclusion might be different for other constitutional rights. For example, some rights in the Constitution expressly provide for line drawing at the threshold inquiry. See, for example, the right to freedom and security of the person (section 12), which includes the right not to be deprived of freedom arbitrarily or without just cause, and the right to freedom of expression (section 16), which does not extend to propaganda for war, incitement of imminent violence or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

[74] Similarly, the focus by the United States Supreme Court on the warrant requirement and on reasonableness appears to stem from the language of the Fourth Amendment and the focus of the Canadian Supreme Court on reasonableness appears to stem from the language of sections 1 and 8 of the Charter.

[61] This Court held in *Makwanyane*[75] that the limitation analysis involves proportionality and that there is no absolute standard for determining reasonableness and justifiability. The Court held:

> "Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests."[76]

[62] Thus, section 36 compels a court to balance all relevant factors. The first factor, the nature of the right, raises at the outset the importance of the right the state seeks to limit. It focuses the court on the purpose of the right, the context that resulted in the right being enshrined in the Constitution and the seriousness of limiting the right.

[63] This Court in *Mistry* described the essential nature of the right to privacy as protected in section 14 of the Constitution and the means through which section 14 repudiates repugnant past practices and re-affirms others consistent with the new constitutional values:

> "The existence of safeguards to regulate the way in which State officials may enter the private domains of ordinary citizens is one of the features that distinguish a constitutional democracy from a police State. South African experience has been notoriously mixed in this regard. On the one hand there has been an admirable

[75] *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 104. *Makwanyane* dealt with the provisions of the interim Constitution. The seminal case on the approach to section 36 of the 1996 Constitution is *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at paras 32-51 where the Court, amongst other things, emphasised that section 36 requires the application of a proportionality analysis.

[76] *Makwanyane* above n 75 at para 104.

> history of strong statutory controls over the powers of the police to search and seize. On the other, when it came to racially discriminatory laws and security legislation, vast and often unrestricted discretionary powers were conferred on officials and police. Generations of systematised and egregious violations of personal privacy established norms of disrespect for citizens that seeped generally into the public administration and promoted amongst a great many officials habits and practices inconsistent with the standards of conduct now required by the Bill of Rights. Section 13 accordingly requires us to repudiate the past practices that were repugnant to the new constitutional values, while at the same time re-affirming and building on those that were consistent with these values."[77]

[64] The Court in *Mistry* also quoted the words of Jackson J, referring to the Fourth Amendment of the United States Constitution protecting against unreasonable searches and seizures, written not long after he acted as a prosecutor at Nuremberg:

> "These, I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police."[78]

[65] The second factor, the importance of the purpose of the limitation, is crucial to the analysis, as it is clear that the Constitution does not regard the limitation of a constitutional right as justified unless there is a substantial state interest requiring the limitation. It is not surprising that this factor is crucial in the United States, as the first

[77] *Mistry* above n 37 at para 25 (SA) and para 18 (BCLR) (footnotes omitted).

[78] Id at para 25 (SA) and para 18 (BCLR) fn 38 quoting *Brinegar v United States* 338 US 160 (1949) at 180-81 (Jackson J dissenting). I have included an additional sentence to the portion quoted in *Mistry*.

necessary condition in the three-pronged test, and in Canada, as a key aspect of the balancing inquiry. Regulatory statutes aim at protecting the public health, safety and general welfare. The court must carefully review the public interest served by the statutory provision and determine the weight that this purpose should carry in the proportionality review.

[66] The third factor is the nature and extent of the limitation. In the context of a regulatory inspection of commercial private property, there are at least three issues that will have a bearing on the nature and extent of the limitations, namely (1) the level of the reasonable expectation of privacy, (2) the degree to which the statutory provision resembles criminal law and (3) the breadth of the provision.

[67] The commercial property occupier's lower expectation of privacy is an important consideration for the extent of the limitation. As recognised in *Bernstein*, as a person's privacy interest is more attenuated and as the individual has a lower reasonable expectation of privacy, the scope of that individual's personal space shrinks and the individual's right to privacy may be limited further by the rights accruing to other citizens.[79] The individual's expectation of privacy will vary, based on the particular context of the statutory provision and the information obtained and premises and objects searched.[80]

[79] *Bernstein* above n 34 at para 67.

[80] See *McKinlay Transport* above n 65 at 645a-f.

[68] *Mistry* listed a number of respects in which the proprietor of a business generally has a reduced expectation of privacy. Reasonable regulations and inspections are an "inseparable part of an effective regime of regulation."[81] The more a business creates potential hazards to the public, the more important and less invasive the inspection. People involved in certain businesses must be taken to know that their activities will be monitored.[82] American cases emphasise the importance of the awareness by people involved in pervasively regulated industries, and especially industries with long histories of government regulation, that they will be subject to inspections.[83] The Canadian case of *Thomson Newspapers*[84] adds that the owner of private commercial property has a lower expectation of privacy, because the inspections will not intrude into the individual's private life, regulations are imperative to ensure compliance, they protect individuals against private power and they are a regular and predictable part of doing business.

[69] Whether the inspection involves a search for criminal evidence is an important measure of the extent of the limitation. A warrantless search aimed at criminal prosecution will constitute a greater intrusion and an owner has a greater expectation of privacy regarding the risk of criminal prosecution, even in the context of commercial private property.

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[81] *Mistry* above n 37 at para 27 (SA) and para 20 (BCLR).

[82] Id.

[83] See *Burger* above n 41 at 705-06; *Dewey* above n 58 at 605-06. For the reasons stated in *Dewey* at 606, I agree that a long history of regulation of the industry is only an important factor in determining whether an industry is pervasively regulated, so that owners of businesses in the industry must be taken to be aware that the government will inspect their property.

[84] Above n 65 at 506g-507h (La Forest J).

[70] Provisions that more closely resemble traditional criminal law require closer scrutiny.[85] Factors in assessing each case include the nature of the conduct addressed by the provision, the purpose for which it was designed and the civil or criminal nature of the sanctions for violating the provision.[86] The more the purpose of the provision and the intent of the inspectors is to obtain evidence for criminal prosecution, the greater the limitation of the right to privacy. The distinction often will be between compliance and enforcement. Inspections aimed at compliance — characterised as "the random, overarching supervision of an industry at large, with particular actors within that industry 'targeted' without particular regard to any pre-existing objective save the integrity of the scheme of regulation in general"[87] — are less like criminal searches and impose lesser limitations on the right to privacy. Searches aimed at enforcement — characterised as "a focused investigation of a

[85] See the Canadian cases above n 65 in which the question of whether the provision is criminal or quasi-criminal in nature is crucial for determining the level of scrutiny the provision will face. Indeed, the issue was the main source of disagreement between La Forest and L'Heureux-Dubé JJ and Wilson J in *Thomson Newspapers*. In *Thomson Newspapers* above n 65 at 507i-508d La Forest J explained the need for closer scrutiny of provisions that more closely resemble traditional criminal law:

> "The situation is, of course, quite different when the state seeks information, not in the course of regulating a lawful social or business activity, but in the course of investigating a criminal offence. For reasons that go to the very core of our legal tradition, it is generally accepted that the citizen has a very high expectation of privacy in respect of such investigations. The suspicion cast on persons who are made the subject of a criminal investigation can seriously, and perhaps permanently, lower their standing in the community. This alone would entitle the citizen to expect that his or her privacy would be invaded only when the state has shown that it has serious grounds to suspect guilt. This expectation is strengthened by virtue of the central position of the presumption of innocence in our criminal law. The stigma inherent in a criminal investigation requires that those who are innocent of wrongdoing be protected against overzealous or reckless use of the powers of search and seizure by those responsible for the enforcement of the criminal law. The requirement of a warrant, based on a showing of reasonable and probable grounds to believe that an offence has been committed and evidence relevant to its investigation will be obtained, is designed to provide this protection."

[86] See *Thomson Newspapers* above n 65 at 509g-j (La Forest J).

[87] Hutchison et al above n 66 at 5-30.8; see also the statement of L'Heureux-Dubé J in *Comité paritaire* above n 64 at 453f-g quoted above at n 66.

particular actor under that regime, often with a view to quasi-penal consequences"[88] — are more like criminal searches, especially if the sanctions under the regulatory provision are essentially criminal or if the target can be charged under a criminal statute. Not every case will be amenable to such a clear distinction between compliance and enforcement and some cases involving enforcement might not be characterised as those in which the inspectors intend to obtain evidence for criminal prosecution. The fact that an inspector responded to a complaint, or found evidence of a criminal violation during the inspection, might not be conclusive of an inspection aimed at criminal prosecution.[89] The assessment must be made on the facts of each case.

[71] *Mistry* provides that the breadth of the provision is an important determinant of the extent of the limitation.[90] The provision must be "sufficiently circumscribed" so as to limit the discretion of the inspector as to the time, place and scope of the search.[91] Overbreadth may cause at least three problems. An overbroad provision may fail to inform the occupier of the limits of the inspection, and may even leave the inspector without sufficient guidelines with which to conduct the inspection within legal limits. It also permits greater privacy intrusions, extending beyond circumstances in which the reasonable expectation of privacy is low, to situations in which the reasonable expectation of privacy is at its apex. Thus the Court in *Mistry*

[88] Hutchison et al above n 66 at 5-30.8; see also *Comité paritaire* above n 64 at 416h-417b (La Forest J).

[89] See *Comité paritaire* above n 64 at 454a-h (L'Heureux-Dubé J); *Burger* above n 41 at 716.

[90] Above n 37 at paras 28-30 (SA) and paras 21-23 (BCLR).

[91] See *Comité paritaire* above n 64 at 424b-g (La Forest J) and 449i (L'Heureux-Dubé J); *Burger* above n 41 at 703 and 711-12; *Biswell* above n 58 at 315.

mentioned the "lack of qualification of the powers of entry and inspection given to the inspectors".[92] The provision in *Mistry* imposed no requirement other than that the inspector's powers be exercised at reasonable times; it permitted inspections of a wide range of property, potentially including private homes, and it authorised entrance and inspection merely upon the reasonable suspicion that medicine or a scheduled substance was present.[93]

[72] For law that limits a right to be reasonable and justifiable there must be a causal connection between the purpose of the law and the limitations imposed by it. Legislation providing for regulatory inspections in the public interest must have a strong relationship to the limitation of the privacy right, because the inspection aims at protecting the public interest.

[73] The final listed factor in determining whether the limitation is reasonable and justifiable is whether there exists a less restrictive means to achieve the purpose. This factor is important for the question whether the limitation of the right to privacy caused by the inspection is proportionate to the purpose of the legislative provision. In most cases, a highly relevant question will be whether the provision could have achieved its purpose even if it required a warrant prior to the search.[94]

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[92] Above n 37 at para 21 (SA) and para 14 (BCLR).

[93] Id at paras 21 and 28 (SA) and paras 14 and 21 (BCLR).

[94] If the statute does provide for some form of administrative warrant, the question will be whether the warrant adequately protects the property owner and guides the inspector. The Supreme Court of the United States has given some thought to this issue. See *Marshall* above n 58 at 320-21 and *Camara* above n 58 at 539-40. We need not decide this issue in the present case.

[74] Exceptions to the warrant requirement should not become the rule. A warrant is not a mere formality. It is the method tried and tested in our criminal procedure to defend the individual against the power of the state, ensuring that police cannot invade private homes and businesses upon a whim, or to terrorise. Open democratic societies elsewhere in the world have fashioned the warrant as the mechanism to balance the public interest in combating crime with the individual's right to privacy.[95] The warrant guarantees that the state must justify and support intrusions upon individuals' privacy under oath before a neutral officer of the court prior to the intrusion. It furthermore governs the time, place and scope of the search, limiting the privacy intrusion, guiding the state in the conduct of the inspection and informing the subject of the legality and limits of the search. Our history provides much evidence for the need to adhere strictly to the warrant requirement.

[75] Of course, the law recognises that there will be limited circumstances in which the need of the state to protect the public interest compels an exception to the warrant requirement. In certain cases regulatory inspections aimed at protecting the public health, safety and general welfare will require such an exception.

[76] In the context of regulatory searches aimed at criminal prosecution, the state will be hard-pressed to show the need for provisions authorising warrantless searches. Searches aimed at criminal prosecution offer the greatest invocations of the purposes

[95] See *Hunter* above n 63 at 161j-162a, in which Dickson J described the purpose of the warrant requirement:

> "The purpose of a requirement of prior authorization is to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be assessed, so that the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior."

of the warrant requirement. The need for surprise is preserved through warrants, which could be obtained on an ex parte basis.[96] There may, however, be instances where warrantless searches are justified, such as those provided for in the Criminal Procedure Act.[97]

[77] Legislation authorising warrantless regulatory inspections must provide a constitutionally adequate substitute for a warrant. This would create certainty and regularity in the application of the inspections sufficient to inform the commercial property owner of the legality and properly defined scope of the inspection and to limit the discretion of the inspectors. The legislation should be sufficiently comprehensive and defined so that the property owner must be taken to be aware that the property will be subject to periodic inspections undertaken for a specific purpose. The discretion of the inspectors should be limited as to time, place and scope.[98]

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[96] See *Burger* above n 41 at 722 fn 8 (Brennan J dissenting). See also *Omar v Government of the Republic of South Africa and Others (Commission for Gender Equality, Amicus Curiae)* 2006 (2) SA 289 (CC); 2006 (2) BCLR 253 (CC) at paras 37-38, stating that to require notice to alleged perpetrators of domestic violence before issuing an interim protection order would defeat the object of protection for the complainant, who could be placed in more serious danger.

[97] See section 22 which provides:

> "A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20—
>
> . . . .
>
> (b) if he on reasonable grounds believes—
>
> (i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and
>
> (ii) that the delay in obtaining such warrant would defeat the object of the search."

[98] See *Burger* above n 41 at 703; *Dewey* above n 58 at 603-05.

[78] These considerations must be applied to the impugned provisions in this case. It is important to note that section 65 of the Act governs two types of inspections. It authorises inspections of licensed premises as well as unlicensed premises. Section 65(1) to (3) applies to both types of inspections. Section 65(4) applies only to "administrative inspections to check for compliance" by licensed and associated entities. The applicant limits his constitutional challenge to inspections of unlicensed premises. Accordingly, the issue of the constitutionality of the section as to inspections of licensed premises is not before the Court.

[79] Following my earlier finding that all regulatory inspections constitute "searches" for the purposes of the threshold question of whether the inspection infringes upon the right to privacy, the inspection of Las Vegas Gold in accordance with section 65 was a search as referred to in section 14 of the Constitution. The question therefore is whether the limitation of the right to privacy by section 65 is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom in terms of section 36 of the Constitution.

[80] The essential constitutional nature of the right to privacy and its connection to past practices and present constitutional values have been discussed by this Court in *Mistry*[99] and need not be repeated.

[99] The discussion in *Mistry* is quoted above at para 63.

[81] As to the importance of the purpose of the limitation, section 65 obviously serves a beneficial public purpose. The Preamble of the Act makes clear that the Act aims to protect the public confidence and trust and the health, safety, general welfare and good order of the inhabitants of the province through the strict regulation of institutions and individuals involved in the gambling industry.[100] The importance of this general purpose is beyond question. An effective inspection scheme, as intended by section 65, is crucial to ensuring compliance with and enforcement of the regulations prescribed by the Act. Section 65 plays a necessary role in furthering the important public purposes of the Act.

[82] As to the nature and extent of the limitation, gambling is an activity that could pose a threat to individuals' psychological, financial and even physical health, as well as those of their families and communities. Regulation is essential to protect participants in the gambling industry and the general public. The gambling industry is a pervasively regulated industry. Schedule 4 Part A of the Constitution lists gambling as a functional area of concurrent national and provincial legislative competence, and

[100] The Preamble of the North West Gambling Act provides in part:

> "AND WHEREAS it is recognized that the public confidence and trust and the health, safety, general welfare and good order of the inhabitants of the Province are dependent upon the strict regulation of all persons, premises, practices, associations and activities relating to gambling".

Similarly, the Preamble of the National Gambling Act provides in part:

> "It is desirable to establish certain uniform norms and standards, which will safeguard people participating in gambling and their communities against the adverse effect of gambling, applying generally throughout the Republic with regard to casinos, racing, gambling and wagering, so that—
>
> * gambling activities are effectively regulated, licenced, controlled and policed;
> * members of the public who participate in any licenced gambling activity are protected;
> * society and the economy are protected against over-stimulation of the latent demand for gambling; and
> * the licensing of gambling activities is transparent, fair and equitable".

the provisions of the National Gambling Act 7 of 2004 and the North West Gambling Act show that both national and provincial legislation regulate the industry. The preambles of both statutes proclaim the necessity of regulation to safeguard the public.[101] In terms of the North West Gambling Act participation in the gambling industry requires a licence. Participants in licensed industries must be taken to expect regular inspections.[102] Casino operators generally would have a low expectation as far as the protection of privacy is concerned, as the inspection will reach well outside their inner sanctum. In this respect their position differs vastly from the residential poker or bridge player.

[83] The extent of the limitation is heightened by the possible implications of provisions of the Act for criminal proceedings. While the Act aims at economic regulation,[103] it also seeks to prevent illegal gambling. Thus, the Preamble states in part: "AND WHEREAS the Provincial Legislature has recognized the need for such legislation in order to prevent the conduct of illegal gambling activities in the Province". The statute provides for criminal sanctions. Section 82 lists offences for violating the Act and provides that violators "shall be guilty of an offence and on

[101] Id.

[102] In his papers, the applicant argued that he had not accepted upon himself the government regulations of gambling because (contrary to the law) his business was not licensed. To his credit, the applicant withdrew this submission at the hearing before this Court.

[103] See the Preamble, which states in part:

> "AND WHEREAS gambling matters are privileged activities which should stimulate the creation of employment opportunities and thereby promote the improvement of the quality and standard of living of the people of the Province,
>
> AND WHEREAS gambling provides a significant source of public revenue for the Province,
>
> AND WHEREAS the levying of such taxes has to be dealt with in terms of the Provincial Legislation".

conviction be liable to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and imprisonment."

[84] Section 65, to the extent that it authorises searches of unlicensed premises, indicates a statutory purpose of facilitating raids aimed at collecting evidence for criminal prosecution. The provision empowers inspectors to inspect any unlicensed premises based on suspicion that gambling is taking place therein or that gambling objects are located within the premises.[104] This constitutes enforcement, not compliance, as the catalyst for the inspection is suspicion of illegality.

[85] The facts of this case illustrate the provision's aim of collecting evidence for criminal prosecution through the inspection of unlicensed premises. The inspectors launched their raid following a report of unlicensed gambling activity and evidence from an undercover operation. Furthermore, the inspectors knew that Las Vegas Gold was unlicensed. Mr Erasmus conceded in his affidavit before the High Court that –

> "[h]ad such a licence ever been applied for or processed by the Board, authorising Mr Magajane or anyone else to carry out a gambling business at the premises, I would have been aware of the application and process."

The applicant faced criminal prosecution based on the evidence found during the search.

[104] Section 65(1)(a).

[86] The aim of section 65 in its provision for searches of unlicensed premises to collect evidence for criminal prosecution weighs strongly against the reasonableness and justifiability of those aspects of the section. A search aimed at criminal prosecution constitutes a significantly greater intrusion than a regulatory inspection aimed at compliance.

[87] The provisions of section 65 relating to searches of unlicensed premises are broad. The section empowers inspectors to enter and search unlicensed premises which are occupied or being used for the purposes of any gambling activities or any other premises on which it is suspected that gambling takes place.[105] By authorising searches based only on a suspicion, rather than a reasonable suspicion, that the premises house gambling facilities or activities the statute permits a vast array of searches. This is compounded by the broad definition of "premises" as "any site, place or location, regardless of whether it is or forms part of any temporary or permanent structure, building, vessel, vehicle or aircraft".[106] The scope of premises that can be searched is broadened even further by section 65(1)(a)(iii), which includes any premises in which it is suspected –

> "that any gambling machine or any equipment, device, object, book, record, note, recording or other document used or capable of being used in connection with the conducting of gambling games or any other gambling activity may be found."

[105] Section 65(1)(a).

[106] Section 1. This definition is similar to the language deemed too broad in *Mistry*.

The breadth of this subsection is increased by the phrase "used or capable of being used". Presumably, this subsection would include any notebook or any item of furniture that is "capable of being used" for gambling, even though it never has been used for such purposes.

[88] In the context of warrantless searches aimed at obtaining evidence for criminal prosecution, the overbreadth creates an impermissible threat to the right to privacy. Section 65 does not narrowly target only those premises whose owners possess a low reasonable expectation of privacy; the statute permits inspectors to reach into a person's inner sanctum. The section fails to guide inspectors as to how to conduct searches within legal limits, and it leaves property owners unaware of the proper limits to the invasion of their privacy. The boundaries of a permissible search of unlicensed premises could be delineated and protected by a warrant, but section 65 permits warrantless searches of unlicensed premises.

[89] The applicant appears to accept that section 65 does serve its purpose of achieving compliance with and enforcement of the provisions of the Act. The facts of this case illustrate that the inspections may uncover gambling businesses operating without a licence, at least in some instances. The concern, however, is that the breadth of section 65 makes enforcement searches less targeted. Presumably, less targeted inspections will be less effective in achieving the purposes of enforcement inspections and will be more intrusive to privacy interests.

[90] Are less restrictive means to achieve the purpose available? The respondents have not shown why section 65 could not have achieved its purpose while requiring that inspectors obtain a warrant before searching unlicensed premises. As these searches aim to collect evidence for criminal prosecution, subjects of the searches require the protection of warrants as embodied in Chapter 2 of the Criminal Procedure Act.

[91] It is startling that section 65 provides for warrantless searches of unlicensed premises when it requires administrative warrants for inspection of licensed premises. The statute expressly states that these administrative warrants, extensively provided for in section 65(6) to (12), "shall be in accordance with the Criminal Procedure Act, 1977".[107] There appears to be no reason to believe that a warrant requirement would interfere with the purpose of section 65 for unlicensed premises, while it would not for licensed premises. Indeed, it would seem that the occupiers of unlicensed premises might often have a greater privacy interest than those of licensed premises. Inspections of unlicensed premises will aim at enforcement, while inspections of licensed premises can serve compliance or enforcement goals (or both). Additionally, warrantless searches of unlicensed premises carry greater risks of error and abuse. While inspectors are certain that gambling takes place in licensed premises, inspectors might search unlicensed premises based on a suspicion that the premises are being used for gambling.[108] Inspections of licensed premises thus will typically be more

[107] Section 65(7).

[108] In this case, it is clear that Magajane was operating a gambling operation without a licence, in violation of the law. However, in considering this factor of the limitation analysis, it is important to note the potential that inspectors mistakenly will suspect that unlicensed premises are being used for gambling.

targeted and specific and accordingly pose a lesser risk of infringing upon an individual's reasonable expectation of privacy.[109]

[92] The respondents have not provided any support for their contention that warrantless searches of unlicensed premises are necessary to avoid flight. The only possibility would be that evidence could disappear while a warrant is being sought. This is unlikely to happen where, for example, the premises contain sizable gambling equipment. The inspectors in this case certainly did not have this concern, as they waited four days from when they received the report of illegal gambling until they raided Las Vegas Gold. Should inspectors legitimately fear flight, they can avail themselves of the provisions covering such circumstances in the Criminal Procedure Act.[110]

[93] It is telling that a number of other provinces require warrants for inspections of unlicensed premises. Section 14 of the Western Cape Gambling and Racing Law 4 of 1996 contains separate provisions for inspections of licensed and unlicensed premises. Section 14(4) permits warrantless searches of licensed premises. Section 14(4A), however, authorises searches of unlicensed premises with a warrant and based on a reasonable suspicion standard. Similarly, section 84 of the KwaZulu-Natal Gambling Act 10 of 1996 and sections 76 and 78 of the Northern Cape Gambling and Racing

[109] As noted above at para 78, this case does not raise the constitutionality of section 65 as per licensed premises. Accordingly, I take no position as to the constitutionality of warrantless searches of licensed premises in terms of section 65 or in general. I also take no position as to the constitutionality of searches of licensed premises in terms of the administrative warrant provisions of section 65.

[110] See above n 97. The inspectors can avail themselves of these provisions of the Criminal Procedure Act when they are accompanied by police officers.

Act 5 of 1996 permit warrantless searches of licensed premises, but require warrants for searches of unlicensed premises (based on a suspicion standard).[111]

[94] Taking into account all relevant factors, the provisions in section 65 governing searches of unlicensed premises cannot be deemed reasonable and justifiable. These provisions serve the worthy goal of ensuring enforcement of the statute's regulation of the gambling industry. However, while the owner or occupier of a gambling business generally will have a low reasonable expectation of privacy in the gambling premises, the provisions relating to unlicensed premises aim at collecting evidence for criminal prosecution and thus constitute significant intrusions. The breadth of the provisions extends the scope of permissible searches beyond situations in which the expectation of privacy is low, potentially reaching to innocent activity in private homes. The breadth of the provisions also gives inspectors too much discretion in their searches, endangering the privacy of property owners and occupiers who are not adequately informed of the limits of the inspection. Finally, section 65 could achieve its purpose of promoting enforcement of the Act, while more appropriately protecting the privacy rights of the subjects of searches. Section 65 should require inspectors to obtain warrants before searching unlicensed premises. A warrant would mitigate to some extent the effects of the statute's broad scope, as a neutral officer would weigh the state's justifications for the inspection and would stipulate the time, place and scope of the search. Inspectors and police officers would not be prevented from conducting

[111] Section 14(4A) of the Western Cape Gambling and Racing Law requires that the inspector conducting a search of an unlicensed premises be accompanied by an officer of the South African Police Service of the rank of Inspector or higher. Similarly, section 84(2) of the KwaZulu-Natal Gambling Act requires that the inspector be accompanied by a member of the police.

investigations by a warrant requirement. Like any member of the public, inspectors and police officers may enter gambling premises and engage in gambling activities as part of an investigation. Such activity would not amount to a search.

[95] I repeat that this conclusion is reached in the light of the fact that there is an absence of proportionality between the extent of the limitation of the right to privacy occasioned by section 65(1) keeping in mind an understanding of the importance of the right to privacy in our democracy, on the one hand, and the purpose and effect of section 65 on the other. In considering the purpose and effect of section 65(1), I have taken into account whether there are less restrictive means available to the government to achieve the purpose of the section.[112] It is clear that given that section 65, as it relates to unlicensed premises, aims at collecting evidence for criminal prosecution, considerable limitations on the right to privacy may occur. On the other hand, the searches of homes or other premises not involved in the gambling industry, which could be authorised by the section, is not closely related to the overall purpose of the Act which is to regulate gambling, particularly commercial gambling. Section 65(1) could achieve its purpose through the requirement of a prior warrant. The conclusion is bolstered by the reasons which informed our judgment in *Mistry*. Given the potential invasion of privacy permitted by section 65(1), the breadth of the provision and the availability of a warrant as a less restrictive means to achieve the purposes of the section, section 65(1) is not reasonable and justifiable in terms of section 36. I conclude, therefore, that it is unconstitutional.

[112] See *Manamela* above n 75 at paras 32-33 of the judgment of the Court and at para 66 of the minority judgment.

[96] The applicant managed a business operation apparently conducting unlicensed gambling activity in public. That conduct is unacceptable. However, the statutory provision with which we are concerned in this case is not a neatly tailored provision allowing for controlled and circumscribed inspections of unlicensed premises in which commercial gambling activity is conducted in public. It is not advisable to speculate on what the outcome of a constitutional investigation might have been if the provision had in fact been so tailored.

Remedy

[97] If it would be possible to sever the invalid provisions from section 65 and the remainder would give effect to the purpose of the law, then severance would be preferable to striking down.[113] However, the structure of section 65(1) and (2) compels the conclusion that the appropriate remedy is to strike down the two subsections. Section 65(1)(a) establishes the premises which inspectors may enter. The provision intertwines licensed and unlicensed premises so that it would be difficult to unravel the authorisation to enter licensed premises and unlicensed premises. The remaining provisions of section 65(1) depend upon section 65(1)(a). Thus, section 65(1)(b) empowers the inspector to perform a number of functions "with

[113] See *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at para 16, in which Kriegler J articulated the general rule as follows:

> "Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and second, if so, is what remains giving effect to the purpose of the legislative scheme?" (Footnote omitted.)

regard to any premises referred to in paragraph (a)". Section 65(1)(c) provides that the inspector shall require a number of things from "any person who is deemed or appears to be in charge of any premises referred to in paragraph (a)". While section 65(1)(d) does not contain similar language, it must be taken as authorising seizure and removal only from premises referred to in section 65(1)(a). Section 65(1)(b) to (d) repeatedly references "other document [or documents] referred to in paragraph (a)",[114] and section 65(1)(b)(iv) defines premises that inspectors can inspect and examine with reference to section 65(1)(a).

[98] The intertwining of licensed and unlicensed premises in section 65(1)(a) and the references to the parts of that paragraph relating to unlicensed premises in the remainder of section 65(1) make severance difficult and undesirable.[115] Accordingly section 65(1)(a) must be struck out in its entirety. The structure of section 65(1)(b) to (d) and the references to section 65(1)(a) require that those paragraphs also be struck out. It follows that section 65(2) must be struck out as well, as that provision applies only to inspectors "[w]hen performing any function in terms of subsection (1)". However, the remainder of section 65 stands on its own and is not affected.[116]

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[114] Section 65(1)(b)(iii), (c)(ii) and (d).

[115] See *S v Coetzee and Others* 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC) at para 226 (Sachs J concurring), in which it was stated:

> "I believe the Constitution requires us to be creative in saving the garment, or at least, a wearable part of it, if we can do so in a manner consistent with the purpose of the Legislature as expressed in the text. But, too much reading down of too many terms, coupled with too many excisions of the text, leaves something so tattered and insecure, that it cannot be said that effect would be given to any of the principal objects of the Legislature."

[116] The only provision in the remainder of section 65 that refers to section 65(1) is section 65(5)(b). It can operate without section 65(1) as it applies to "gambling operations or any premises referred to in sections 65(1)(a) and 65(1)(b)(iv)".

[99] It is not in the interests of justice to suspend the order of invalidity of section 65(1) and (2). Inspectors and the police can still enforce violations of the Act without section 65(1) and (2). Inspectors can investigate alleged violations of the Act, and the police can use their powers under the Criminal Procedure Act to conduct searches with warrants. Inspectors can continue to conduct administrative inspections of licensed premises to ascertain compliance pursuant to section 65(4) to (12).

The right to remain silent

[100] The applicant does not point to any specific question, but rather raises a broad challenge to the statute as violating his right to remain silent. He refers to three provisions of the Act. Section 65(1)(b)(ii) empowers an inspector to question any person who is on or in the targeted premises and to inspect any activities in connection with the conduct of any gambling activity. Section 65(1)(c)(iii) provides that an inspector can "require any person who is deemed or appears to be in charge of" the premises "to provide any information in connection with anything which has been pointed out or produced in terms of subparagraph (i) or (ii)". Section 82 provides:

> "Any person who—
>
> (a) contravenes or fails to comply with any provision of this Act . . .
>
> . . . .
>
> (e) hinders or obstructs any police officer or inspector in the performance of his or her functions under this Act;
>
> (f) gives an explanation or information to a police official or inspector which is false or misleading, knowing it to be false or misleading;
>
> . . . .
>
> shall be guilty of an offence and on conviction be liable to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and imprisonment."

[101] The applicant argues that section 65(1)(b)(ii) and (c)(iii), read with section 82, requires him to provide potentially self-incriminating information in violation of the right to freedom and security of the person (section 12(1) of the Constitution) and the right to a fair trial (section 35 of the Constitution).[117] While the applicant acknowledges that section 82 — and particularly section 82(a) — could be read so as not to create an offence for the failure to answer questions, he contends that the possibility that section 82(a) creates an offence places the questioned person in the impossible situation of checking whether to risk self-incrimination or violate section 82(a). He asserts that the provisions at least should contain a proviso that information obtained is not admissible in any ensuing criminal proceeding.[118]

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[117] In his amended notice of motion in the High Court, the applicant did not challenge the constitutionality of section 65(1)(c)(iii) and challenged section 65(1)(b) broadly, without specifying section 65(1)(b)(ii). However, the judgment of the High Court indicates that the applicant challenged these two subsections. The High Court squarely dealt with the constitutionality of these provisions. In his application for leave to appeal to this Court, the applicant again raised the constitutionality of section 65(1)(b)(ii) and (c)(iii).

[118] By way of comparison, the applicant notes that the National Gambling Act does contain such a safeguard. Section 80 provides:

> "(1) A person questioned by an inspector in terms of this Act is not obliged to answer any question if the answer is self-incriminating.
>
> (2) No self-incriminating answer given or statement made to a person exercising any power in terms of this Act is admissible as evidence against the person who gave the answer or made the statement in any criminal proceedings, except in criminal proceedings for perjury or in which that person is tried for an offence contemplated in this section, and then only to the extent that the answer or statement is relevant to prove the offence charged."

Similarly, the Western Cape Gambling and Racing Law protects against self-incrimination. As noted above at para 93, section 14(4) and (4A) govern inspections of licensed and unlicensed premises. Section 14(5) provides:

> "No evidence regarding any questions and answers contemplated in subsection (4) shall be admissible in any subsequent criminal proceedings against a person from whom information in terms of that subsection is acquired if the answer will incriminate him or her, except in criminal proceedings where the person concerned stands trial on a charge contemplated in subsection (6)."

Section 14(6) provides:

> "Any person who—
>
> (a) obstructs or hinders a person referred to in subsection (2) [which lists the individuals who may exercise the powers conferred by section 14] in the performance of his or her functions under this section;

[102] There may well be some merit in the concerns raised by the applicant. However, it is not necessary for this Court to reach this issue. The provisions of section 65(1) authorising an inspector to enter an unlicensed premises without a warrant are unconstitutional and invalid. The inspector, therefore, was not authorised to question the applicant, a manager of an unlicensed business, in terms of section 65(1)(b)(ii) and (c)(iii). In view of the striking down of the bulk of section 65, the provincial legislature may wish to reflect carefully on its purpose and the issues raised in connection with it, in deciding whether and how to formulate a new provision to replace it.

Conclusion and costs

[103] From the above it follows that leave to appeal must be granted. Furthermore the appeal against the judgment of the High Court must be upheld. The High Court erred insofar as it found that section 65(1) does not violate the right to privacy as protected in section 14 of the Constitution. Section 65(1) and (2) is therefore unconstitutional and invalid. The order of the High Court, including the order as to costs, has to be set aside. The applicant does not seek costs. No order as to costs in this Court is therefore made.

(b) when asked by a person referred to in subsection (2) for an explanation or information relating to a matter within his or her knowledge, gives an explanation or information which is false or misleading, knowing it to be false or misleading, or

(c) falsely represents himself or herself to be a person referred to in subsection (2),

shall be guilty of an offence."

Order

[104] It is ordered as follows:

1. The application for leave to appeal is granted.
2. The appeal is upheld.
3. The order of the High Court, including the order regarding costs, is set aside and replaced with the following:

> "Section 65(1) and (2) of the North West Gambling Act 2 of 2001 is inconsistent with the Constitution and is therefore invalid."

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

For the applicant: N Jagga instructed by Nienaber & Wissing Attorneys

For the respondent: M Donen SC instructed by the State Attorney, Mafikeng