

**“TATA ‘MA MILLIONS?’”
THE ENFORCEABILITY OF A GAMBLING DEBT
BETWEEN THE LOTTERY OPERATOR AND THE
TICKET-HOLDER; AND THE ENFORCEABILITY
OF A PARTNERSHIP AGREEMENT TO SHARE
LOTTERY WINNINGS ALREADY PAID TO ONE
OF THE PARTNERS**

1 Introduction

“A lottery in ‘... a narrow sense connotes an element of gambling in that the participants must stake, subscribe or contribute something in order to acquire the chance of winning a prize” (Harker “Gaming, Wagering and Lotteries” in Joubert (ed) *LAWSA Vol 10* (1979) par 426).

The national statute, the Lotteries Act 57 of 1997 (hereinafter “the Act”) exclusively regulates lotteries and sports pools in South Africa (ss 44 and 104(1)(b)(i) read with schedule 4 part A of the Constitution of the Republic of South Africa, 1996 (hereinafter “the Constitution”). Since the implementation of the National Lottery, the “playing” of the National Lottery has become part of the weekly lives of South Africans. From its inception in March 2000 until March 2005 more than R3.4 billion has been generated for good causes (National Lotteries Board *Annual Report* (2005) sourced electronically from <http://www.nlb.org.za>). The National Lottery is by far the best supported form of gambling in the country with a survey showing that more than 71% of participants had purchased a National Lottery ticket during the 12 months prior to the survey being conducted, whilst, for example, only 19% had participated in casino gaming (National Gambling Board *Economic Impact of Legalised Gambling in South Africa* (2003) Executive Summary 2). The National Lottery is however not the only form of lottery regulated in terms of the Act as it also provides for the regulation of societal and private lotteries, as well as promotional competitions (Part II of the Act).

The aim of this note is to focus on two types of lottery agreements. The first type of agreement relates to the question whether a lottery ticket-holder can enforce payment, arising from his winning ticket, from the operator in the courts: *id est* the enforceability of the gambling contract between the parties.

The second type of lottery agreement deals with the enforceability of a partnership agreement *inter partes*, where the partners agreed to share lottery winnings, but where the receiver of the winning amount refuses to share it with his partner(s). The focus is on the partnership agreement, collateral or ancillary to the gambling contract. It is, for the purposes of this

discussion, presumed that the lottery winnings have already been paid over to one of the partners.

In each of the above two types of agreements under discussion, a distinction is made between an agreement arising from a licensed, and thus lawful, lottery on the one hand; and one arising from an illegal lottery, conducted in contravention of the Lotteries Act, on the other hand. Section 57(1) of the Lotteries Act provides that any person who participates in, or conducts, facilitates, promotes or derives any benefit from a lottery is guilty of an offence unless it has been authorised by the Act or any other law. No other statute or law however authorises lotteries. It is thus illegal to participate, conduct, facilitate, promote or derive a benefit from an unregulated lottery.

From the outset it should be noted that the common law, and most of the jurisprudence relating to gambling contracts, focuses on the fact that lawful gambling contracts were regarded as natural obligations and unenforceable as a matter of public policy. This note does not deal with such lawful, yet unenforceable natural obligations. It is submitted that these unenforceable contracts are irrelevant in the lottery scenario as a result of section 57(1).

2 Enforcement of a gambling debt arising from an agreement between the lottery operator and the lottery ticket holder

2.1 Lawful lottery

In terms of the common law any lawful gambling debt, although legal, was as a matter of public policy unenforceable in the courts (Harker par 430; Christie *The Law of Contract* 4ed (1996) 436; *Christie NO v Mudaliar* 1962 2 SA 40 (N) 48; *Dodd v Hadley* 1905 TS 439; *Cohen v Isaacs* 1918 CPD 586; and *Fisher v Straiton* 1920 WLD 53).

The Lotteries Act changed the applicability of the common law to lawful gambling debts. It provides that “any lottery debt lawfully incurred by a person in the course of any lottery ... shall, notwithstanding the provisions of any law or the common law, be enforceable in a court of law” (s 65). Any debt arising from a regulated lottery would thus be enforceable between the parties who entered into the gambling contract, such as between Uthingo, the current licensed National Lottery operator, and the holder of the National Lottery - lottery ticket.

The Act does not amend the common law, but merely suspends it in this particular circumstance, namely where the debt was lawfully incurred. This is also the case with other types of gambling contracts. The enforceability of a lawful gambling contract was confirmed on appeal in the unreported case of *Sea Point Racing CC v Pierre de Villiers Berrange NO* ((N) 2000-08-01 (case number AR 774/99)), that overturned *Sea Point Racing CC v Wilkinson* ([1999] 2 All SA 626 (D)); and discussed by Carnelley “Enforcement of Lawfully Incurred Gambling Debts” 2001 *De Rebus* 57). In

this case a Cape Town bookmaker successfully sued a Durban-based businessman for gambling debts of R4 million owed for unpaid bets placed on horse races. The gambling debt itself was found to be enforceable, as it was lawfully incurred. The legislative provision this judgment was based upon, section 18 of the (then applicable) National Gambling Act 33 of 1996, was almost identical to section 65 of the Lotteries Act and it is submitted that this decision should be followed where the National Lottery operator is sued for payment of an outstanding winning lottery ticket.

2.2 *Illegal lottery in contravention of legislation*

The common law does not deal with gambling agreements specifically prohibited by legislation. The question to be asked is whether agreements prohibited by statute are void or merely unenforceable? These agreements are generally void but not always, as some unlawful contracts, although unlawful, may not be void. Sharrock states that, as a general proposition, any agreement penalized by statute is void and it is presumed to be void until the contrary has been established. But, "the crucial inquiry in each case is whether the legislature intended the transaction to be void as well as illegal. If the enactment does not specifically state whether the agreement is void ..., the intention of the legislature must be determined by considering the 'language, scope and object [of the legislation] and the consequences in relation to justice and convenience of adopting one view rather than the other' ..." (Sharrock *Business Transactions Law* 6ed (2002) 99; and see also Christie 391-398). Sharrock refers to two guidelines that have crystallised in the courts: firstly, in light of *ABSA Insurance Brokers (Pty) Ltd v Luttig NNO* (1997 4 SA 229 (SCA)), that the legislature would have intended to invalidate the agreement if upholding it would give rise to the very situation the legislature intended to prevent; and secondly, following *Pottie v Kotze* (1954 3 SA 719 (A)), that the legislature would not have intended invalidity where the criminal sanction would be an adequate deterrent, or where greater hardship would result from invalidating the contract than from upholding it (Sharrock 99).

In the previous legislation applicable to lotteries, the Gambling Act of 1965, under the heading of "Prohibition of participation in a lottery ..." it was provided *inter alia* that "no person shall establish, manage or conduct a lottery" (s 2(1)). Any lottery run in contravention of this Act would thus have been unlawful as it was "tainted with criminality" (Kerr *The Principles of the Law of Contract* (1998) 179). This was interpreted to mean that any contract between the organiser of the unlawful lottery and the participant would be void (Joubert *General Principles of the Law of Contract* (1987) 141) and any money won would not be claimable at law (Joubert 142).

The wording of the Lotteries Act is slightly different. Under the heading "General offences" the Act provides that any person who participates in or conducts an unauthorised lottery is guilty of an offence (s 57(1)). If one applies the *ABSA* case referred to by Sharrock, it can be argued that to uphold an agreement arising from an illegal lottery would give rise to the

very situation the legislature intended to prevent. Joubert (141) argues that even where the statute forbids a particular type of wager on pain of a penalty, the wager would still be treated the same as in the common law, leading to practically the same result. In terms of the common law, gambling contracts in contravention of legislation are null and void and create no legal rights whatsoever between the parties. (Hutchinson (ed) *Wille's Principles of South African Law* 8ed (1991) 450 with reference to *Rousseau NNO v Visser* 1989 2 SA 289 (C) and *Visser v Rousseau NNO* 1990 1 SA 139 (AA) 148f-g; *Yannakou v Apollo Club* 1974 1 SA 614 (A) 622; *Affhauser v McLeod* 1909 TS 827; and *CIR v Insolvent Estate Botha t/a "Trio Kulture"* 1990 2 SA 548 (A). See also Harker par 430).

In short, the holder of an unpaid winning lottery ticket bought in an illegal lottery would not find any relief in the courts.

In summary it can be concluded that where a lottery debt arises from a lawful lottery, it is enforceable, but where the lottery is run in contravention of the Lotteries Act, it is null and void.

3 Enforcement of a partnership agreement to share lottery winnings, collateral or ancillary to the gambling contract

"You double the opportunity to win ... you only end up with half of what you might have had, had you been ... on your own, but you have got twice the chance of winning it ..." (*Robertson v Anderson* ((Scottish) Court of Session) 2002-12-05 unreported case A 12234/01 par 14).

3 1 Lawful lottery

"In the case of games of chance a distinction must be drawn between games which are illegal and those which are not. This distinction ... is of crucial significance in so far as it concerns the validity of ancillary contracts such as contracts of partnerships ..." (Harker par 429).

3 1 1 It is one of the *essentialia* of a partnership agreement that a partner has the right to share in the profits of a partnership (Cilliers, Benade, Henning, Du Plessis, Delpont, Fourie and De Koker *Entrepreneurial Law* (1993) 4.14). In terms of the common law, a partnership agreement, collateral or ancillary contract to a lawful (but then unenforceable) gambling contract, was fully enforceable as the turpitude of the gambling contract did not extend to the partnership agreement (Hutchinson 451; Harker par 437; *Whittet v O'Connor* 1918 NPD 376; and *Goldstein v Nochemowitz* 1914 OPD 95).

As the gambling debt is now enforceable, *a fortiori*, so is the partnership agreement. In practical terms this would mean that where a person enters into a partnership agreement to share winnings from the National Lottery, a private lottery, a societal lottery, a lottery incidental to exempt entertainment or a promotional competition in terms of the Lotteries Act, such an

agreement would be enforceable and any winnings would have to be shared between the partners in accordance with their agreement.

3 1 2 A similar result would be reached in terms of the Scottish common law as was seen in the case of *Robertson v Anderson* ((Court of Session) *supra*). Although the partnership agreement related to the sharing of bingo winnings, a lawful gambling game in Scotland, the principles are similar. In this case the parties had an agreement to “go halfers” with regard to any big prize won whilst playing bingo. Anderson won in excess of £100 000 and Robertson sued her for half the amount in terms of their agreement. Anderson denied knowledge of the agreement. The arguments of the parties were as follows:

Anderson submitted that the contract between them was a *sponsio ludicra* (translated to mean “lacking in that element of seriousness and deliberation which is essential in our law” (De Villiers JP in *Fisher v Straiton supra* 57)), making the recovery of a gaming debt not maintainable against the party to the gaming contract. As each party had an interest in the gaming contract that they entered into with the operator when they played the game, the contract between the parties to share any winnings was intimately connected with the gaming contracts. Anderson argued that it was not merely collateral or incidental to the gaming contract and as such, it should also be unenforceable (par 16 of the judgment).

Robertson on the other hand argued that in terms of the Scottish common law, gaming debts are not “maintainable against a party in the gaming contract with whom the bet or wager is made. ... (but) the court will deal with an action which is connected with the gambling transaction if the connection is collateral or incidental” (*Cumming v Mackie* 1973 SC 278 279-280 as quoted with approval in *Robertson v Anderson supra* par 16). She argued further that the concept of *sponsio ludicra* was confined to gaming contracts or contracts which sought to enforce gambling contracts. As the contract *in casu* was collateral to the gaming contract and not a gaming contract itself, it should be enforceable (par 17).

The court agreed with Robertson and found that the Scottish law does neither define the concept of *sponsio ludicra* precisely, nor the scope of its application. The decided cases are unclear and some cannot be reconciled (par 19). The court found that although their contract related to gaming, it was not in itself a gaming contract and thus did not involve a question of *sponsio ludicra* (par 22). The court ordered Anderson to pay half the winnings to Robertson.

3 1 3 Similarly, the Texan case of *Iacono v Lyons* (No 01-99-00726-cv (Tex. Ct App 1st Dist; March 16, 2000)) (Gaming Law Review Volume 5/6 (1999) 344) is relevant, although the facts in this matter were slightly different from the case above. Iacono and Lyons were friends and Lyons invited Iacono for an all-expenses-paid trip to Las Vegas, because Lyons thought Iacono was “lucky”. Casino gaming in Las Vegas, Nevada is lawful. Iacono alleged that they had an agreement to split any winnings in the casino. Lyons won the jackpot of US\$1-million and refused to share it with

lacono. lacono herself did not gamble. The trial court granted summary judgment in favour of Lyons. The reasoning was firstly, that the contract was an unenforceable oral contract in violation of the Statute of Frauds since the jackpot was payable over 20 years; and secondly, that the contract was void for lack of consideration. This decision was taken on appeal and the appeal court overturned the decision of the trial court and found, with regard to the first argument, that any agreement that could possibly be performed within a year, satisfied the Statute of Frauds. The court found that if the agreement to share the winnings is proven at trial, it could be performed within a year. Secondly, the court found that in Texas, "valid consideration [implies] mutuality of obligation, *id est* any exchange of promises bargained for". In other words, "consideration consists of benefits and detriments to the contracting parties". The court, applying the summary judgment standard, found that lacono raised a genuine issue of material fact and set the judgment aside. The court made no finding on the existence of the agreement, but added that if the agreement were proven at the trial court, it would be enforceable.

3 1 4 Both the Scottish and Texan Laws are thus *ad idem* with the South African law on this point, namely that a partnership to share winnings in a lawful gambling game is enforceable.

3 2 *Illegal lottery in contravention of the legislation*

"Any lawful enterprise may form the object of a partnership. Unlawful objects include the commission of an offence; thus a partnership formed to enter into a prohibited gaming and gambling transactions would be unlawful" (Harker par 437).

Does a partner have an enforceable claim against another partner who refuses to share with him the winnings from an unlawful lottery?

Two situations should be distinguished. Firstly, where the partners reside within South Africa and the unlawful lottery itself is also conducted in South Africa. Secondly, the situation where the partners are in South Africa, but the lottery was (lawfully) conducted in another country's jurisdiction. This scenario is gaining more relevance with the participation of South Africans in foreign interactive lotteries via the Internet. Statistics on South Africans playing foreign lotteries are not available, but it is interesting to note that some of the foreign lottery websites are available in Afrikaans (<http://www.playuklottery.com/afr>), indicating at least some South African participation.

3 2 1 Partners and lottery in the same jurisdiction

3 2 1 1 In terms of the common law, if the object of a partnership is illegal, the partnership is void and has no legal effect (Henning and Delport "Partnership" in Joubert (Ed) *The Law of South Africa* First Reissue Vol 19 (1997) par 278). The partnership agreement is tainted with the illegality of the

gambling operation and unlawful, as it promotes an illegal act (Harker 437). As the illegality of the gambling contract taints the collateral partnership agreement, the court would not assist a partner in enforcing a partnership agreement to partake in an illegal act. Two cases are relevant here.

In *Grant v Collett* (1883) NLR 32, Collett sued Grant for £29 14s, the value of a sealed packet that contained that sum of money, addressed to him and deposited with Grant's wife for delivery to Collett. Collett was a stake-holder in an unlawful lottery and his proceeds was in that packet. Collett's wife however gave the money to P who claimed it. In terms of the Natal Law 25 of 1978 (s 1), all lotteries were declared to be against the law. The court referred to Voet and the general rule that a contract could not be enforced if it was based on what is unlawful. The court found that the illegality tainted the deposit and the consequences were therefore similar to that of a thief and that the law would not aid Collet. Collett's action failed.

The court in *Meyer v Legge* (1909 TS 226) reached a similar conclusion, although the final decision was based on a lack of evidence of the alleged partnership. Meyer argued that he bought a ticket in a lottery for a motor-car on the name of Legge on condition that he, Legge and Shaddock should share the prize if won. Legge won the car and disposed of it and Meyer sued him for a third of its value. The court found that the lottery ticket was a gift from Meyer to Legge. The court *obiter* stated that the taking or having of any share in a lottery ticket was a contravention of section 1(c) of Law 7 of 1890 (T), as it was a criminal offence to sell or dispose of any ticket in a lottery or to have a share therein, Meyer's claim should fail as he was suing as an accomplice in an unlawful and criminal transaction (229). The court distinguished the facts in this case from *Dodd v Hadley* (*supra* 439) where the contract was merely unenforceable. In this case (*Meyer v Legge supra*) the contract was based on what was illegal and criminal. The court noted with approval the case of *Yenka Reddy v Naidoo* (1916 NPD 210) where the money paid towards an unlawful "chit" was found not to be recoverable.

The same principle is applicable to other types of ancillary contracts (Christie 440): a loan agreement to settle an illegal gambling debt is unrecoverable (*Thompson v Van der Lingen* 1942 NPD 295), as are contributions to a partnership for illegal gambling purposes (*Jacksen v Black* 1945 CPD 317).

For purposes of completeness, it should be noted that section 2(1)(a) of the now repealed Gambling Act 51 of 1965 specifically prohibited the establishment of a partnership with the object of conducting an (unlawful) lottery. This section was not repeated in the 1997 Act. Thus it could be argued that as the common law was amended by the 1965 Gambling Act, it would, on the repeal by the Act, revive the common law on this point. (Botha *Wetsuitleg* 3ed (1998) 113 and Van Graan *Interpretation of Legislation in South Africa* (1995) 183 both with reference to *Rand Bank v De Jager* 1982 3 SA 418 (C). This argument is however by no means settled, but ignored for purpose of this note.)

3 2 1 2 Events in the past decade or two, leading up to the promulgation of the Lotteries Act, are deserving of some attention. Prior to the commencement of the Act, several lotteries were conducted mainly by, or on behalf of, charitable organisations, which were technically unauthorised and unlawful in terms of the Gambling Act 51 of 1965 (s 2-5). These lotteries however “enjoyed increasing public support and implicit, if not express, sanction of decision-making authorities. Closest to general familiarity would be the various scratch card competitions, with tickets being sold from public kiosks, retail stores and the Post Office ... In addition there were fundraising mechanisms such as the Defence Bonds and fun events at community fêtes and bazaars ... These all constituted forms of a lottery as defined in the 1965 Act” (Brand *Gambling Laws of South Africa*, loose leaf revision service 4 (2002) 11-1 to 11-2). Notwithstanding attempts by the legislature to counter these unlawful activities in the early 1990’s, these activities remained operational (Brand 11-2).

The Lotteries Act, upon its commencement in 1998, contained certain arrangements whereby these unlawful operators could, within three months of the coming into operation of the Act, apply for registration in terms of the Act. This registration would have rendered their activities lawful until a date determined by the Minister, eventually determined to be 24 February 2000 (GN 173/2000 in GG 20907 of 2000-02-18). Although the majority of the provisions of the Act commenced 28 August 1998, the Regulations relating to the Registration of Unlawful Lotteries were only published in November 1998 (GN 1513/1998 in GG 19503 of 1998-11-20). Until the time of registration (20 November 1999), lotteries were technically unlawful.

3 2 1 3 During this time the case of *Pillay v Denton & Denton* ((NPD) 2001-11-08 case number AR 214/2001)) was heard. On 11 September 1998 the winning ticket for the KwaZulu-Natal lotto was purchased at Hutton Motors, entitling the holder to the jackpot prize of R1 589 826. The amount was paid to the second respondent, Mrs Denton, who was married out of community of property to Mr Denton, the first respondent (hereinafter “JD”). The appellant (Pillay) claimed half the amount of the jackpot from the respondents jointly and severally based on a joint venture between him and JD to share any lotto winnings. The court *a quo*, after hearing oral evidence, granted an order absolving the respondents from the instance, with costs. Pillay appealed.

Without dealing with the procedural issues, it is sufficient to note that the court on appeal made the following factual findings on a balance of probabilities: firstly, that Pillay and JD entered into a joint venture in respect of the lotto tickets JD purchased on the date in question from Hutton Motors; and secondly that there was a “deliberate attempt on the part of the first and second respondents to defraud the plaintiff of his share of the winnings”. The court found that the respondents were jointly and severally liable in terms of the law of delict and that JD was further liable by virtue of his contract with Pillay. The appeal was successful, although there was no discussion of any legal principles.

In the assessment of the *Pillay* case, the first issue arising from this matter relates to the legality of the KwaZulu-Natal lotto. The relevant dates *in casu* are 11 September 1998 (date of the purchasing of the ticket); 28 August 1998 (date of commencement of the sections of the Act relating to unlawful lotteries as well as the registration of unlawful lotteries provisions) and 20 November 1998 (promulgation of the regulations relating to the registration of unlawful lotteries). When the ticket was bought, KwaZulu-Natal lotto was technically an unlawful lottery in terms of the Act and subject to the offence clause (s 57(1)). The Lotto, at that time would not have been able to apply for registration and subsequent legalisation in terms of the transitional provisions. Even if they had, subsequently, been registered, it would only have made their activities lawful from the date of registration (s 66(3)). The common law position was thus still applicable to the facts as set out in this case.

If one accepts that in common law an unlawful, illegal lottery did taint a collateral partnership agreement to share the winnings (*Grant v Collett supra* and *Meyer v Legge supra*), the partnership agreement between Pillay and Denton should not have been enforceable, as the lottery was unlawful and conducted in contravention of the then applicable legislation. The judgment of *Pillay v Denton (supra)* is thus out of line with earlier cases and wrong.

3 2 1 4 One might be able to argue that the partner who received the winnings is unduly enriched if he does not share the winnings with his partners. The court would however still refuse to enforce the partnership agreement, as enforcement would amount to the enforcement of an unlawful agreement (Henning and Delpont par 278).

3 2 2 Partners in South Africa, but the lottery operated in another jurisdiction

3 2 2 1 In terms of the common law, a partnership agreement to share lottery winnings was enforceable if the lottery was legally conducted in the country where the lottery took place. The partnership was, after all, a partnership with a lawful object, namely to participate in a lawful lottery. A penal statute only applies to acts committed within the territory of the country where the statutes were passed (Kriegler *Hiemstra Suid Afrikaanse Strafprosesreg* 5ed (1993) 227). If the gambling contract itself is not unlawful, then the partnership agreement ancillary thereto is also not. Three judgments are important in this regard.

In *Wilson v O'Halloran* ((1899) 20 NLR 155) five men from Natal formed a syndicate to purchase five tickets in the Phillips sweep drawn in Johannesburg where it was legal, and to divide the proceeds from any prize. O'Halloran, who was in charge of the tickets, on finding that his ticket won a prize, tried to deceive the others by misrepresenting the number of the winning ticket and decided to keep the winnings. Upon being sued, he argued that the contract was unlawful in Natal because it was a gaming transaction in violation of the legislation. The court referred to the Roman-

Dutch writers in general (although no authority was cited) and held that in the case of a partnership for the purpose of gambling, the other members may recover the proceeds fraudulently retained by one partner.

Similarly, in *Bishop v Conrath* (1947 2 SA 800 (T)) the parties agreed in the Transvaal to form a syndicate to purchase tickets in the lawful Rhodesian State lottery. It was agreed that Conrath would secure the tickets in his own name for the benefit of the syndicate. A ticket purchased by Conrath won and in a claim for a share in the winnings, an exception was taken that Law 7 of 1890 (Transvaal) made the transaction a criminal offence. "Sec 1(a) and (b) prohibits the establishment or conduct of lotteries, and sec 1(c) strikes any person who ... 'sells or disposes of any ticket in a lottery or offers to sell or dispose of or takes or purchases or has any share therein'". The court held that the agreement was concluded in Rhodesia and in terms of the law of Rhodesia where the lottery was lawful. As Law 7 of 1890 was only applicable to the Transvaal and only where the positive act of acquiring was committed within the borders of the Transvaal, the exception was dismissed. The court argued that, as statutes do not operate extra-territorially, the court need not deal with contracts concluded in foreign countries. Conrath had to share the winnings.

In *Garth v Lai* (1961 2 SA 15 (W)), Garth and Lai, who both lived in the Transvaal, agreed to form a partnership whereby they jointly purchased tickets for the Ndola lottery (in the then Rhodesia) with the understanding that they would share all winnings equally. After winning a prize of £10000, Lai paid Garth only £600. Garth sued him for the remainder of his half-share. The Transvaal legislation (Law 7 of 1890) stated that "a subscriber to a lottery shall not be entitled to take any legal steps for the obtaining of transfer, delivery or payment of any (lottery) prize ..." The court found that the "prize" of the lottery ceases to be a prize after it has been paid out. The section was interpreted in such a manner that a member of a partnership could sue for his half-share of the winnings of the lottery as agreed upon.

The approach by this court, to interpret the legislation restrictively so as not to prevent the partner from claiming his share of the winnings, has been quoted with approval by Christie (420) and in *Nkosi v TAB (Transvaal)* (1980 1 SA 122 (T)); *Mcangyangwa v Nzima* (1993 1 SA 706 (E) 712); *Banco Exterior de Espana SA v Government of Namibia* (1992 2 SA 434 (Nm) 444); *Ex parte Liebenberg* (1992 4 SA 691 (T) 693); and *Minister of Law v Mathebe* (1990 1 SA 114 (A) 119).

3 2 2 2 The question *in casu* is whether the Lotteries Act changed the common law on this point, namely to make partnerships to participate in a lottery outside the country illegal even though it is lawful in that country? Section 59 of the Act states that "(i)n a prosecution arising from anything done or not done in the Republic in connection with a lottery ..., it shall not be a defence merely to prove that the management, conduct or business of or concerning the lottery ... in question is or was wholly or in part carried on at a place outside the Republic".

It is submitted that this section is aimed at the prosecution of unlawful acts within the country. It is not relevant to partnerships entered into in the country with the object of doing something legal in another country. Such a partnership agreement remains lawful. The Act thus does not change the application of the common law and the rules as set out in 3 2 2 1 are still applicable. Practically it is submitted to mean that a partnership agreement to buy foreign lottery tickets is lawful and such an agreement to share the winnings should be enforceable in South Africa.

4 Conclusion

In conclusion, the current legal position could be summarised as follows: with lawful lotteries conducted in accordance with the legislation, both the contract between the operator and ticket-holder, as well as the agreement between partners who agree to share the winnings, are enforceable.

With regard to illegal lotteries, the contract between the operator and the ticket-holder is void and unenforceable in the courts. A partnership agreement to share in the winnings of an unlawful lottery conducted in South Africa is unenforceable, as the illegality of the unlawful lottery taints the partnership agreement.

Where the partnership agreement relates to a lottery lawfully conducted in another country, the partnership agreement entered into in South Africa is enforceable.

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