

*A gambler, a casino, a suicide by self-immolation –
and “business is as usual”*

**VULNERABLE PROCESS-ADDICTED
MENTALLY ILL GAMBLERS:
THEIR STATUTORY RIGHTS AND
GAMBLING INDUSTRY DUTIES TO THEM**

*Compliance and Gambling’s own Apartheid:
Responsible Gambling, Provider Duties and
Gambler Roles in Public Law and Public Health*

A legal essay to mark the life and passing of
the late Peter Williams

A legal essay to mark the life and passing of

Peter Williams

1969 - 2016

*Everybody liked him
He was a clever guy*

He intended “to burn his despair into public consciousness”

A person, in governance and ethics

A citizen, in the Constitution

A customer, in consumer protection

A gambler, in gambling law

Author

Peter Strasheim

BA (*Psychology III; Political Science III Roman Dutch Law III; Government & Law II;*)
(University of Cape Town, *South Africa*)
LLB, B.Proc (University of Cape Town, *South Africa*);
Admitted Attorney of the High Court of South Africa (n-p)
Advanced Labour Law (University of South Africa);
MAP (University of the Witwatersrand, *South Africa*);

Medical and Disability Law

Consultant, Lawyer, Legal Advisor, Trainer, Lecturer, Author and Expert Witness

Johannesburg,
Gauteng Province
South Africa
+27 11 486-0478
+27 73-340-7596
stras@iafrica.com

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The author has gambled in various countries about six times at casinos only and placed a bet on a horse once. The author has never requested or received a loyalty card / an MVG card / any comps / any concessions.

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“Everybody Knows”¹
Leonard Cohen

*Everybody knows ... that the dice are loaded
Everybody rolls with their fingers crossed
Everybody knows ... the war is over
Everybody knows ... the good guys lost
Everybody knows ... the fight was fixed
The poor stay poor, the rich get rich ...
That's how it goes ...
Everybody knows ...*

On 24 July 2016, a normal Sunday in Johannesburg, South Africa, a gambler’s suicide inside a casino, and a casino’s response to it started a process of change. The tragedy focused social and printed media attention to how gambling providers respond to vulnerable gambling customers who become process-addicted to gambling, or who are at risk to it.

This paper reviews how addicted gamblers are treated by gambling service providers in terms of gambling legislation – and concludes that gambling service providers do not appear to be complying with the law: the constitution, applicable non-gambling legislation as well as the common law and international conventions.

1 A TRAGEDY – IN A CASINO

That Sunday, a casino’s gambling customer who had been experiencing extreme psychiatric distress decided to end his life dramatically, by self-immolation, through dousing himself with an inflammable liquid, and then setting himself aflame in a deliberately selected venue: inside a casino, near the casino entrance, in front of the designated gambling area, near the machines.

After the tragedy, later that same day, the casino may have wanted to downplay its customer’s tragic decision to end his life dramatically on the casino’s own premises: it recorded on social media that “*business is as usual*”. That response ensured that any expectation the casino may have had to minimize the incident would be lost. Social media users reportedly noticed that response, but cared about the gambler and empathized with the tragedy of his demise – and criticized the casino for its response and slated its attitude.

1.1 Suicide in the Public Consciousness

Maybe the casino hoped to shift attention from the incident; a mirror to Pieter Bruegel’s ‘*Landscape with the Fall of Icarus*’, a painting depicting man’s first attempt to fly – a momentous event is portrayed as just one activity within a much wider frame – one of many at that place, that day, that time. But for the casino that day at that time, social media delivered an unexpected result.

¹ Lyrics taken from the webpage <http://www.azlyrics.com/lyrics/leonardcohen/everybodyknows.html>

Some suicides become memorable: Life Magazine ensured Evelyn McHale's fall from the 86th floor of the Empire State Building would become symbolized by an image of her at peaceful rest on the roof of an automobile; Associated Press marked the tragedy of 9/11 by an image of Norberto Hernandez, the 'falling man', reconciled and descending against the backdrop of the North Tower's windows.

But that Sunday in Johannesburg, that tragic event in the casino, the life of that gambler, the casino's response and the social media censure would mean that the death of that gambler would never be able to be disregarded with indifference as just another gambler suicide in just another casino, in which "*business is as usual*".

1.2 The Gambler and the Suicide

The casino's customer that day was Mr. Peter Williams, a 47 year old unmarried Information Technology professional living in Johannesburg, a "*clever guy*" that "*everybody liked*". The next day, electronic media ² reported that he had "*lost a lot of money gambling*". ³ Mr. Williams was a customer who gambled but had reportedly struggled with gambling addiction for many years but had relapsed. ⁴ He was claimed to have gambled R180,000 the night before his death.

Mr. Williams' cousin said he appeared to have planned to end his life by suicide through self-immolation and to have taken deliberate steps to perform it inside the casino venue itself. ⁵ The reporter inferred that by planning and performing his suicide in the casino itself, Mr. Williams had intended "*to burn his despair into public consciousness*".

Mr. Williams, the tragedy of his suicide, the method he chose and the place he did so at are unlikely to be readily forgotten, by many, and for many reasons. A man's life was sadly lost in a dramatic way by a distressing method. But a concerned and alarmed public did notice and was not indifferent: in the social media ⁶ the public empathized about the life of a vulnerable gambler, how that life had been forfeited and the reasons why it had happened.

Social media telegraphed the reality that any suicide is always a tragedy and amplified the concern about suicide's consequences: a human life ends; a spouse is bereaved; children lose a parent; a family is devastated; relatives and friends are shocked; witnesses to it are traumatized. For everyone, the implications take time to understand, process and accept.

² A MzansiLive.co.za report undated and unattributed: '*Man Bets, Loses R48,000 and wife, Kills Himself at Montecasino*' [<http://mzansilive.co.za/man-bets-loses-money-wife-montecasino/>]

³ SA Breaking News report 26 July by Ole! Media Content Hub: '*Montecasino Suicide Man Kept Losing Money*' which reports that "*An eyewitness, who asked to remain anonymous, told News24 that she heard the man lost a lot of money gambling before setting himself on fire at the casino in Sandton, Johannesburg*" and "*They told us he kept losing money. When he lost everything he went to his car and came out and set himself on fire. We suspect he went to the car to douse himself with petrol or paraffin.*" [<http://www.sabreakingnews.co.za/2016/07/26/montecasino-suicide-man-kept-losing-money/>]

⁴ Sunday Times 11 September 2016 page 5: '*Casino owners deny link between death and losses*': "*Williams was 47 and an IT professional, employed by a Randburg firm for more than 10 years. He relapsed into gambling recently, after many years of recovery from an earlier addiction. He was single, but cherished family life, living with his parents at weekends and other relatives near his workplace during the week. 'Everybody liked him' said Byrne [a cousin of the deceased]. 'He was a clever guy'*"

⁵ Sunday Times 11 September 2016 page 5: '*Casino owners deny link between death and losses*': "*It appears he went home, slept, got up and decided to commit suicide. I found evidence in his car and in his flat that he planned it; purchase slips and stuff. He left his keys in the car and his cellphone at home. There was no suicide note anybody could find. According to witnesses, relying on what the police told us, he poured petrol over himself, then lit himself and ran through security, who weren't going to stop a burning person, ran downstairs, then upstairs, then towards the gambling hall, and collapsed just before he reached the machines. And that's where he died.*"

⁶ In social media on the "Twitter" platform. Twitter account-holders' "tweets" reflected their concern and distress - and censure of the casino.

1.3 The Casino and its Response

That same Sunday, reportedly not long after the tragedy, the casino decided to use social media⁷ to publicly assure its patrons that, from the casino's point of view, "*business is as usual*".⁸ That assurance on social media reportedly resulted in the casino being "*slammed*"⁹ by the public for "*insensitive handling of suicide*".¹⁰ The casino reportedly deleted the social media posting later the same day.

But by even that early stage, the casino had published its response – and social media reportedly censured the casino for responding in an unsympathetic and indifferent way. The gambler had suffered catastrophic damage – and it appears the casino may have damaged itself.

1.4 The Social Media and its Censure

The reported South African on-line reaction in social media appeared to have been as rapid as it was unambiguous: the contributors showed that they cared about the life of a gambler who had self-immolated in a casino and that they expected from the casino a more sensitive and humane response. To social media users, it apparently made no difference at all that the tragedy had happened to a member of a group society stigmatizes – a 'problem' / 'pathological' / 'disordered' gambler. Social media users cared about him, about what he had endured and about what had happened to him.

Social media's response was as it should have been in terms of South African law. It reflected the way South African legislation expects citizens to treat and respect each other: the Constitution imposes a duty on every private person to treat any other person with *dignity*, with *equality*, with *ubuntu*, and to promote their right to *freedom* in the form of "*psychological integrity*" and to *not unfairly discriminate* on the grounds of a mental disability. These same expectations and requirements also apply to business entities, but it appears the casino reportedly may not have responded that way.

1.5 National Media Attention

Six weeks later, the tragedy was reported nationally in the printed and the electronic versions of South Africa's leading Sunday newspaper.¹¹ A full-page spread in the print edition featured the incident and covered aspects of it in four articles, a statistical table and

⁷ <https://twitter.com/MONTECASINOZA>

⁸ Montecasino [@MONTECASINOZA] tweeted that "*Business is as usual as the investigation takes place now*", which has been deleted from the twitter account. That tweet had followed a previous tweet that "*We are aware of a incident of fire outside one of our restaurants & are currently investigating & will keep you updated on further details.*" A tweet subsequent to the (now deleted) 'business is as usual' tweet read "*Please see the following statement just released on the incident that took place this afternoon – An incident, involving a possible suicide, involving a man who set himself alight at the entrance, before the security checkpoint of Montecasino has been reported to the SAPS who are currently investigating. Emergency services are also on the scene and precautionary measures were immediately taken to ensure the safety of visitors. Our thoughts are with the family and friends. Please direct all queries to the SAPS.*"

⁹ A DestinyMan.com on-line report by Zukiswa Zimela dated July 25 2016: "*Montecasino criticised for insensitive tweet after suicide - Montecasino's management team has been slammed for its initial response to the death of a man who set himself alight in the centre on Sunday*".

[<http://www.destinyman.com/2016/07/25/montecasino-hot-water-following-insensitive-tweet-suicide/>]

¹⁰ A TimesLive.co.za on-line report dated 24 July 2016: "*Montecasino takes flak for insensitive handling of suicide*" and reproduced tweets that expressed views such as "*how insensitive*"; "*Oh dear. Perhaps time for the #MonteCasino social media team to attend a refresher communications training?*"; "*may as well say "we still want your money although someone just killed himself here"*" and "*if you are still eating & gambling at #MonteCasino just after someone killed himself right there. Please reevaluate your life*".

[<http://www.timeslive.co.za/local/2016/07/24/Montecasino-takes-flak-for-insensitive-handling-of-suicide>]

¹¹ Sunday Times 11 September 2016 at page 5: four articles: (1) '*Dicing with Death - Against the Odds*'; (2) '*Casino owners deny link between death and losses*'; (3) '*Gambling addicts more than a safe bet for casino operators*' and (4) '*An insane addiction that takes no prisoners*' and one table titled '*The House Wins [-] Gambling in Numbers*'.

gave web addresses to access stories of two recovering members of Gamblers Anonymous South Africa and that organization's website.

The reporter¹² summarized the event,¹³ described the gambler's suicide,¹⁴ reported the casino's claimed "efforts to identify and help customers at risk" and the "responsible gambling" service's comment,¹⁵ recorded the contribution of addicted gamblers to casino revenues¹⁶ and provided excerpts from the stories of "two recovering gambling addicts".¹⁷ A table of gambling statistics was also provided.¹⁸

2 THE LEGAL ISSUES

One of the articles¹⁹ recognized that the gambler's tragic suicide raised crucial questions, which the reporter put to the casino – and then quoted the casino's responses.

2.1 Is there a Link Between Addicted Gambler Suicide and Gambling?

The question put to the casino was whether the casino perceived a link between the gambler's suicide and gambling? Based on the reported facts and circumstances²⁰ for some the answer might have been a foregone conclusion.²¹²² For others an apology²³ might be appropriate. But in this instance that apparently did not happen. The newspaper article reports that "... the company also denied a link between his death and his losses" and recorded the reasoning: the casino's spokesperson responded that "We have not been advised this gentleman's tragic suicide was in any way related to gambling."²⁴

So it appears the casino's basis for not recognizing there that there was (or might be) "a link" between the gambler's suicide and the gambling venue it happened at was that no one had "advised" the casino there was one.²⁵ This appears not dissimilar to apologizing by giving a

¹² The Sunday Times' Carlos Amato.

¹³ 'Dicing with Death - Against the Odds | The gruesome death of Peter Williams was a shocking reminder of the human cost of gambling – but experts say casinos do little to help the addicts who fill their coffers'. (Sunday Times 11 September 2016 at page 5).

¹⁴ "He poured petrol over himself, then lit himself and ran through security, who weren't going to stop a burning person, ran downstairs, then upstairs, then towards the gambling hall, and collapsed just before he reached the machines. And that's where he died."

¹⁵ 'Casino owners deny link between death and losses'. (Sunday Times 11 September 2016 at page 5).

¹⁶ 'Gambling addicts more than a safe bet for casino operators'. (Sunday Times 11 September 2016 at page 5).

¹⁷ 'An insane addiction that takes no prisoners'. (Sunday Times 11 September 2016 at page 5).

¹⁸ 'THE HOUSE WINS Gambling in numbers'. (Sunday Times 11 September 2016 at page 5).

¹⁹ 'Casino owners deny link between death and losses'. (Sunday Times 11 September 2016 at page 5).

²⁰ The circumstances and facts concerning Mr. Williams suicide were reportedly the following: he was an addicted gambler; he had gambled the previous day at that casino; he had lost a bit less than R200,000 the previous day; he planned later that day to commit suicide; he chose to die inside the casino he was at the previous day; he chose that venue over all the other locations that were viable alternatives; he bought the means to be able to die in that casino; he drove to that casino and parked near the entrance; he set himself aflame elsewhere but ran to the gambling machine area; he wanted to performed the suicide in that casino; he burned to death just before reaching the gambling machines.

²¹ 'Casino owners deny link between death and losses'. (Sunday Times 11 September 2016 at page 5): see the response of the former director of the South African National Responsible Gambling Foundation, Professor Peter Collins, as "If somebody is prepared to set himself on fire, I'd be surprised if there was no indication beforehand that he was in trouble."

²² 'Casino owners deny link between death and losses'. (Sunday Times 11 September 2016 at page 5): see the reference to South African National Responsible Gambling Foundation information that "about 22% of problem gamblers have attempted suicide and 52% are thinking of suicide by the time they seek help."

²³ Its useful to consider what an "apology" actually is. An advisor at Pike Law Adam Pike, in a LinkedIn blog on 22 November 2016 titled 'The Anatomy of an Apology' (see <https://www.linkedin.com/pulse/anatomy-apology-adam-pike>) records the origin: "The word apology is derived from the Greek word apologia (ἀπολογία). An apologia is a formal written defence of one's opinions or one's conduct. The synonyms for apologia are defence, justification, vindication, explanation, argument, case and plea. ... Presently, an apology is understood to be a regretful acknowledgement of an offence or failure."

²⁴ "It was a definite statement ... that gambling can kill." "Tsogo Sun, which owns Montecasino, expressed sadness and offered condolences to Williams's family this week. But the company also denied a link between his death and his losses. "We have not been advised this gentleman's tragic suicide was in any way related to gaming," it said." See <http://www.timeslive.co.za/sundaytimes/stnews/2016/09/11/It-was-a-definite-statement-...-that-gambling-can-kill>

²⁵ Of course the essence of a proper apology is to actually accept responsibility for the thing that prompted the need to say anything at all. In South African law, apology comes up in defamation law: courts have commented on what a proper apology actually is. Pike in 'The Anatomy of an Apology' (see above) cites *Ward Jackson v Cape Times Ltd* 1910 WLD 257 which at page 263 (per Curlewis J) ruled that an apology should contain the following:

- an unreserved withdrawal of the defamatory statement;
- an expression of regret that the defamatory statement was made.

non-apology: 'If I offended anyone, I apologize'. No statement of admission of wrongdoing, acceptance of responsibility and sincere regret is stated or given.

This paper provides information that appears to show that a link between gambler suicide and gambling is already well established.

2.2 Are Casinos Adequately Supporting Addicted Gamblers?

Another question put to the casino was whether after the tragedy the casino would offer more support to addicted gamblers: the casino was asked “[would Williams’ death] *prompt greater efforts to identify and help customers at risk*”? From the reported facts and circumstances²⁶ it might be reasonable to think the answer would again be a foregone conclusion. However “[the casino] *said it gave information on problem gambling in casino signage as required by regulations*” and “[the casino] *also gave gamblers the option of voluntarily banning themselves from all casinos.*”

The casino spokesman referred to gambling legislation only – and to the two duties gambling legislation imposes. The casino also implied that it complied with both. But since the question related to addicted gamblers (like Mr. Williams) a legal problem arises: the casino appears to have referred to the *wrong legislation*, given the *wrong information* and complied with the *wrong duties*.

The casino’s assurance appears to show that it *had* complied with the wrong legislation – and by implication that it was *not* complying with the right legislation.

The reason is that for *the majority* of gamblers, gambling legislation applies. However for *the minority* of vulnerable gamblers who *have become process-addicted to gambling and are or appear to have the psychiatric diagnosis of Disordered Gambling and suffer from this disabling mental illness and its consequences*, then non-gambling legislation applies.

Gambling legislation was enacted to regulate the majority of gamblers and gambling generally. But *gambling legislation* does not address the specific rights and needs of gamblers who become mentally disabled and psychiatrically disordered by process-addiction to gambling and directly harmed by gambling – *non-gambling legislation* does that.

Non-gambling legislation establishes a range of rights for persons with mental and physical disabilities – which includes vulnerable persons such as gamblers who have become process-addicted to gambling and have the psychiatric diagnosis of Disordered Gambling and who suffer from this disabling mental illness and its consequences. For persons disabled by mental illnesses (such as Disordered Gambling) *non-gambling legislation* enacts rights and protections, and corresponding duties for others to respect and to ensure them, such as licenced gambling service providers.

The *non-gambling legislation* relates to equality and non-discrimination, to protect consumers from unconscionable practices and to promote mental health care and treatment. *Non-gambling* legislation of this nature has general application over all other legislation and

Pike also cites a decision of the pre-democratic era Appellate Division in *Coetzee v Nel* (1972) 1 SA 353 (A) and *Norton v Ginsberg* (1953) 1 SA 537 (A) ruled that “*a mere retraction cannot be called a full and free apology*”.

²⁶ See footnote above for circumstances and facts concerning Mr. Williams suicide.

takes precedence over other legislation. All non-gambling legislation of general application supersedes legislation enacted for a specific purpose – like gambling legislation.

This paper gives legal references that appear to show that the casino may not be adequately supporting the minority of addicted gamblers who have become process-addicted to gambling and who suffer from the mental illness and disabling psychiatric diagnosis of Disordered Gambling.

2.3 Are Gambling Service Providers Ensuring Addicted Gamblers' Rights?

The casino's response referred to complying with *gambling law* requirements only. The casino made no reference to the legislation that applies to the gambler group of severely process-addicted disabled gamblers diagnosed with the psychiatric disorder of Disordered Gambling suffering disabling mental illness and its consequences.

The casino's response to the reporter's question did not identify these gamblers as a vulnerable customer group with rights the casino recognized, respected or protected (or would now begin to) under the Promotion of Equality and Prevention of Unfair Discrimination Act ("Equality Act").

This paper provides legal information that appears to show the casino and licensed gambling service providers do not recognize Disordered Gamblers as a vulnerable group with rights they have a duty to promote and protect under the Equality Act.

2.4 Are Providers Ensuring Addicted Gamblers' Consumer Protection Rights?

The casino's response to the reporter's question confined itself to *gambling law* only. It omitted reference to compliance with the Consumer Protection Act, and the duty in that legislation to not discriminate unfairly in the provision of services or products to disabled customers. The legislation protect consumers from "*unconscionable ... trade practices*"²⁷ as prohibits "*unconscionable conduct*" which includes "*knowingly [taking] advantage of the fact that a consumer was substantially unable to protect the consumer's own interests because of ... mental disability*"²⁸ and conduct that is "*otherwise unethical or improper to a degree that would shock the conscience of a reasonable person*".²⁹

This paper provides legal information that appears to show that the casino and licensed gambling service providers breach key statutory protections enacted for vulnerable consumers in the Consumer Protection Act. Many other casinos and other licensed gambling

²⁷ **Part B - Purpose, policy and application of Act - Purpose and policy of Act**

3. (1) The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by—

(d) **protecting consumers from—**

(i) **unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices;** and

(ii) **deceptive, misleading, unfair or fraudulent conduct;**

²⁸ **Part F - Right to fair and honest dealing**

Unconscionable conduct

40. (1) ...

(2) *In addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer's own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.*

(3) *Section 51 applies to any court proceedings concerning this section.*

²⁹ **Definitions**

1. In this Act—

"**unconscionable**", when used with reference to any conduct, means—

(a) having a character contemplated in section 40; or

(b) **otherwise unethical or improper to a degree that would shock the conscience of a reasonable person;**

service providers appear to believe that the only legislation relating to any gambling customer they have any statutory obligation to comply with is gambling legislation.

2.5 Are Providers Promoting Addicted Gamblers' Constitutional Rights?

Ultimately Mr. Williams' suicide, the social media reaction, the Sunday Times reporter's questions, and the casino's answers must be tested against the supreme law – the national Constitution. This enshrines the rights of vulnerable citizens, such as gamblers who have become process-addicted to gambling and have the psychiatric diagnosis of Disordered Gambling and who suffer from this disabling mental illness and its consequences.

The rights of this gambler group must be measured against the corresponding constitutional rights of licensed gambling service providers. The primary constitutional rights are those of "human dignity", to "equality", to no "unfair discrimination", to "freedom" (in the form of "psychological integrity") and to "ubuntu". For licensed gambling providers, the last question is whether their gambling services and the gambling products on offer to wager on are constitutional in the sense that they comply with and promote the constitutional rights of vulnerable disabled persons, such as the gambler group involved here.

This paper offers legal information that appears to show that licensed gambling providers, the services provided, and gambling products on offer to wager on appear to be unconstitutional and unlawful. The products and services appear to be aligned only with gambling legislation and appear to ignore provider duties to promote the relevant rights in the constitution itself and to discriminate directly, indirectly, systemically and by adverse impact.

3 GAMBLER SUICIDE, TRAGEDY AND MEANING

Experts say that when a person plans their suicide, their consuming concern is about carrying out the sad act, and not about the place they plan do perform it at. But the place does become the crucial concern when the person's goal, "*beyond bringing an end to oneself, is to wrap [the] untimely death in a very particular context*".³⁰ So when a gambler decides to bring their life to its end, and plans to do so in a casino by suicide and self-immolation, after having lost a lot of money,³¹ then the probabilities suggest that a casino may be linked to that decision.

So when the casino's response to a customer's suicide by self-immolation which has been planned to take place on its premises is "*business is as usual*", then the public via social media might be forgiven for declaring that response unacceptable.

Gambling and suicide have always had a sad association – Las Vegas "*has the highest visitor suicide rate in the nation*" and "*suicides in Vegas hotels occur multiple times a month according to a recent ... Coroner's report*". It is reported that "*[b]etween 12 and 24% pathological gamblers attempt suicide*", that "*[t]he rate of suicide among their spouses is three times greater than that of the general population*" and that "*factors that increase the risk in problem gamblers include mental illness, alcohol and drug misuse*".³²

³⁰ Levander, Caroline Field and Guterl, Matthew Pratt; (27 April 2015); *Hotel Life: The Story of a Place Where Anything Can Happen*, UNC Press.

³¹ SA Breaking News report 26 July by Ole! Media Content Hub: "Montecasino Suicide Man Kept Losing Money" which reports that "*An eyewitness, who asked to remain anonymous, told News24 that she heard the man lost a lot of money gambling before setting himself on fire at the casino in Sandton, Johannesburg*" and "*They told us he kept losing money. When he lost everything he went to his car and came out and set himself on fire. We suspect he went to the car to douse himself with petrol or paraffin.*" [<http://www.sabreakingnews.co.za/2016/07/26/montecasino-suicide-man-kept-losing-money/>]

³² Wikipedia on "Suicide" citing academic authority for the three quotes given [<https://en.wikipedia.org/wiki/Suicide>]

These causes and the consequences are all noted and corroborated by Psychologists, Medical Practitioners, Social Workers, Sociologists and Researchers in published books and papers. So do the activities, findings and recommendations of non-profits in the ‘responsible gambling’ field – as well as police statistics. John O’Brien’s novel ‘Leaving Las Vegas’, and the subsequent movie with the same title both reflect the disordered gambler’s desperation and distress. Leonard Cohen’s cynical critique of apathy, injustice and inequality in ‘Everybody Knows’ references gambling and reminds of the public discomfort and disquiet about its consequences.

4 GAMBLING LICENSEES COMPLIANCE: IMPORTANCE

Gambling industry licensees appear to be applying the wrong legislation to respond to process-addicted mentally ill gamblers who are disabled by “Disordered Gambling”. As legislation regards disordered or compulsive gamblers as vulnerable and disabled, *non-gambling* legislation that has general application applies – and this *non-gambling* legislation supersedes and takes precedence over *gambling* national and provincial legislation. Being vulnerable disabled persons, non-gambling legislation enacts rights for them to dignity and equality and protection as consumers. It also imposes specific duties on gambling industry licensees to promote these rights – in the gambling venue.

The legal issues arising appear to relate to non-compliance with statutory duties to protect process-addicted gamblers, and compliance by gambling service providers with these statutory requirements. There appears to be widespread and systemic non-compliance by gambling service providers. There appear to be two reasons: (a) because *gambling* legislation on process-addicted gamblers doesn’t align with the *non-gambling* legislation that supersedes it; (b) because gambling service provider practices do not comply with the requirements imposed by non-gambling legislation.

Gambling legislation enacts just one main provision for process-addicted gamblers: to apply to be excluded from entering licensed premises to gamble. This omits process-addicted gamblers’ rights *in non-gambling legislation* to dignity, equality, fairness, safety and consumer protection. All of these supersede gambling legislation – which appears to render *gambling* legislation relating to process-addiction unconstitutional, illogical, unlawful and systemic unfair discrimination on the ground of disability.³³

Non-gambling legislation gambling service providers must comply with is the national Constitutional, as well as equality, consumer protection and mental health care statutes – as well as the common law in Court rulings in decided cases. All this *non-gambling* legislation ‘trumps’ any *gambling* legislation: for boards, directors, executives and managers of licensees’ non-compliance results in exposure to the full spectrum of possible statutory, governance, reputational and related non-compliance risks.

4.1 The Groups Affected: Process-Addicted and Chemically Addicted Gamblers

Vulnerable gamblers are broadly customers with impulse control disorders. That includes gamblers (a) who are (or are at risk of becoming) process-addicted to the activity of gambling and mentally disabled by the psychiatric mental illness of “Disordered Gambling”;

³³ Gambling legislation’s apparent inconsistency with non-gambling legislation – and apparent systemic breach of constitutional and equality and consumer legislation – seems to have happened because gambling legislation is founded on the model of process-addiction and Disordered Gambling as an individual pathology and that its cause (absence of self-control) and solution (self-exclusion from gambling) are the process-addicted gambler’s responsibility. But constitutional and equality and consumer protection law and common law all contradict gambling law’s approach.

(b) who are (or are at risk of becoming) process-addicted to gambling due to the effects of medication prescribed for Parkinson's Disease ("PD"), a devastating degenerative neuro-psychiatric disease and "is accompanied by relatively high rates of depression, and a sizable proportion of patients with PD have anxiety and / or apathy".³⁴

Gamblers who are (or are at risk of becoming) process-addicted in these ways to the activity of gambling become mentally disabled by their behavioural incapacity to control their impulse to gamble and to stop themselves from doing it. The behaviour is a mental illness psychiatrists diagnose as "Disordered Gambling". The DSM 5 diagnosis lists criteria of which some need to have existed over a specific period. But the concern is the *effect*: (a) *loss of control* as there is resolve to not gamble but an incapacity to stop; (b) *compulsion to continue* to gamble despite the adverse consequences; (c) *preoccupation or obsession with gambling* that takes priority over everything else.

Gamblers suffering from Parkinson's Disease on certain prescribed medications reportedly experience debilitating impulse control disorders *including compulsive gambling*.³⁵ A 2005 research study concluded that "dopamine agonist drugs appear to be uniquely implicated as a cause of pathological gambling."³⁶ The use of a dopamine agonist is the primary risk factor. Medical research recommends that all patients treated with a dopamine agonist should be screened for a variety of ICDs.³⁷

Both group of gamblers do not currently appear to be cautioned by licensees with advice, information, notice or screen on a machine / device that gambling play or participating may be hazardous to their health and wellbeing. In the light of the psychiatric and pharmacological facts and circumstances, and the constitutional, equality, mental health and older persons legislation, a licensee appears to have legal obligations and a duty of care to ensure that the necessary information is provided to members of these groups, and that their conduct and gambling behaviour is monitored, to intervene when appropriate or necessary. A licensee's duties and obligations will be most onerous where the game or activity is particularly favoured by mentally ill or older persons.

³⁴ Lee X. Blonder and John T. Slevin; Emotional Dysfunction in Parkinson's Disease; Behav Neurol. 2011 January 1; 24(3): 201–217. doi:10.3233/BEN-2011-0329.

³⁵ Eugenia Mamikonyan, MS, Andrew D. Siderowf, MD, MSCE2,3, John E. Duda, MD2,3, Marc N. Potenza, MD, PhD, Stacy Horn, DO, Matthew B. Stern, MD, and Daniel Weintraub, MD; Long-Term Follow-Up of Impulse Control Disorders in Parkinson's Disease; *Mov Disord*. 2008 January ; 23(1): 75–80. doi:10.1002/mds.21770. Authors state:

"Multiple impulse control disorders (ICDs), including compulsive gambling, sexual behavior, buying, and eating, have been reported to occur frequently in Parkinson's disease (PD). Estimates of ICDs in PD typically exceed those in the general population, in total affecting ~5% of patients at any given time and between 5 and 10% at some point during the course of the disease.

Case reporting and prospective studies have implicated dopamine agonist (DA) use as a primary risk factor for the development of ICDs in PD, although these disorders have also been linked with levodopa (L-dopa) use. Other risk factors for the development of ICDs may be younger age at PD onset and a pre-PD history of ICD behaviors or substance use disorders."

³⁶ M. Leann Dodd, MD; Kevin J. Klos, MD; James H. Bower, MD; Yonas E. Geda, MD; Keith A. Josephs, MST, MD; J. Eric Ahlskog, PhD, MD; Pathological Gambling Caused by Drugs Used to Treat Parkinson Disease; *Arch Neurol*, September 2005; Volume 62, pages 1377-1381. Some of the authors' findings and conclusions are as follows:

"These 11 patients developed pathological gambling only after starting therapy with a dopamine agonist, either pramipexole (9 of 11 cases) or ropinirole (2 of 11 cases). The gambling resolved when the dopamine agonist was tapered or discontinued in 8 of the 11 cases; follow-up was not available in the other 3 cases. Although levodopa therapy might have been a contributory factor, none developed these problems when receiving levodopa mono-therapy, and 3 patients had not been treated with levodopa. The relationship of pathological gambling to dopamine agonist therapy in these cases is striking." – page 1380

"In summary, dopamine agonist drugs appear to be uniquely implicated as a cause of pathological gambling. Both our series and prior reports have especially linked this to administration of the selective dopamine D3 agonist pramipexole. Disproportionate stimulation of dopamine D3 receptors might be responsible for patho- logical gambling in these PD cases." – page 1381

³⁷ Daniel Weintraub, M.D., Andrew D. Siderowf, M.D., MSCE2, Marc N. Potenza, M.D., Ph.D., Joseph Goveas, M.D., Knashawn H. Morales, Sc.D., John E. Duda, M.D., Paul J. Moberg, Ph.D., and Matthew B. Stern, M.D.; Dopamine Agonist Use is Associated with Impulse Control Disorders in Parkinson's Disease, *Arch Neurol*. 2006 July ; 63(7): 969–973. Based on these authors' findings they recommend as follows:

"Our findings highlight the importance of screening for a variety of ICDs in PD patients treated with a dopamine agonist, particularly since only one-quarter of active ICD cases in this study had been identified clinically."

4.2 The Gambling Service Providers Affected

Gambling service providers are required to comply with the *Constitution*, the legislation on equality and non-discrimination in the *Promotion of Equality and Prevention of Unfair Discrimination Act* (“Equality Act”), the legislation that promotes the rights of their customers in the *Consumer Protection Act* (“CPA”), the legislation on mental health in the *Mental Health Care Act* (“MHCA”) as well as applicable *common law* requirements established by the Courts.

The non-gambling legislation that has general application and the common law apply to all “*licensed premises*”³⁸ in the form of a “*casino*”³⁹ operator, a “*bingo*”⁴⁰ operator, and also “*bookmakers*”,⁴¹ whether licensed as a “*site operator*”⁴² or a “*route operator*”.⁴³ It appears that boards, directors, executives and managers of licensees, the full spectrum of compliance requirements may hold significant statutory, governance, reputational and related non-compliance obligations and non-compliance risks.

5 GAMBLING LEGISLATION: VULNERABLE GAMBLER PROVISIONS

For process-addicted disabled mentally ill gamblers, and gamblers at risk to it, the National Gambling Act (“NGA”) and the various provincial gambling acts enact no effective protections that comply with legislation for the very vulnerable gamblers who need it most.

This omission contradicts the very purpose⁴⁴ of the NGA: “*to provide a legal basis for the regulation and control of all gambling activities*” as defined in sections 1⁴⁵ and 3.⁴⁶

³⁸ National Gambling Act No. 7 of 2004: 1. Definitions
'licensed premises' means specific premises that are named or described in a licence issued in terms of this Act or applicable provincial law;

³⁹ National Gambling Act No. 7 of 2004: 1. Definitions
'casino' means premises where gambling games are played, or are available to be played, but does not include premises in which—
(a) only bingo and no other gambling game is played or available to be played;
(b) only limited pay-out machines are available to be played;
(c) limited pay-out machines are available to be played and bingo, but no other gambling game is played or available to be played; or
(d) only social gambling is conducted in terms of a temporary license or provincial law;

⁴⁰ National Gambling Act No. 7 of 2004: 1. Definitions
'bingo' means a game, including a game played in whole or in part by electronic means—
(a) that is played for consideration, using cards or other devices—
(i) that are divided into spaces each of which bears a different number, picture or symbol; and
(ii) with numbers, pictures or symbols arranged randomly such that each card or similar device contains a unique set of numbers, pictures or symbols;
(b) in which an operator or announcer calls or displays a series of numbers, pictures or symbols in random order and the players match each such number, picture or symbol on the card or device as it is called or displayed; and
(c) in which the player who is first to match all the spaces on the card or device, or who matches a specified set of numbers, pictures or symbols on the card or device, wins a prize, or any other substantially similar game declared to be bingo in terms of section 6 (4);

⁴¹ National Gambling Act No. 7 of 2004: 1. Definitions
'bookmaker' means a person who directly or indirectly lays fixed-odds bets or open bets with members of the public or other bookmakers, or takes such bets with other bookmakers;

⁴² National Gambling Act No. 7 of 2004: 1. Definitions
'site operator' means a person who is licensed to operate a site in terms of applicable provincial laws contemplated in section 18;

⁴³ National Gambling Act No. 7 of 2004: 1. Definitions
'route operator' means a person who is licensed as such in terms of applicable provincial laws contemplated in section 18;

⁴⁴ 2A. **Purpose of Act**
The purpose of this Act is to—
(a) provide a legal basis for the regulation and control of all gambling activities;

⁴⁵ “**gambling activity**” means any activity described as such in section 3;”.

⁴⁶ “3. **Gambling activities generally**
An activity is a gambling activity if it involves -
(a) placing or accepting a bet or wager in terms of section 4 (1);
(b) placing or accepting a totalisator bet, in terms of section 4 (2); or
(c) making available for play, or playing -
(i) bingo or another gambling game in terms of section 5;
(ii) an amusement game, to the extent that applicable provincial laws require such games to be licensed, or
(iii) an interactive game.”

Gambling legislation should have referred to the rights and protections that process-addicted gamblers with “Gambling Disorder” have in non-gambling legislation and gambling service providers’ duties to those gamblers. There are clear precedents for doing so: legislation on equality and consumer protection and mental health. The medically-focused health-related support is in *health* legislation by a “*health care provider*” regulated by health professions⁴⁷ legislation – the “*speciality area*” of a *psychiatrist, medical practitioner,*⁴⁸ *psychologist*⁴⁹ or a *social worker*.

5.1 Voluntary Self-Exclusion

The NGA’s omission of the rights and protections that process-addicted gamblers with “Gambling Disorder” have in other legislation leaves the group most susceptible to harm from gambling activity without rights or protections. The omission in effect compels them to try to address their problems *themselves* without having effective constitutionally aligned and equality-promoting legislative tools for the purpose.

The NGA places no duty of care for a gambler with “Disordered Gambling” on a gambling service provider, and shifts responsibility onto the gambler by making legislative provision for them to apply for voluntary self-exclusion.⁵⁰ Voluntary self-exclusion⁵¹ under section 14 enables a gambler who “*wishes to be prevented*”⁵² from continuing to gamble to administratively “*register as an excluded person*”⁵³ - although they can “*cancel that registration at any time*”.⁵⁴ Section 14(4)⁵⁵ permits others to do so if the gambler does not, will not or can not. The common law provides for a declaration as a Prodigal.

5.2 Declaration of Prodigality

A non-statutory option in common law is to apply to a Court to be declared a Prodigal. For the majority of people, the legal technicalities are formidable and the costs prohibitive. A Prodigal is described as “*a person with normal mental ability but who, through some weakness or defect of character, judgment or will, squanders his or her assets in such a reckless and irresponsible way that he or she threatens to reduce both himself or herself and his or her dependents to penury*”.⁵⁶

⁴⁷ Health Professions Act, 1974 (Act No. 56 of 1974)

⁴⁸ Health Professions Act, 1974 (Act No. 56 of 1974) – section 1: definitions: “**medical practitioner**” means a person registered as such under this Act;

⁴⁹ Health Professions Act, 1974 (Act No. 56 of 1974) – section 1: definitions: “**psychologist**” means a person registered as such under this Act;

⁵⁰ Section 14 provides for “**Excluded persons**”.

⁵¹ ““**excluded person**” means a person who has been registered as such in terms of section 14 in order to be prevented from engaging in any gambling activity;”

⁵² 14. (1) *A person who wishes to be prevented from engaging in any gambling activity may register as an excluded person by submitting a notice to that effect in the prescribed manner and form at any time.*

⁵³ 14. (1) *A person who wishes to be prevented from engaging in any gambling activity may register as an excluded person by submitting a notice to that effect in the prescribed manner and form at any time.*

⁵⁴ *Excluded persons*

14. (2) *A person who registered as an excluded person in terms of subsection (1) may submit a notice in the prescribed manner and form to cancel that registration at any time.*

⁵⁵ 14. (4) *A person may apply to a court of competent jurisdiction for an order requiring the registration as an excluded person of-*

(a) *a family member of the applicant;*

(b) *a person on whom the applicant is economically dependent in whole or in part;*

(c) *a person for whom the applicant is economically responsible in whole or in part;*

(d) *a person who is subject to an order of a competent court holding that person to be mentally deranged; or*

(e) *any other person -*

(i) *to whom the applicant has a duty of care; and*

(ii) *whose behaviour manifests symptoms of addictive or compulsive gambling.*

(5) *If, in the circumstances of an application in terms of subsection (4), the court considers it reasonable and just to prevent the person concerned from engaging in any gambling activity, the court may order the registration of that person as an excluded person”.*

⁵⁶ *Wille's Principles of South African Law*; (2007)(9th Ed), Du Bois F (General Editor) Juta, at 385 – 386 on “Prodigals”:

“*III Prodigals*

A prodigal is a person with normal mental ability but who, through some weakness or defect of character, judgment or will, squanders his or her assets in such a reckless and irresponsible way that he or she threatens to reduce both himself or herself and his or her dependents to penury ...

The purpose of a declaration of prodigality is to “*limit the prodigal’s capacity to act*” and the effect of it is “*that, as far as the administration of his or her estate is concerned, the legal position of the prodigal closely resembles that of a minor*”. The legal result of the declaration and interdict is that the person is able to perform juristic acts where the person “*acquires rights without incurring any corresponding obligations*” but the person does require “*assistance to enter into transactions by which obligations are imposed*” on the person.

5.3 NGA Mechanisms Appear to Exacerbate Harm

In most instances, the psychiatric distress, financial harm and social consequences that lead to the need for either the statutory *self-exclusion application* or the common law *prodigality application* would not arise if gambling service provider practice was aligned with and met the statutory requirements of non-gambling legislation: the Constitution, Equality Act, Consumer Protection Act and common law.

The NGA and all provincial gambling legislation – being subordinate legislation with specific limited application to gambling only – contain no statutory provisions to address the vulnerability of mentally disabled gamblers at greatest risk of harm from gambling and to protect them from possible harm or exploitation by gambling service providers.

The NGA and all provincial gambling legislation enact no duty on gambling service providers to promote the dignity, equality, freedom, ubuntu of process-addicted vulnerable gamblers who suffer from (or are at risk to) Disordered Gambling. No national and no provincial gambling legislation refers to or prohibits unfair discrimination against them on the ground of their psychiatric disability. Under gambling legislation mentally ill addicted gamblers suffering from the psychiatric illness of “Disordered Gambling” are ‘whales’ (to employ a gambling industry phrase) and encouraged, rewarded and incentivized to continue gambling until they apply for their own self-exclusion (or someone else does for them).

6 ‘RESPONSIBLE GAMBLING’, INDUSTRY ‘PR’ AND THE NRGF

Gambling was legalized in 1994⁵⁷, followed by the National Gambling Act.⁵⁸ Legislators enacted no specific rights or protections for what was then described as ‘problem gambling’ or ‘gambling addiction’. Two decades ago the phenomenon of process-addiction to gambling and mentally ill gamblers disabled by its consequences had not been recognized.

Unlike mental illness, prodigality per se does not affect a person’s capacity to act: whereas the incapacity of a mentally ill person to perform juristic acts flows from his or her mental condition at the time of the act in question and not from any declaration of mental illness by the court, it is the declaration of prodigality by the court and the concomitant interdict against the prodigal restraining him or her from dealing with his or her property that, as such, limit the prodigal’s capacity to act ... The effect of such a declaration of prodigality (and the concomitant interdict) is that, as far as the administration of his or her estate is concerned, the legal position of the prodigal closely resembles that of a minor ... He or she therefore has limited capacity to act. Without the assistance of the curator bonis appointed to him or her by the court, ... the prodigal may perform juristic acts by which he or she acquires rights without incurring any corresponding obligations, but he or she requires such assistance to enter into transactions by which obligations are imposed on him or her ... In respect of the latter, he or she either acts with the consent or assistance of his or her curator or his or her curator acts on his or her behalf ... So, too, as in the case of a minor, the curator can ratify a transaction initially entered into by the prodigal without the necessary assistance ...

The prodigal retains his or her full capacity to perform juristic acts in so far as such acts do not relate to the administration of his or her property – he or she may therefore exercise parental power over his or her children, ... and have parental responsibilities and rights in terms of the Children’s Act, litigate unassisted, ... and, it would seem, enter into a contract of engagement or marriage without the assistance of his or her curator ... As pointed out above, the limitations on the prodigal’s capacity to act are not automatically lifted when he or she abandons his or her prodigal ways; he or she regains his or her full capacity to act only when the order of court declaring him or her to be a prodigal is set aside by a subsequent order of court discharging him or her from curatorship ...”

⁵⁷ https://en.wikipedia.org/wiki/Gambling_in_South_Africa

⁵⁸ The initial National Gambling Act in 1996. That was repealed by a new National Gambling Act in 2004. That was followed by the National Gambling Amendment Act in 2008.

For this vulnerable group, across every successive amendment to the gambling legislation, no specific duties were enacted to be complied with by gambling industry participants. Process-addiction to gambling activities was not recognized by psychiatry to constitute a psychiatric disorder until 2013. Since then no rights have ever been accorded to 'problem gamblers' in gambling legislation or regulations.

6.1 Gambling Legalization, 'Problem Gambling' and Industry Risk

But the industry did recognize 'problem gambling' to be an actual or potential serious public reputational risk for the industry. At the time gambling was to be legalized, this development stimulated public opposition in certain sectors, which would result in new legal risks and possible reputational harm for service providers in the gambling industry.

Gambling legislation omitted any specific compliance obligations by providers to 'problem gamblers' other than the self-exclusion and information provision. This appeared to enable the industry to address potential risks to image and reputation that might arise from having provided the means (machines and tables) that would lead to 'problem gambling' emergence as a new social harm in society.

6.2 Gambling and Public Relations

In the context of major change⁵⁹ – the legalization of gambling in South Africa – public relations risk management⁶⁰ became important to identify what the industry issues were,⁶¹ what the associated business risks might be, and, where possible, to attempt shape public policy to the benefit of the gambling industry.⁶² Public relations programmes are established inter alia to “reinforce the attitudes and behavior of those who are in agreement with the organizations' position” and “to change the attitudes of those who do not agree with the organization's position”.⁶³

Public opinion about gambling's negative consequences might be able to be shaped by transferring responsibility and accountability for 'problem gambling' onto the gamblers who suffered the effects of gambling, and away from the gambling providers who offered the services that caused it.

⁵⁹ Regester, M and Larkin, J (2008) 45: “Managing issues frequently involves dealing with change. An overall aim is to bring some control to the impact caused by discontinuity in the environment (Heath and Nelson 1986). The ultimate goal, according to Hainsworth and Meng, is to shape public policy to the benefit of the organization through:

- early identification of the potential impact of the change;
- organized activity based on sound management principles and techniques, and allowing time for analysis and creative thinking to influence the evolution and ultimately, the outcome of that change.”

⁶⁰ See for example a leading work on the subject of public relations use in risk and reputation management: Regester, M and Larkin, J (2008) ‘*Risk Issues and Crisis Management in Public Relations – a Casebook of Best Practice*’ (Kogan Page).

⁶¹ Regester, M and Larkin, J (2008) 40 – 41: ‘What Is Issues Management?’: “Issues management was an attempt to define the strategies that companies needed to use to counter the efforts of activist groups which were putting pressure on legislators for stricter controls of business activity ... So, a new area of corporate communication emerged – issues management was first implemented as a way in which companies could deal with their critics”.

⁶² Regester, M and Larkin, J (2008) offer a number of descriptions of an issue at 44 – 45 in ‘What is an Issue?’: “

⁶³ Mersham GM, Rensburg RS and Skinner JC (1995) *Public Relations Development and Social Investment a Southern African Perspective* (Van Schaik Academic and reproduced by Content Solutions 2005) at 152 – 153:

6.2 Types of Public Relations Programmes

Newsom et al (1993) differentiate between six types of public relations programmes:

1. Public Awareness programmes.
2. Programmes offering information along with awareness.
3. Public education programmes.
4. Programmes that reinforce the attitudes and behavior of those who are in agreement with the organisation's position.
5. Programmes that attempt to change the attitudes of those who do not agree with the organisation's position.
6. Behaviour modification programmes.”

By this simple expedient, a ‘problem gambler’s’ problem would be caused by the gambler themselves: the predicament the gambler was in arose because the gambler had not been a ‘responsible gambler’ and had not ‘gambled responsibly’. The logic established culpability of gamblers themselves, who could be held accountable by their families and communities for the harm the gambler caused – they had simply not gambled ‘responsibly’. The gambling service providers who offered the means by which they did so – the gambling products and services that had addicted the gamblers – would not be able to be accorded any responsibility for adverse consequences: the cause was the gambler who had not been able to ensure that they played by the dictat to ‘gamble responsibly’.

6.3 The Principle and Duty to ‘Gamble Responsibly’

In the late 1990s the gambling industry introduced into the gambling public’s lexicon a new concept it called “*responsible gambling*”. Over time this concept evolved into a behavioural principle that gambling providers expected of gamblers – a de facto ‘house rule’.

To the gambling industry, the justification for the concept was clear: from a public relations perspective gambling clearly did need to be perceived by the public to be ‘responsible’ industry – but delivering it would be complex, ensuring it would raise serious legal risks and providing it would be expensive. The obvious expedient was to establish a rule to be ‘responsible’ on gamblers themselves – instead of on the providers.

From this evolved a behavioural rule that gamblers should take care to “*gamble responsibly*”.

The concept of ‘responsible gambling’ is an obvious oxymoron: since most gamblers cannot financially afford to gamble and to lose the sum wagered, the decision to gamble is already an imprudent or irresponsible act: a message to “do something irresponsible responsibly” is inherently meaningless.⁶⁴ An associated message is that an inherently irresponsible decision to gamble when unable to afford the financial loss entailed can be justified and legitimate if the gambler takes care to “*gamble responsibly*”.

What the duty actually meant, and how the gambling industry would support gamblers to achieve and maintain the gambler’s duty was never clear.

6.4 No Statutory Basis for the Principle / Duty to ‘Gamble Responsibly’

There is no statutory duty or common law basis for the rule or the principle to ‘gamble responsibly’ or for imposing the rule or duty on customers who gamble.⁶⁵ So the basis for the rule or duty the gambling industry established might have been public relations (“PR”). It seems gambling PR shifted the duty to ‘act responsibly’ onto gamblers generally and particularly process-addicted disabled mentally ill gamblers. The idea may have come from the NGA: one of its purposes focuses on the *industry* and is to “*promote the development of a responsible gambling industry*”.⁶⁶

⁶⁴ Sydney Morning Herald 29 September 2016 “Comment”: ‘There’s no such thing as gambling responsibly’: “*This highlights the oxymoronic nature of the "gamble responsibly" message. The truth is, gambling is not a particularly responsible thing for any of us to do. Most Australians can't afford to lose \$1240 a year, let alone considerably more than this. What the "gamble responsibly" message essentially says is, "do something irresponsible responsibly."* [accessible at <http://www.smh.com.au/comment/theres-no-such-thing-as-gambling-responsibly-20160929-grr8u5.html>]

⁶⁵ There are however many statutory duties in non-gambling legislation to provide gambling products and services that comply with that legislation.

⁶⁶ National Gambling Act: and developing a “responsible gambling industry”: section 2A -
2A Purpose of Act
The purpose of this Act is to—
(c) *promote the development of a responsible gambling industry in the Republic;*

When it came to gambling addiction, gambling industry PR seems to have transferred the ‘responsible gambling industry’ goal for the industry as a rule for the gambler. A legal effect of this appears to have been that gambling providers were able to avoid a duty of care to vulnerable ‘problem’ or addicted gamblers when they gambled – even though they used gambling machines recent Princeton research had found are designed and programmed with the objectives of facilitating process-addicted gamblers in the venue to gamble as long and as intensively as possible. A casino’s business objective is “*expediting continuous gaming productivity*” ... which requires “*three interlinked operations ... accelerating play, extending its duration and increasing the total amount spent.*”⁶⁷

Gambling’s PR also transferred accountability for the consequences of a gambler’s failure to gamble responsibly from the provider and onto the gambler. Legally, the effect was that vulnerable addicted gamblers perceived themselves as solely accountable for their actions: gambling PR cast the gambler as the cause of the self-initiated catastrophe that befell them; as the architect of their own misfortune.

In Australia, gambling’s consequences have severe social and economic consequences. A commentator notes that the gambling adverts’ words “ ‘Gamble responsibly’ ... are ... meant to ... undo the damage caused by the ads themselves” and to “make sports betting agencies, governments, and television networks ... feel they are doing something about the problem of gambling – or at least appear to be.”⁶⁸

6.5 Gambling Service Provider Duties to Ensure ‘Response-able’ Gamblers

Literature and legislation both show that gamblers will only be in a position to ‘gamble responsibly’ once they are enabled or empowered to do so by information and support. This is recognized in the Consumer Protection Act: section 48(1) prohibits suppliers from acts and omissions that are “unfair, unreasonable or unjust” regarding pricing, terms, marketing, waiver of consumer’s rights, waiver by consumers of the liability of the supplier and so on. Section 48(2)(a) deems a contract “unfair, unreasonable or unjust” if “it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied.

Protection is promoted by consumer information: in this instance information a gambler needs to be able to ‘gamble responsibly’ and be a ‘responsible gambler’. McKenna⁶⁹ recommends that in the context of gambling, ‘*responsibility*’ requires the need to have the *ability to respond both positively and negatively* and ‘responsible gambling’ should place gamblers in a position to be ‘response-able’,⁷⁰ and recommends three characteristics.

⁶⁷ Dow Schull, Natasha; Chapter 2: ‘Engineering Experience’ at 52.

⁶⁸ Sydney Morning Herald 29 September 2016 “Comment”: ‘There’s no such thing as gambling responsibly’: “*Gamble responsibly*” is of course the term tacked on the end of the sports betting advertisements that bombard us from all directions. They are words meant to perform a kind of magic – to undo the damage caused by the ads themselves and somehow make everything OK. They are also words designed to make sports betting agencies, governments, and television networks breathe easier. To make them feel they are doing something about the problem of gambling – or at least appear to be doing something – when they are in fact doing nothing except taking money from those who can’t afford it.” [accessible at <http://www.smh.com.au/comment/theres-no-such-thing-as-gambling-responsibly-20160929-grr8u5.html>]

⁶⁹ McKenna, James (2005) ‘Beyond Tells – Power Poker and Psychology’ (Lyle Stewart Kensington Publishing). McKenna is described at the time of publication as “... a practicing individual and group therapist for over 35 years and a management consultant to Fortune 500 corporations”.

⁷⁰ The author interprets the word “responsible” in the context of gambling as follows:

“A helpful way to define “responsible” is to view it as two words: *response* and *able*. This defines ‘responsibility’ as having the ability to respond both positively and negatively to the cards that life deals our way. Response-ability also determines how much a person is highly structured versus how emotionally or impulsively he or she deals with life.

Response-able players will have three essential qualities:

- 1 They like themselves and they know how to take care of themselves during good times as well as bad times.
- 2 They come prepared with the necessary information and skills.
- 3 They have permission to use their talents and to succeed.”

6.6 'Responsible Gambling', Stigma, Labeling, Deviancy - and Suicide

It appears that in South Africa, the effect of gambling industry's "responsible gambling" PR has been to exonerate the gambling service provider and to stigmatize the gambler. If Mr. Williams' tragedy is any indicator, the consequences of gambling's PR may be much more serious for the most vulnerable of mentally ill gamblers. Gambling's PR may have laid the foundation of the stigmatization and labeling and psychiatric harm that has followed: the inference is that any gambler who had allowed themselves to become a process-addicted, mentally ill, disabled and who suffered from "Disordered Gambling" must have done so irresponsibly, was 'irresponsible', was a loser not a "winner", and subject to stigma by society as a failure and labeling as a deviant.

Psychiatry⁷¹ regards 'stigma' in its modern sense as a reference to "the sense of collective disapproval and group of negative perceptions attached to a particular people, trait, condition, or lifestyle". 'Stigmatization' "describes the process by which the characteristics of the group in question are identified and discriminated against". Psychiatry regards stigmatization as happening in "a three-stage process: first, the individual is marked out as different by his actions or appearance; secondly, society develops a series of beliefs about the affected individual; finally, society changes its behavior towards these individuals in a way that is consistent with those beliefs, often to the detriment of the stigmatized individuals.

On this basis the gambling industry's own "responsible gambling" PR may be or have become a trigger for the progressive psychiatric decline of a process-addicted, mentally ill, disabled gambler suffering "Disordered Gambling": a possible cause of or contributor to the ensuing distress, depression, anxiety, stigmatization, exclusion, guilt, shame, indignity, inequality, discrimination, and loss of psychological integrity and ubuntu. A lesson from the tragedy that befell Mr. Williams' is how easily any, some or all of these consequences can lead to a distressed gambler's decision to commit suicide in a casino itself.

6.7 The National Responsible Gambling Foundation and Consumer Protection

Industry concerns about public reactions and industry risk were reportedly the main reason the South African gambling industry decided in 1999⁷² to establish the National Responsible Gambling Foundation ("NRGF") which began operating in 1999 and which the gambling industry has consistently funded. It inter alia informed gamblers of the principle of "*responsible gambling*" and to discharge their behavioural duty to "*gamble responsibly*".

The NRGF's well-publicized "National Responsible Gambling Programme" ("NRGP") and message to the public and to gamblers is that gamblers should gamble responsibly, because if they do, every gambler would be a winner and "*Winners Know When to Stop*", as every gambling provider's radio advert must communicate to everyone listening.

But the "*responsible gambling*" concept, the "*gamble responsibly*" duty, the NRGF's NRGF programme and even the "*winners*" jingle all appear to be fatally flawed, for two reasons. Firstly, these appear to be aligned only with gambling legislation and its self-exclusion option. None appear to make specific reference at all to the key rights in non-gambling

⁷¹ Oxford Handbook of Psychiatry; Semple, D & Smyth, R (2ed, 2011 reprint); 'Stigma' 18 – 19.

⁷² Professor Peter Collins, Professor Dan J Stein, Dr Adele Pretorius, Dr Heidi Sinclair, Professor Don Ross, Professor Graham Barr, Andre Hofmeyr, Dr Carla Sharp, Professor David Spurrett, Jacques Rousseau, Dr George Ainslie, Dr Andrew Dellis, Professor Harold Kincaid, Professor Nelleke Bak; all University of Cape Town, South African Responsible Gambling Foundation, National Gambling Board, and South African Department of Trade and Industry; 'Addressing problem gambling: South Africa's National Responsible Gambling Programme'; South African Medical Journal October 2011, Vol. 101, No. 10

legislation with general application that process-addicted disabled mentally ill gamblers suffering from “Disordered Gambling” have, or to the duties in that legislation that are imposed on gambling service providers.

Second, a gambler is able and empowered to gamble responsibly once they have been provided with information about gambling odds, rules and principles, and been sensitized to how to mitigate losses. Then they are in a proper position to take an informed decision. From these and others comes the insight and appreciation into why, when and how to commit to and apply a personal strategy to ‘gamble responsibly’. These they rarely, if ever receive, from any gambling service provider.

So it seems that the NRGF’s vision, mission, governance, goals, policies, procedures, practices and services breach constitutional and equality and consumer protection legislation. It appears they do not refer to, align with or aim to promote the rights of vulnerable gamblers and the duties gambling service providers to them. These are mandatory outcomes under the Constitution and non-gambling legislation with general application like the Equality Act, the Consumer Protection Act, the Mental Health Care Act and the common law in applicable Court decisions.

6.8 Health Professionals Employed / Contracted with Gambling Providers & NRGF

It also appears that health care providers registered under the Health Professions Act who may be employed by or contracted by gambling service providers and the NRGF may be providing services to gamblers in their “*speciality area*”⁷³ in breach of the provisions of at least four Acts that have general application and take precedence over gambling legislation and supersede gambling legislation.

7 SOUTH AFRICAN CONSTITUTION AND DISORDERED GAMBLERS

In South Africa, the legal basis for the rights of vulnerable process-addicted gamblers and gambling provider duties to them are significantly different from those in most other countries which have enacted legislation to regulate gambling.

7.1 A National and Political History of Injustice

There are two reasons for the difference: the foreign countries’ history was not founded on discrimination, exclusion, domination, apartheid and dispossession – and their constitutional⁷⁴ and legislative goals are not aimed at rectifying the prejudice and harm that resulted and at recalibrating a damaged society towards ethical conduct, moral behaviour and common humanity – and to instill in society the constitutional values of dignity, equality, non-discrimination, freedom, ubuntu and social justice.

7.2 A Transformative Constitution

⁷³ Health Professions Act, 1974 (Act No. 56 of 1974) – section 1: definitions: “**speciality**”, in relation to a medical practitioner, dentist or psychologist, includes any particular subdivision of a speciality in which such medical practitioner, dentist or psychologist specializes or intends to specialize;

⁷⁴ The former South African Deputy Chief Justice, Dikgang Moseneke has noted that “[m]any constitutions of the world merely regulate the dispersal and exercise of public power. Others also record justiciable fundamental rights and freedoms. Our Constitution does these things too. But it goes much further than any other constitution I know around the world.” (Georgetown Law Journal Vol. 101: 749 – 773: “Remarks: The 32nd Annual Philip A. Hart Memorial Lecture: A Journey from the Heart of Apartheid Darkness Towards a Just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa” by Dikgang Moseneke; then Deputy Chief Justice of the Republic of South Africa.

To achieve these ends, the South African Constitution is regarded as very different. Unlike most other constitutions it is “... *avowedly transformative* ...”⁷⁵ and extends far further than “... *the ordering of the exercise of public power and the protection of fundamental rights and freedoms against state action* ...”⁷⁶ The South African constitution “... *aims to influence not only the vertical relationships between the state and its subjects but also the horizontal relationships between private parties.*”⁷⁷

7.3 The US v SA Constitution

Labour Appeal Court in Kylie v Commission for Conciliation Mediation and Arbitration and Others⁷⁸ has noted that with reference to the US Constitution, “...*much of their jurisprudence can be described as being significantly incongruent with our Constitution’s commitment to freedom, equality and dignity and its concern to protect the vulnerable, exploited and powerless* ...”.⁷⁹

7.4 Constitution as Starting Point

It follows that the Constitution is always the starting point to assess the lawfulness of gambling industry responses to process-addicted disabled mentally ill gamblers suffering from “Disordered Gambling”.

7.5 Constitutional Court Decision: Dignity, Humaneness, Social Justice, Fairness

A suicide signals deep distress and severe desperation. Peter Williams’s decision to do so in a casino signified a much more. A suicide also suggests forfeiture of the constitutional inherent right to dignity⁸⁰; on this the Constitutional Court in Dawood / Shalabi / Thomas⁸¹ ruled that dignity is a justiciable right as “*a value that informs the interpretation of many, possibly all, other rights*” and that dignity “... *is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected*”.

⁷⁵ Former Deputy Chief Justice Dikgang Moseneke: 757;

⁷⁶ Former Deputy Chief Justice Dikgang Moseneke; “*Remarks*”; page 757

⁷⁷ Former Deputy Chief Justice Dikgang Moseneke; “*Remarks*”; page 757

⁷⁸ Kylie v Commission for Conciliation Mediation and Arbitration and Others (CA10/08) [2010] ZALAC 8; 2010 (4) SA 383 (LAC) ; 2010 (10) BCLR 1029 (LAC) ; (2010) 31 ILJ 1600 (LAC) ; [2010] 7 BLLR 705 (LAC) (26 May 2010)

⁷⁹ Kylie v Commission for Conciliation Mediation and Arbitration and Others at [47] to [49]:

[47] *The need to interrogate the purpose of legislation that is contravened by a contract or an employment relationship and the ideological implications of a decision are well illustrated by the judgments in this case. This case invoked the payment of backpay to a dismissed worker who had not complied with US immigration laws and was thus classified as an ‘undocumented worker’. Chief Justice Rehnquist, who wrote the majority opinion, drew an analogy between employees who worked without immigration authorization and employees who were ineligible for reinstatement or backpay because, they have ‘committed serious criminal acts’, such as trespass or violence against the employers property.*

[48] *The majority then went on to say that backpay award could undermine a ‘federal statute or policy outside of the competence’ of the National Labour Relations Board, in this case immigration laws. The majority characterized the dismissed employee’s conduct in completing the relevant immigration laws as ‘criminal’ and hence awarding backpay would condone and encourage future violations of the relevant immigration laws.*

[49] *Justice Breyer, who dissented with three other justices, held that an award of backpay is consistent with labour law and immigration policy as it would help to deter unlawful activity that both labour and immigration laws seek to prevent. Further, the dismissal of the employee was motivated by the employer’s anti-union conduct and not by the employee’s own conduct.*

[50] *With due respect to the majority of the Supreme Court, much of their jurisprudence can be described as being significantly incongruent with our Constitution’s commitment to freedom, equality and dignity and its concern to protect the vulnerable, exploited and powerless. The Constitution reflects the long history of brutal exploitation of the politically weak, economically vulnerable and socially exploited during three hundred years of racist and sexist rule. The text represents a majestic assertion of the possibility of the construction of a community of concern, compassion and restitution for all such segments of the South African community.*

⁸⁰ 10. Human dignity. – *Everyone has inherent dignity and the right to have their dignity respected and protected.*

⁸¹ Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000)

Gambler suicide telegraphs profound vulnerability; on this the CC in *Walker*⁸² ruled that “[t]he more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair.” Gambler suicide signals a denial of ubuntu; on this the CC in *Everfresh*⁸³ ruled that this principle “... carries in it the ideas of humaneness, social justice and fairness.” Gambler suicide highlights a serious public health issue; on this the Supreme Court of Appeal (“SCA”) in *British American Tobacco*⁸⁴ ruled that “public health in South Africa which is of national concern.”

Gambler suicide also suggests a loss of “psychological integrity”, one of the key elements of the Constitutional right to “freedom” in section 12(2). So a wide range of constitutional rights and common law of the courts must be complied with by gambling law and gambling providers. The South African National Gambling Board’s 2005 study into the ‘Socio-Economic Impact of Legalized Gambling In South Africa’⁸⁵ identified that one consequence of disordered gambling was “[c]ases of people committing suicide in public places”.⁸⁶

8 NON-GAMBLING LAW: WHICH GAMBLERS HAVE RIGHTS?

To the majority, gambling is marketed as an unthreatening and benign recreational activity; but to a small minority group of gamblers who do become process-addicted to gambling and psychiatrically disabled by the mental illness of “Disordered Gambling” (and those who are at risk to it) the activity of gambling is precisely the opposite.

The Constitution – as well as a range of non-gambling legislation, as well as conventions and the common law – all compel licensed and unlicensed gambling service providers to promote the rights of process-addicted mentally ill gamblers disabled by “Disordered Gambling”. These all require compliance in the process of providing gambling services and in wagering and betting. These all prohibit unfair discrimination on the ground of disability – which covers not only the more familiar physical disability but also that of *mental disability*.

For that small minority of process-addicted mentally ill gamblers disabled by “Disordered Gambling”, the activity of gambling and the wager involved causes process-addiction and resulting severe psychiatric debilitation. The effects for them can be socially, financially and personally devastating – and for some can end in a gambler choosing to end their life. These catastrophic effects of process-addiction to gambling are internationally recognized and undisputed.

8.1 Diagnostic and Statistical Manual 5th Edition

The current 5th edition of the American Medical Association (“AMA”) Diagnostic and Statistical Manual for Mental Disorders (“DSM 5”) published in 2013 has classified *addiction to a process* (“process addiction”) as a form of disabling mental illness; at this stage, the only form of process addiction DSM 5 recognizes is that of “Disordered Gambling”. DSM 5 sets out a list of criteria that Psychiatrists must use to diagnose whether a patient / gambler

⁸² *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998)

⁸³ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* (CCT 105/10) [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) (17 November 2011)

⁸⁴ *British American Tobacco South Africa (Pty) Ltd v Minister of Health* (463/2011) [2012] ZASCA 107; [2012] 3 All SA 593 (SCA) (20 June 2012) at paragraph [10].

⁸⁵ Study Commissioned by the National Gambling Board compiled by Prof AA Ligthelm; (Bureau of Market Research, University of South Africa); Ms T Mango Ms E Jonkheid (National Gambling Board), March 2005, ISBN: 0-620-36311-8

⁸⁶ 5.4.4.3 **Potential instigation of violence**

A few respondents acknowledged that they became so angry and aggressive when they lost that they felt quite capable of hurting somebody in the process or damaging casino property. Cases of people committing suicide in public places were also mentioned as a result of big losses.

appears to be addicted to the process of gambling and therefore diagnosed as suffering from “Disordered Gambling”.

8.2 Effects of Process-Addiction / Gambling Disorder: Industry Responses

There are reported to be a number of causes of process-addiction and “Disordered Gambling”. The DSM 5 diagnosis lists criteria of which some need to have existed over a specific period. But the concern here is the *effect*: essentially there are two of them: (a) *a loss of control* as the process-addict resolves to not gamble but cannot prevent themselves doing it; (b) *a compulsion to continue* to gamble despite the adverse consequences it has for the process-addict and others; (c) *a preoccupation or obsession with gambling* that for the process-addict takes priority over everything else.

Process-addiction is about *disordered emotions* and not disordered thinking. Its effect is democratic: process-addiction can impact any gambler. How rich, sophisticated, attractive or clever is irrelevant. To have a diagnosis of Disordered Gambling as a disabling psychiatric illness is to have become emotionally broken and in need of constant stimulation. There are often other co-morbid mental illnesses and substance abuse diagnoses associated with process-addiction.

8.3 Process Addiction and “Disordered Gambling”

Therefore gamblers whose conduct or gambling behaviour discloses or indicates or suggests process-addiction and the mental illness of disabling “Disordered Gambling”, or gamblers who appear to be at risk to it, have rights in constitutional, equality and consumer legislation as well as in common law to not be unfairly discriminated against on the ground of their obvious disability.

These gamblers constitute a vulnerable customer group and under the provisions of the legislation can become subject to unfair discrimination in two ways: (1) if the gambling provider does not discharge its statutory duties to respect the right to dignity, equality, freedom (“psychological integrity”) and ubuntu toward the gambler whose conduct or gambling behaviour discloses or indicates or suggests the mental disability of “Disordered Gambling” and / or (2) if the gambling provider’s environment, designated area, wager process, machines and tables, or policies and practices have the effect that they unfairly “[impose] burdens, obligations or disadvantage on”⁸⁷ or that they unfairly withhold “*benefits, opportunities or advantages from*”⁸⁸ a customer whose conduct or gambling behaviour discloses or indicates or suggests the possibility of the mental disability of “Disordered Gambling”.

9 RECOGNIZING “DISORDERED GAMBLING” CONDUCT AND RISK

The mental disability of “Disordered Gambling” and the process-addicted mentally disabled gamblers whose conduct or gambling behaviour on licensed gambling premises discloses or indicates or suggests “Disordered Gambling”, or being at risk to it, can be recognized by

⁸⁷ Equality Act: Definition of “Discrimination”

1.(1)(viii) “**discrimination**” means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly—
(a) **imposes burdens, obligations or disadvantage** on; or
(b) **withholds benefits, opportunities or advantages** from,
any person on one or more of the prohibited grounds;

⁸⁸ See footnote above.

gambling service providers using readily available tools, existing technology and human resources.

For the purpose, gambling service providers gambling service providers have at least ⁸⁹ eight readily available methods, which can be used individually or in combination; these include the following:

- (1) using existing algorithms that have been developed and validated by experts for the precise purpose;
- (2) monitoring by overhead surveillance by the all-seeing ‘eye-in-the-sky’ (as the Alan Parsons Project’s lyrics ⁹⁰ described it and the television series Las Vegas ⁹¹ dramatized it);
- (3) scrutiny by cameras in the gambling area itself to closely monitor gambling play; ⁹²
- (4) reviewing a gambler’s loyalty card as it is credited with wagers made;
- (5) monitoring any gamblers’ machine transactions via the local and national databases;
- (6) software from 3rd party providers that provides instant and continuous management, performance and financial information on linked machines, tables or equipment;
- (7) direct visual observation by floor staff of a specific gambler’s conduct or gambling behaviour; ⁹³ and finally
- (8) interacting with the gambler if necessary to investigate and verify the position.

Gambling “*site operator*” ⁹⁴ and / or “*route operator*” ⁹⁵ licensees may have fewer methods available to recognize vulnerable mentally disabled gamblers whose conduct or gambling behaviour discloses or indicates or suggests “Disordered Gambling”, and then promote their constitutional and equality and protect their consumer rights. They may have fewer resources to install, hire or employ them. However they would not be exempted from their statutory duties to comply with applicable constitutional and equality and consumer protection rights of vulnerable process-addicted customers.

Gambling businesses that are *unlicensed and illegal establishments* would also not be exempt from compliance on the ground that their establishment is unlicensed and illegal – or because the process-addicted gambler was gambling at a venue they knew or ought

⁸⁹ There may be more: the range will depend on the gambling provider’s facilities and the third party products it purchases and services it contracts.

⁹⁰ ‘*Eye in the Sky*’ by the Alan Parson Project (1982). The chorus has some relevance to the position process-addicted, mentally ill gamblers suffering from disabling psychiatric “Disordered Gambling” find themselves in:

*I am the eye in the sky / Looking at you, I can read your mind / I am the maker of rules, Dealing with fools / I can cheat you blind,
And I don't need to see any more, To know that I can read your mind, I can read your mind.*

⁹¹ American NBC television series over five seasons from 2003 to 2008, which dramatized the work of the senior management team at the ‘Montecito Resort & Casino’, a fictional Las Vegas casino. Much involves monitoring and surveillance and the operations and techniques associated with these, and center on the ‘Head of Security and Surveillance’. For more information see the webpage [https://en.wikipedia.org/wiki/Las_Vegas_\(TV_series\)](https://en.wikipedia.org/wiki/Las_Vegas_(TV_series))

⁹² *Briedenhann v Peerment Global (Eastern Free State) (Pty) Ltd* (5839/2008) [2008] ZAFSHC 147 (4 December 2008) referenced surveillance cameras on the floor in the casino’s designated gambling area which were monitoring gamblers playing the game of roulette.

⁹³ An indication of a casino’s capacity to observe and monitor gamblers and gambling activity appears in ‘*This is Gambling*’ by Nick Constable (Sanctuary Publishing 2003) at pages 162-3 which refers to an incident in 1999 in Johannesburg at Caesars involving cheating by marking cards: an internet reference is at <http://www.cabinetmagazine.org/issues/19/archibald2.php>

⁹⁴ National Gambling Act No. 7 of 2004: 1. Definitions

‘site operator’ means a person who is licensed to operate a site in terms of applicable provincial laws contemplated in section 18;

⁹⁵ National Gambling Act No. 7 of 2004: 1. Definitions

‘route operator’ means a person who is licensed as such in terms of applicable provincial laws contemplated in section 18;

reasonably to have known was an unlicensed or illegal establishment.⁹⁶ Illegality will not relieve the owner from its statutory duties to recognize and promote the rights and interest of vulnerable mentally disabled gamblers whose conduct or gambling behaviour discloses or indicates or suggests “Disordered Gambling”, and promote their constitutional and equality rights and as gambling customers, to protect their rights and interests as consumers.

10 LEGISLATION THAT SUPERCEDES GAMBLING LEGISLATION

Gambling legislation does not make express provision for the rights of vulnerable gamblers who are process-addicted and mentally ill and disabled by the consequences of the psychiatric diagnosis of “Disordered Gambling”, or gamblers who appear to be at risk to it - and are unable to cease gambling.

Gambling legislation also does not set out the duties of gambling service providers to these gamblers.

Gambling legislation is silent on the key legal issues the se gamblers face: Which vulnerable gamblers may be subjected to unfair discrimination by gambling product and service providers on the ground of their disability or process-addiction to gambling?⁹⁷ What are the rights of gamblers with severe disordered psychiatric gambling behaviours who are seriously disabled and mentally ill? Which grounds of prohibited discrimination may be involved? What are the statutory and legal duties of gambling providers to support them?⁹⁸

The answers to these legal questions are found in non-gambling legislation, common law and international conventions. All there set out the rights and protections of these vulnerable gamblers when they gamble and the duties of gambling service providers to them as they gamble.

The non-gambling legislation that is relevant to mentally ill vulnerable gamblers has ‘general application’ and takes precedence over and supersedes legislation such as national / provincial gambling legislation (which has a narrower and a specific application).

In a conflict between legislation that has general application and national and / or provincial legislation regulating gambling and / or legislation regulating gambling machines, the legislation with general application prevails and an Equality Court has jurisdiction.

Non-gambling legislation with general application ‘trumps’ national and provincial gambling legislation and all gambling legislation is subordinate to it. In the context of gambling and specifically the rights of process-addicted mentally ill vulnerable gamblers disabled by the psychiatric illness of “Disordered Gambling”, and gamblers at risk to it, and the duties of gambling service providers to them:

Relevant *legislation* with general application that supersedes and takes precedence over national and provincial gambling legislation is the following:

1. Constitution;

⁹⁶ See for example the Labour Appeal Court decision of *Kylie v Commission for Conciliation Mediation and Arbitration and Others* (CA10/08) [2010] ZALAC 8; 2010 (4) SA 383 (LAC) ; 2010 (10) BCLR 1029 (LAC) ; (2010) 31 ILJ 1600 (LAC) ; [2010] 7 BLLR 705 (LAC) (26 May 2010).

⁹⁷ So severe that they decide or are impelled by great distress to commit suicide in a casino by self-immolation in front of the gambling machines.

⁹⁸ And thereby due to unfair discrimination that was reported to have been so severe that a gambler decided to end their own life inside a gambling venue, in front of the gambling machines.

2. Promotion of Equality and Prevention of Unfair Discrimination Act;
3. Mental Health Care Act;⁹⁹
4. Consumer Protection Act;
5. Older Persons Act;¹⁰⁰

Relevant *non-legislation* that supersedes and takes precedence over national and provincial gambling legislation are:

6. Common law;
7. International Conventions.

11 THE CONSTITUTION: DISORDERED GAMBLER RIGHTS

For vulnerable process-addicted gamblers disabled by mentally illness and suffering from the psychiatric illness of “Disordered Gambling”, or who are at risk to it, Constitutional rights are crucial: the Constitution’s Bill of Rights “*affirms the democratic values of human dignity, equality and freedom*”.¹⁰¹ The deceased gambler may have been very vulnerable and deeply troubled: he may have been so impelled by profound mental distress that he chose to end his life inside the casino building by a method chosen to cause such severe injury by self-immolation that he would succumb. The psychological effects of unfair discrimination on a person have been recognized in Pillay¹⁰² by the KZN High Court: “[t]hey feel harassed, demeaned, humiliated and traumatised as a result of the discrimination”.

For vulnerable process-addicted gamblers disabled by the mental illness of “Disordered Gambling” who conclude contracts of wager in gambling establishments on gambling machines, and are unable to cease doing so, Constitutional rights are self-evidently vital as rights and duties: in the gambling context, a key constitutional / equality issue is this:

Are a gambler’s constitutional rights respected when a gambling service provider can continuously observe a process-addicted gambler’s psychiatric disordered conduct and inability to stop gambling, but does not act or intervene or support the gambler as the provider directly benefits financially by facilitating and incentivizing the disordered gambling to continue gambling.

The Constitutional Court in 2000 in 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 Others¹⁰³ ruled that “judicial officers read legislation, where possible, in ways which give effect to its fundamental values”.¹⁰⁴

⁹⁹ Mental Health Care Act 2002, No. 17 of 2002

¹⁰⁰ Older Persons Act, No 13 of 2006. Assented to 29 October 2006. Published in Government Gazette Vol. 497 dated 2 November 2006 No. 29346

¹⁰¹ 7. *Rights.*-

(1) *This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.*

(2) *The state must respect, protect, promote and fulfil the rights in the Bill of Rights.*

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

¹⁰² KZN High Court sitting as an Equality Court - (AR 791/05) (5 July 2006)

¹⁰³ 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC)

¹⁰⁴ The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and **includes all in the process of governance**. As such, **the process of interpreting the**

11.1 Constitutional Right: Dignity – Respected and Protected

For vulnerable gamblers suffering from process-addiction and the disabling psychiatric mental illness of “Disordered Gambling”, or who are at risk to it, the Constitutional right to “dignity” is crucial. It provides that “*Everyone has inherent dignity and the right to have their dignity respected and protected.*”¹⁰⁵

11.2 Constitutional Right: Equality – Equal Protection and Benefit

For vulnerable gamblers suffering from process-addiction and the disabling psychiatric mental illness of “Disordered Gambling”, or who are at risk to it, the Constitutional right to Equality¹⁰⁶ has important protective implications. It provides that “*Everyone is equal before the law and has the right to equal protection and benefit of the law*” and that “*Equality includes the full and equal enjoyment of all rights and freedoms.*”

11.3 Constitutional Right: Freedom – Psychological Integrity

For vulnerable gamblers suffering from process-addiction and the disabling psychiatric mental illness of “Disordered Gambling”, or who are at risk to it, the Constitutional right to freedom in section 12 is directly relevant: it includes the right to “*... bodily and psychological integrity ...*”¹⁰⁷

For gambling providers whose products and services are acknowledged to have the capacity to cause psychological harm, section 12 establishes a duty to promote their “psychological integrity”. This may be achieved by identify disordered gamblers and reasonably accommodating to preclude and prevent breaches of this right.

11.4 Ubuntu

The Constitutional Court established a duty to respect the principle of *ubuntu*, in *S v Makwanyane and Another*¹⁰⁸ and *Dikoko v Mokhatla*¹⁰⁹ to treat others by demonstrating *ubuntu* practices and principles. In *S v Makwanyane* Judges described “ubuntu” as a key value that denotes humanity and morality and emphasizes respect for the dignity of others;¹¹⁰ as recognizing love between people and innate humanity of another;¹¹¹ on communality and interdependence between people and recognition of status as a human being.¹¹²

Constitution must recognise the context in which we find ourselves and the Constitution’s goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole ... The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.

¹⁰⁵ 10. **Human dignity.**-

Everyone has **inherent dignity** and the right to have their dignity respected and protected.

¹⁰⁶ 9. **Equality.** –

(1) **Everyone is equal before the law** and has the right to **equal protection and benefit of the law.**

(2) Equality includes the **full and equal enjoyment of all rights and freedoms.** To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

¹⁰⁷ Constitution: Bill of Rights: **Freedom and security of the person** - Section 12

12 (2) Everyone has the right to **bodily and psychological integrity,** ...

¹⁰⁸ (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995)

¹⁰⁹ (CCT62/05) [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) (3 August 2006)

¹¹⁰ *S v Makwanyane*: Mokgoro, J at para 307:

The King Report on Corporate Governance also emphasizes ubuntu: the entity's obligation of ethical and moral responsibility to undertake corporate governance and leadership¹¹³ must take place in accord with inter alia Ubuntu principles.¹¹⁴

In this regard, the Constitutional Court has ruled that contracts such as gambling wagers are subject to the principle of Ubuntu. In *Barkhuizen v Napier* the Court found that "... it is highly desirable and in fact necessary to infuse the law of contract with constitutional values" and emphasized the obligation to include the values inherent to ubuntu into the common law of contract because ubuntu carries in it the ideas of "humaneness, social justice and fairness".

12 EQUALITY ACT: DISORDERED GAMBLER NON-DISCRIMINATION

The Promotion of Equality and Prevention of Unfair Discrimination Act ("Equality Act") is a law with general application.¹¹⁵ It requires all persons and legal entities to promote equality and to not discriminate unfairly. It enacts rights for persons such as vulnerable gamblers and duties for gambling providers that support process-addicted mentally disabled gamblers – and which national (and all provincial) gambling legislation makes no reference to at all.

Gambling industry practice appears to have also not incorporated these rights, duties and protections that process-addicted mentally disabled gamblers have. This appears to demonstrate why legislation that has general application always takes precedence over and supersedes legislation with a specific and limited scope.

12.1 Equality Act: Prohibited Discrimination Ground - Disability

One of the Equality Act's specific "prohibited grounds"¹¹⁶ is that of "disability". Disability involves living with (or suffering from) an impairment that has a disabling effect on the person: the nature of the impairment can be physical, mental, neurological, sensory, medical, learning or possibly a perceived one.

"While [*ubuntu*] envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation."

¹¹¹ S v Makwanyane: Mohamed J at para 262:

"... the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognizing their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by."

¹¹² S v Makwanyane: Langa J at para 224:

"The concept is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all."

¹¹³ The King Report on Governance for South Africa ("King III") confirms that corporate governance is about "leadership":

Good corporate governance is essentially about effective, responsible leadership. Responsible leadership is characterized by the ethical values of responsibility, accountability, fairness and transparency.

¹¹⁴ King III at "Principle 1.2: The board should ensure that the company is and is seen to be a responsible corporate citizen" at point 21 emphasizes the moral centrality of the concept of Ubuntu, and the principles underlying it in corporate leadership, governance and social responsibility:

In the African context these moral duties find expression in the concept of Ubuntu which is captured in the expression 'uMuntu ngumuntu ngabantu', 'I am because you are; you are because we are'. Simply put, Ubuntu means humaneness and the philosophy of Ubuntu includes mutual support and respect, interdependence, unity, collective work and responsibility. It involves a common purpose in all human endeavour and is based on service to humanity (servant leadership).

¹¹⁵ 5. (2) If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act must prevail.

¹¹⁶ Equality Act: definition of prohibited grounds of unfair discrimination:

1.(1)(xxii) "prohibited grounds" are—

(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth;

Psychiatry in DSM 5 classifies a gambler whose conduct or gambling behaviour displays or indicates or suggests process-addiction to gambling to have the disabling mental illness described as “Disordered Gambling”.

Therefore the Equality Act applies to these vulnerable process-addicted gamblers because they have a “*disability*”: they suffer from the disabling mental illness of “Disordered Gambling”. The Equality Act protects vulnerable process-addicted gamblers by prohibiting discrimination against them in two ways:

- (a) a *general prohibition* in section 6¹¹⁷ on general discrimination; and
- (b) a *specific prohibition* in section 9¹¹⁸ on discrimination *on the ground of disability*.

12.2 Equality Act: the General Prohibition of General Unfair Discrimination

A key object of the Equality Act is the promotion of “*equality*” – which is defined as the “*full and equal enjoyment of rights and freedoms as contemplated in the Constitution*”.¹¹⁹ This definition defines equality very specifically: it includes “*de jure*”¹²⁰ and “*de facto*”¹²¹ equality.

To promote its object, the Equality Act prohibits discrimination by defining the acts and omissions that constitute to “*discrimination*” for the purposes of the legislation.¹²² Acts and omissions that constitute discrimination include:

“any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly
(a) imposes burdens, obligations or disadvantage on or
(b) withholds benefits, opportunities or advantages from,
any person on one or more of the prohibited grounds”.

12.3 General Discrimination: Policy, Law, Rule, Practice, Condition or Situation

Under the *general prohibition*, the forms of conduct by a licensed gambling provider toward a mentally disabled gambler that are prohibited are as wide the scope of the acts and omissions the Equality Act defines as amounting to “*discrimination*”. This definition covers conduct in the form of an “*act or omission*” including “... *a policy, law, rule, practice, condition or situation ...*”

¹¹⁷ Equality Act: General Prohibition of Unfair Discrimination
Prevention and general prohibition of unfair discrimination
6. *Neither the State nor any person may unfairly discriminate against any person.*

¹¹⁸ Equality Act: definition: Unfair Discrimination on Ground of Disability
Prohibition of unfair discrimination on ground of disability
9. *Subject to section 6, no person may unfairly discriminate against any person on the ground of disability, including—*
(a) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;
(b) contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;
(c) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.

¹¹⁹ Equality Act: definition of “equality”:
1.(1)(ix) *“equality” includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes de jure and de facto equality and also equality in terms of outcomes;*

¹²⁰ A definition of this term is ‘a state of affairs that is in accordance with law’; per https://en.wikipedia.org/wiki/De_jure,

¹²¹ A definition of this term is ‘in fact, in reality, in actual existence, force, or possession, as a matter of fact’ per https://en.wikipedia.org/wiki/De_facto

¹²² A second enquiry must determine whether the act / omission that is alleged to constitute discrimination was unfair or not.

This definition is cast very widely and will extend to any licensed gambling provider's conditions of entry, built environment, designated gambling area, wager and betting arrangements, consumer information provided, machine and table access and accessibility, machine programming and features and properties, health and safety protections, consumer protection as well as gambling policies and practices.

12.3.1 General Discrimination: Imposing “Burdens, Obligations, Disadvantage”

The legal effect of 1(1)(viii)(a) is that no “*policy, law, rule, practice, condition or situation*” should directly or indirectly unfairly *impose* “... *burdens, obligations or disadvantage* ...” on a vulnerable gambler whose conduct or gambling behaviour displays or indicates or suggests that they are process-addicted and psychiatrically disabled by the mental illness defined in DSM 5 as “Disordered Gambling”.

12.3.2 General Discrimination: Withholding “Benefits, Opportunities, Advantages”

The legal effect of (1)(1)(viii)(b) is that no “*policy, law, rule, practice, condition or situation*” should unfairly *withhold* “... *benefits, opportunities or advantages* ...” from a vulnerable gambler whose conduct or gambling behaviour displays or indicates or suggests that they are process-addicted and psychiatrically disabled by the mental illness defined in DSM 5 as “Disordered Gambling”.

12.4 Specific Prohibition of Disability Discrimination: Four Forms

The Equality Act definition of *disability-related* unfair discrimination in section 9 is specific: three sub-sections define certain conduct (acts and omissions) as constituting unfair disability-related discrimination. Sub-sections (a) – (c) have establishing specific rights for persons with disabilities and specific corresponding statutory duties on natural persons and legal entities to afford them.

12.5 Disability Discrimination 1: Denying / Removing Supporting / Enabling Facility

The Equality Act's definition of disability-based discrimination in sub-section 9(a) is crucial: “*denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society*” are forms of unlawful unfair discrimination. The section renders an act that involves “*removing ... a facility*” and the omission that has the effect of “*denying ... a facility*” unfair discrimination. The act or the omission could be intentional or negligent to fall foul of the section.

The Equality Act does not define a “*facility*” in relation to a person living with a disability but the UNCRPD does do so. In the UNCRPD the word “*facility*” is extensively referred to: some selected examples are the following: as an *assistive technology*,¹²³ as a means to promote access,¹²⁴ to include a building,¹²⁵ as a place or service that must be accessible;¹²⁶ and as a measure to prevent exploitation, violence and abuse.¹²⁷

¹²³ (h) *To provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities;*

¹²⁴ UN CRPD Article 9: Accessibility
Accessibility

1. *To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the **physical environment**, to **transportation**, to*

Process-addicted gamblers who are disabled by the mental illness of “Disordered Gambling” are vulnerable because they are open to abuse and exploitation at a gambling venue, since gambling product and service providers are aware that their process-addiction renders them unable to resist the compulsion to gamble, and will continue to gamble to their own financial extinction. Because of the severe psychiatric effects of the mental illness of “Disordered Gambling” gambling product and service providers will need to consider, identify and provide appropriate “*supporting*” and “*enabling*” facilities “*for their functioning in society*” on a basis that is equal with others that these gamblers have the right to receive.

12.5.1 Disability Discrimination 2: Contravening Environmental Accessibility Code

The Equality Act’s definition of disability-based discrimination in sub-section 9(b)¹²⁸ aims to promote equality and prevent unfair discrimination in equal access for disabled people to the built environment, and in equal accessibility to venues, facilities or services. It declares “*contravening the code of practice or regulations of the [SABS] that govern environmental accessibility*” a form of unfair discrimination.

Gambling product and service providers will need to consider, identify and address all machines and tables and facilities and amenities that are unfairly inaccessible to disabled gamblers¹²⁹ in the sense that they do not comply with SABS code requirements may be regarded as amounting to unfair disability-based discrimination under section 9(b) and an actionable breach equality legislation.

12.5.2 Disability Discrimination 3: Failing to Eliminate Obstacles that Limit / Restrict

information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:

- (a) **Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;**
- (b) **Information, communications and other services, including electronic services and emergency services.**

¹²⁵ UN CRPD Article 9: Accessibility

(e) *Provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;*

¹²⁶ UN CRPD Article 9: Accessibility

2. *States Parties shall also take appropriate measures to:*

- (a) *Develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;*
- (b) *Ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;*
- (c) *Provide training for stakeholders on accessibility issues facing persons with disabilities;*
- (d) *Provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;*
- (e) *Provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;*
- (f) *Promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;*
- (g) *Promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;*
- (h) *Promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.*

¹²⁷ UN CRPD Article 9: Freedom from Exploitation, Violence and Abuse

3. *In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.*

¹²⁸ Equality Act: definition: Unfair Discrimination on Ground of Disability

Prohibition of unfair discrimination on ground of disability

9. *Subject to section 6, no person may unfairly discriminate against any person on the ground of disability, including—*

- (a);
- (b) **contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;**
- (c)

¹²⁹ Some familiar examples are the following: Blindness or partial sightedness; Deafness or hearing impairment; Physical impairment (Wheelchair use, Amputation, etc); Learning impairment; Neurological impairment (Epilepsy, TBI, Stroke and others); Mental Illnesses (Disordered Gambling, Alcohol Addiction, Anxiety, Social Phobia, and others); Intellectual disability;

The Equality Act's definition in sub-section 9(c) of disability-based discrimination renders a failure to act in a manner that promotes the equality of a person with a disability to be a form of unfair discrimination. The act relates to the needs a disabled person may have, and a failure to respond to these needs is a form of disability discrimination. The first part of sub-section 9(c) defines as discrimination "*failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities*".¹³⁰

Gambling product and service providers will need to consider, identify and remove all "... *obstacles that unfairly limit or restrict*" vulnerable process-addicted gamblers disabled by the mental illness of 'Disordered Gambling' "*from enjoying equal opportunities*" to gamble and when they gamble. Where gambling environments are designed and gambling products are manufactured to take advantage of Disordered Gamblers' addiction and inability to cease gambling is likely to be ruled to constitute an unfair "*obstacle*" and be an unfair "*limit*" and a denial of an "*equal opportunity*" to gamble.

12.5.3 Disability Discrimination 4: Failing to ... Reasonably Accommodate Needs

The Equality Act's definition in sub-section 9(c)¹³¹ of disability-based discrimination in the second part confirms the importance of the right to 'reasonable accommodation' for disabled persons and the corresponding duty on persons and judicial entities to "reasonably accommodate" their needs. The second part of sub-section 9(c) defines "*failing to take steps to reasonably accommodate the needs of such persons*" as disability discrimination.

The right to "reasonable accommodation" is the central right people with disabilities have internationally and in South Africa. Courts have all recognized the role and importance of the right in disability law in the context of dignity, equality, diversity and fair labour practice for persons with disabilities. This key right is not defined in the Equality Act but in the UNCRPD¹³² is specifically defined,¹³³ forms part of the definition of disability discrimination¹³⁴ and has a key role in equality,¹³⁵ liberty and security,¹³⁶ education,¹³⁷ and employment.¹³⁸

¹³⁰ Equality Act: definition: Unfair Discrimination on Ground of Disability
Prohibition of unfair discrimination on ground of disability

9. Subject to section 6, no person may unfairly discriminate against any person on the ground of disability, including—

(a) ...;

(b) ...;

(c) *failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or ...*

¹³¹ Equality Act: definition: Unfair Discrimination on Ground of Disability
Prohibition of unfair discrimination on ground of disability

9. Subject to section 6, no person may unfairly discriminate against any person on the ground of disability, including—

(a) ...;

(b) ...;

(c) *... or failing to take steps to reasonably accommodate the needs of such persons.*

¹³² See UNCRPD text at <http://www.un.org/disabilities/convention/conventionfull.shtml>

¹³³ In the UNCRPD the right to "**reasonable accommodation**" is defined in "Article 2: Definitions" as follows:

"Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;

¹³⁴ In the UNCRPD "**Discrimination on the basis of disability**" is defined in "Article 2: Definitions" as follows:

"Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation

¹³⁵ UNCRPD Article 5 - Equality and non-discrimination

3. In order to promote equality and eliminate discrimination, **States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.**

¹³⁶ UNCRPD Article 14 - Liberty and security of the person

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, **including by provision of reasonable accommodation.**

¹³⁷ UNCRPD Article 24 - Education

2. In realizing this right, States Parties shall ensure that:

a. Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;

The Constitutional Court in 2007, in an Equality Act dispute, examined “*the application of reasonable accommodation to disability law*” in MEC for Education: KwaZulu-Natal, Cele, Martin and Knight v Pillay, with Governing Body Foundation, Natal Tamil Vedic Society Trust and Freedom of Expression Institute.^{139 140} The Constitutional Court linked a failure to discharge the statutory duty established by the Equality Act to provide “*reasonable accommodation*” with unfair discrimination. The Court noted the reality that “*Disabled people are often unable to access or participate in public or private life because the means to do so are designed for able-bodied people. The result is that disabled people can, without any positive action, easily be pushed to the margins of society.*”¹⁴¹

The Court based its reasoning on its conclusion that “*the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation*” was the omission “... which results in discrimination against them.” The Constitutional Court then considered the obligation to “*accommodate diversity*”, the failure to do so and unfair discrimination. The Court also ruled that “... *reasonable accommodation will always be an important factor in the determination of the fairness of discrimination*” - although it should not be the only one.¹⁴²

13 MENTAL HEALTH CARE ACT

The Mental Health Care Act¹⁴³ (“MHCA”) is a law of general application, and is relevant to process-addicted gamblers who are mentally ill, and typically have other associated psychiatric illnesses as well.

- b. Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;
 - c. **Reasonable accommodation of the individual’s requirements is provided;**
 - d. ...
 - e. ...
5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties **shall ensure that reasonable accommodation is provided to persons with disabilities.**

¹³⁸ UNCRPD Article 27 - Work and employment

- i. **Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;**

¹³⁹ MEC for Education: KwaZulu-Natal, Cele, Martin and Knight v Pillay, with Governing Body Foundation, Natal Tamil Vedic Society Trust and Freedom of Expression Institute Case No: CCT 51/06 and [2007] ZACC 21

¹⁴⁰ MEC for Education: KwaZulu-Natal, Cele, Martin and Knight v Pillay, with Governing Body Foundation, Natal Tamil Vedic Society Trust and Freedom of Expression Institute through paragraphs 71 – 77

¹⁴¹ MEC for Education: KwaZulu-Natal, Cele, Martin and Knight v Pillay, with Governing Body Foundation, Natal Tamil Vedic Society Trust and Freedom of Expression Institute para 74:

74 *The idea extends beyond religious belief. Its importance is particularly well illustrated by the application of reasonable accommodation to disability law. As I have already mentioned, the Equality Act specifically requires that reasonable accommodation be made for people with disabilities. Disabled people are often unable to access or participate in public or private life because the means to do so are designed for able-bodied people. The result is that disabled people can, without any positive action, easily be pushed to the margins of society.*

Exclusion from the mainstream of society results from the construction of a society based solely on ‘mainstream’ attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them.” Eaton v Brant County Board of Education [1997] 1 SCR 241 at para 67.

¹⁴² MEC for Education: KwaZulu-Natal, Cele, Martin and Knight v Pillay, with Governing Body Foundation, Natal Tamil Vedic Society Trust and Freedom of Expression Institute Case No: CCT 51/06 and [2007] ZACC 21 at para [77]:

77 *It is now necessary to crystallise the role that reasonable accommodation can play in the Equality Act. As noted earlier, the principle is mentioned on a number of occasions in the Equality Act. What concerns us in this case, however, is section 14(3)(i)(ii) which states that taking reasonable steps to accommodate diversity is a factor for determining the fairness of discrimination. From this it is clear that reasonable accommodation will always be an important factor in the determination of the fairness of discrimination. It would however be wrong to reduce the test for fairness to a test for reasonable accommodation, particularly because the factors relevant to the determination of fairness have been carefully articulated by the legislature and that option has been specifically avoided.”*

¹⁴³ Mental Health Care Act 2002, No. 17 of 2002

The MHCA also applies directly to Medical Practitioners / Health Professionals employed by Respondent who treat or advise disordered gamblers on Respondent's property and / or those who are employed by / contracted to the National Responsible Gambling Foundation and treat or support or advise disordered gamblers in a treatment programme.

13.1 MHCA - Definition of Mental Illness

The MHCA defines "mental illness" (and "severe or profound intellectual disability") in section 1¹⁴⁴ to mean "a positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorised to make such diagnosis".

13.2 MHCA - a Law of General Application

MHCA is intended to be a law of general application: section 2(2)¹⁴⁵ provides that in the event of a conflict between a provision of the MHCA and other legislation (for example gambling legislation) the MHCA prevails.

13.3 MHCA - Care, Treatment & Rehabilitation Standards to be Equivalent to Other

The MHCA under the heading "*Respect, human dignity and privacy*", in section 10(1)¹⁴⁶ affords mental health users a statutory right to not be unfairly discriminated against on the grounds of their mental health status.

13.4 MHCA - Unfair Discrimination

The MHCA also establishes a statutory right in section 10(2)¹⁴⁷ for every mental health care user to the effect that a "*mental health care user must receive care, treatment and rehabilitation services according to standards equivalent to those applicable to any other health care user*".

¹⁴⁴ 1 Definitions

In this Act, unless the context indicates otherwise-

'mental illness' means a positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorised to make such diagnosis;

'severe or profound intellectual disability' means a range of intellectual functioning extending from partial self-maintenance under close supervision, together with limited self-protection skills in a controlled environment through limited self care and requiring constant aid and supervision, to severely restricted sensory and motor functioning and requiring nursing care;

¹⁴⁵ 2 Interpretation

(1) This Act must be interpreted in a manner that is consistent with the objectives of this Act.

(2) **In the event of any conflict arising between this Act and any other law other than the Constitution, this Act must prevail.**

¹⁴⁶ 10 Unfair discrimination

(1) **A mental health care user may not be unfairly discriminated** against on the grounds of his or her mental health status.

(2) Every mental health care user must receive care, treatment and rehabilitation services according to standards equivalent to those applicable to any other health care user.

(3) Policies and programmes aimed at promoting the mental health status of a person must be implemented with regard to the mental capacity of the person concerned.

¹⁴⁷ 10 Unfair discrimination

(1) A mental health care user may not be unfairly discriminated against on the grounds of his or her mental health status.

(2) Every **mental health care user must receive care, treatment and rehabilitation services according to standards equivalent** to those applicable to **any other health care user**.

(3) Policies and programmes aimed at promoting the mental health status of a person must be implemented with regard to the mental capacity of the person concerned.

14 CONSUMER PROTECTION ACT

The Consumer Protection Act (“CPA”) at section 3(1)(d)(i) confirms that the “*purposes of this Act*” are to “*promote and advance the social and economic welfare of consumers*” by inter alia “protecting consumers from amongst others “*unconscionable ... trade practices*”.¹⁴⁸

Key provisions of the CPA include the “*right to fair and honest dealing*” in section 40(1)¹⁴⁹ which prohibits a range of acts including “*use [of] physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct*”; the prohibition of “*unconscionable conduct*” which is conduct “*having a character contemplated in section 40*” and also conduct that is “*otherwise unethical or improper to a degree that would shock the conscience of a reasonable person*”;¹⁵⁰ and conduct that is prohibited by section 40(2) because it “*knowingly [took] advantage of the fact that a consumer was substantially unable to protect the consumer’s own interests because of ... mental disability*”.¹⁵¹

14.1 CPA - “Purpose and Application”

The CPA in its “*Purpose, policy and application of the Act*” at section 3(1)(d)(i) confirms that the “*purposes of this Act*” are to “*promote and advance the social and economic welfare of consumers*” by inter alia “protecting consumers from amongst others “*unconscionable ... trade practices*”.¹⁵²

¹⁴⁸ Part B

Purpose, policy and application of Act
Purpose and policy of Act

3. (1) The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by—

- (d) **protecting consumers from—**
 - (i) **unconscionable**, unfair, unreasonable, unjust or otherwise improper **trade practices**; and
 - (ii) **deceptive, misleading, unfair or fraudulent conduct**;

¹⁴⁹ Part F - Right to fair and honest dealing

Unconscionable conduct

40. (1) A supplier or an agent of the supplier must not use **physical force** against a consumer, **coercion, undue influence, pressure, duress** or **harassment, unfair tactics** or any **other similar conduct**, in connection with any—

- (a) **marketing** of any goods or services;
- (b) **supply** of goods or services to a consumer;
- (c) **negotiation, conclusion, execution or enforcement** of an agreement to supply any goods or services to a consumer;
- (d) **demand for, or collection of, payment for** goods or services by a consumer; or
- (e) recovery of goods from a consumer.

(2) ...

(3) ...

¹⁵⁰ Definitions

1. “**unconscionable**”, when used with reference to any conduct, means—

- (a) **having a character contemplated in section 40**; or
- (b) **otherwise unethical or improper to a degree that would shock the conscience of a reasonable person**;

¹⁵¹ Part F - Right to fair and honest dealing

Unconscionable conduct

40. (1) ...

(2) *In addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer’s own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.*

(3) *Section 51 applies to any court proceedings concerning this section.*

¹⁵² Part B

Purpose, policy and application of Act
Purpose and policy of Act

3. (1) The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by—

- (d) **protecting consumers from—**
 - (i) **unconscionable**, unfair, unreasonable, unjust or otherwise improper **trade practices**; and
 - (ii) **deceptive, misleading, unfair or fraudulent conduct**;

14.2 CPA - Right to “Fair And Honest Dealing”

Section 40(1) – in Part F on the “*Right to fair and honest dealing*” – establishes rights to fair and honest dealing for consumers.

14.2.1 Acts Prohibited: “Force”, “Coercion”, “Undue Influence”, “Unfair Tactics” etc

The “*right to fair and honest dealing*” in section 40(1)¹⁵³ expressly prohibits a range of acts by a “... *supplier or an agent of the supplier...*” from “*use [of] physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct*”.

A Court might find that a gambling service provider’s conduct breaches s 40(1) where the tactics are seen as “*unfair*” once they are found to have been “*unconscionable*” as defined in section 1.

14.2.2 Activities the Acts are Prohibited in: “Marketing”, “Supply”, “Negotiation” etc

The acts that are expressly prohibited and may not take place in connection with goods and services in relation to “*marketing*”, “*supply*”, “*negotiation, conclusion, execution or enforcement*”, “*demand for, or collection of, payment for*”, and “*recovery of goods*”.

14.3 Prohibition of “Unconscionable Conduct”

Section 1 (“Definitions”) defines “*unconscionable conduct*” in two ways: (a) as conduct “*having a character contemplated in section 40*” and also (b) as “*otherwise unethical or improper to a degree that would shock the conscience of a reasonable person*”.¹⁵⁴

14.3.1 Conduct of “Knowingly Take Advantage” - S 40:

A Court may rule that a gambling service provider’s conduct toward a process-addicted mentally ill gambler who is disabled by “Disordered Gambling” breaches s 40(2) because it “*knowingly [took] advantage of the fact that a consumer was substantially unable to protect the consumer’s own interests because of ... mental disability*”.¹⁵⁵

¹⁵³ Part F - Right to fair and honest dealing

Unconscionable conduct

40. (1) A supplier or an agent of the supplier must not use **physical force** against a consumer, **coercion, undue influence, pressure, duress** or **harassment, unfair tactics** or any **other similar conduct**, in connection with any—

- (a) **marketing** of any goods or services;
- (b) **supply** of goods or services to a consumer;
- (c) **negotiation, conclusion, execution or enforcement** of an agreement to supply any goods or services to a consumer;
- (d) **demand for, or collection of, payment for** goods or services by a consumer; or
- (e) recovery of goods from a consumer.

(2) ...

(3) ...

¹⁵⁴ Definitions

1. “**unconscionable**”, when used with reference to any conduct, means—

- (a) **having a character contemplated in section 40**; or
- (b) **otherwise unethical or improper to a degree that would shock the conscience of a reasonable person**;

¹⁵⁵ Part F - Right to fair and honest dealing

Unconscionable conduct

40. (1) ...

- (2) *In addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer’s own interests because of physical or mental disability, illiteracy,*

Some ways gambling providers may be at risk relate to their environment, facilities, resources, amenities, machines, information, instructions, notices, incentives, rewards and ancillaries. These are briefly considered below.

14.3.2 Conduct Unethical Improper to Shock Conscience of Reasonable Person - S 1

A Court may take the provider's environment, facilities, resources, amenities, machines, information, instructions, notices, incentives, rewards and ancillaries into account when applying the objective test of whether the provider's conduct was "*otherwise unethical or improper to a degree that would shock the conscience of a reasonable person*". These are also briefly considered below.

14.3.3 Unconscionable Conduct": S 40: to "Knowingly Take Advantage"

In its provisions in CPA Part F covering the "*Right to fair and honest dealing*" at section 40(2) prescribes that it is "*unconscionable*" for a supplier to "*knowingly take advantage*" of "*the fact that a consumer was substantially unable to protect the consumer's own interests*" because of a form of vulnerability the consumer has.

A Court might find that a gambling service provider's conduct breaches s 40(2) where:

- (a) the gambler's conduct and gambling behaviour in the venue disclosed, indicated or suggested process-addiction to gambling and the disabling psychiatric mental illness of "Disordered Gambling";
- (b) the provider accordingly knew (or is regarded as having had the capability to foresee) that the gambler had become process-addicted to gambling and was unable to stop gambling and was thus visibly "*substantially unable to protect [his / her] own interests*";
- (c) the design, nature and effect of the provider's environment, facilities, resources, amenities, machines, information, instructions, notices, incentives and rewards aimed to facilitate a process-addicted gambler continuing to gamble as long and as intensely as possible;
- (d) the longer and more intensely the process-addicted gambler s influenced / induced / encourages to continue gambling, the higher the return to the provider, the greater the productivity of the machine and the net profit to the provider;
- (e) the provider took no steps to promote the vulnerable process-addicted gambler's dignity, equality, freedom (psychological integrity); and to not discriminate on the grounds of known visible disability; to respect ubuntu; to show care and compassion;
- (f) the effect of the provider's business model and environment, facilities, resources, amenities, machines, information, instructions, notices, incentives and rewards were bluntly utilitarian by harnessing the process-addicted gambler as a means to its ends; and by treating the process-addicted gambler as a commodity not a person;

ignorance, inability to understand the language of an agreement, or any other similar factor.

(3) Section 51 applies to any court proceedings concerning this section.

Where on the evidence a Court accepts evidence similar to the above, it might find that the provider's conduct was "*unconscionable*" and was therefore unlawful because it "*knowingly [took] advantage*" of that gambler's process-addiction and substantial inability to protect their own interests. A finding of that nature would appear to also place the provider in breach of the Equality Act and the Constitution and the Common law.

14.3.4 Unconscionable Conduct": S 1: Unethical / Improper Shocking Conscience

CPA s 1 defines "*unconscionable conduct*" as conduct "*having a character contemplated in section 40*" or conduct that is "*otherwise unethical or improper to a degree that would shock the conscience of a reasonable person*".¹⁵⁶

The other leg of the CPA definition of "*unconscionable conduct*" is sub-section (b): this requires there to be any one of two forms of conduct that have one specific effect.

14.3.4.1 Unethical Conduct

The provider's conduct must not involve conduct (an act and / or an omission) that is objectively "*unethical*". The ethical reference introduces the concept ethics: in business this is typically about conflicts of interest, conflicts of duty, or perverse incentives. Guidelines for navigating ethical business conduct are to be found in King Code on Corporate Governance:¹⁵⁷ the ethical values cited are "*Responsibility*"; "*Accountability*"; "*Fairness*" and "*Transparency*".

14.3.4.2 Improper Conduct

The provider's conduct must not involve conduct in the form of acts and / or omissions that are objectively "*improper*". A Court may construe this as ubuntu: the "*values of an open and democratic society based on freedom and equality*" – which the Constitutional Court addressed in *Makwanyane*.¹⁵⁸ The Judges ruled that the concept "*translates as humaneness ... [i]n its most fundamental sense, it translates as personhood and morality*" and it "*expresses itself in umuntu ngumuntu ngabantu*". The Court ruled that ubuntu "*envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality*". King II makes this point: "*creating a structure that can pursue profit at the expense of human rights is legally untenable in South Africa*".¹⁵⁹

¹⁵⁶ Definitions

1. In this Act –

"**unconscionable**", when used with reference to any conduct, means—

(a) having a character contemplated in section 40; or

(b) **otherwise unethical or improper to a degree that would shock the conscience of a reasonable person;**

¹⁵⁷ King III guides corporates that "*corporate governance*" decisions by boards and management must be based on four primary "*ethical values*".¹⁵⁷ *The ethics of corporate governance requires all deliberations, decisions and actions of the board and executive management to be based on the following four ethical values underpinning good corporate governance:*

14.1 **Responsibility:** *The board should assume responsibility for the assets and actions of the company and be willing to take corrective actions to keep the company on a strategic path, that is ethical and sustainable.*

14.2 **Accountability:** *The board should be able to justify its decisions and actions to shareholders and other stakeholders.*

14.3 **Fairness:** *The board should ensure that it gives fair consideration to the legitimate interests and expectations of all stakeholders of the company.*

14.4 **Transparency:** *The board should disclose information in a manner that enables stakeholders to make an informed analysis of the company's performance, and sustainability.*

¹⁵⁸ *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 368 - 369 that:

[368] *In interpreting Chapter 3 of the Constitution, which deals with fundamental rights, all courts must promote the values of an open and democratic society based on freedom and equality [s.35(1)]. One of the values of an open and democratic society is precisely that the values of all sections of society must be taken into account and given due weight when matters of public import are being decided. Ms. David's concern is that when it comes to interpreting Chapter 3, and in particular, the concept of punishment, the values of only one section of the community are taken into account.*

¹⁵⁹ King Report on Corporate Governance: "*Principle 1.2: The board should ensure that the company is and is seen to be a responsible corporate citizen*": point 23.

14.3.5 “Unconscionable Conduct”: 40(2) “Physical” or “Mental” Disability

Section 40(2)¹⁶⁰ describes specified consumer vulnerabilities which are “*physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement*”.

A gambler’s conduct and gambling behaviour in the gambling venue that discloses, indicates or suggests process-addiction to gambling is classified in DSM 5 as a psychiatric impulse control disorder and mental illness described as “Disordered Gambling” which has severely disabling effects.

14.3.6 “Unconscionable Conduct”: S 4(5)(b) Unconscionable, Misleading, Deceptive

The CPA in its “*Realisation of Consumer Rights*” at section 4(5)(b) prescribes that “[i]n any dealings with a consumer in the ordinary course of business, a person must not” inter alia “*engage in any conduct that is unconscionable, misleading or deceptive, or that is reasonably likely to mislead or deceive.*”¹⁶¹

A Court may rule that where a gambling service provider’s conduct is found to be in breach of s 40(2) that it also breaches s 4(5)(b).

14.4 “Warning Concerning Fact And Nature Of Risks”

In Part H’s “*Right to fair value, good quality and safety*” section 58(1) enacts rights to “*Warning concerning fact and nature of risks*”. The section requires a “*supplier of any activity or facility*” that is subject to “*risk*” to “*specifically draw the fact, nature and potential effect of that risk to the attention of consumers in a form and manner that meets the standards set out in section 49.*”¹⁶²

¹⁶⁰ Part F - Right to fair and honest dealing
Unconscionable conduct

40. (1) ...

(2) *In addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer’s own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.*

(3) *Section 51 applies to any court proceedings concerning this section.*

¹⁶¹ Part B

Purpose, policy and application of Act

Realisation of consumer rights

4. (5) **In any dealings with a consumer in the ordinary course of business, a person must not—**

(a) engage in any conduct contrary to, or calculated to frustrate or defeat the purposes and policy of, this Act;
(b) **engage in any conduct that is unconscionable**, misleading or deceptive, or that is reasonably likely to mislead or deceive; or
(c) make any representation about a supplier or any goods or services, or a related matter, unless the person has reasonable grounds for believing that the representation is true.

¹⁶² Part H - Right to fair value, good quality and safety

Warning concerning fact and nature of risks

58. (1) *The supplier of any activity or facility that is subject to any—*

(a) *risk of an unusual character or nature;*

(b) *risk of which a consumer could not reasonably be expected to be aware, or which an ordinarily alert consumer could not reasonably be expected to contemplate, in the circumstances; or*

(c) *risk that could result in serious injury or death,*

must specifically draw the fact, nature and potential effect of that risk to the attention of consumers in a form and manner that meets the standards set out in section 49.

(2) *A person who packages any hazardous or unsafe goods for supply to consumers must display on or within that packaging a notice that meets the requirements of section 22, and any other applicable standards, providing the consumer with adequate instructions for the safe handling and use of those goods.*

(3) *Subsection (2) does not apply to any hazardous or unsafe goods to the extent that a substantially similar label or notice has been applied in terms of any other public regulation.*

(4) *A person who installs any hazardous or unsafe goods contemplated in subsection (2) for a consumer, or supplies any such goods to a consumer in conjunction with the performance of any services, must give the consumer the original copy of—*

The types of “*risk*” associated with “*any activity or facility*” that a “*supplier*” must in terms of section 58(1)(a) – (c) “*draw ... to the attention of consumers*” by informing them of “*... the fact, nature and potential effect of that risk ...*” include the following risks:

- “*risk of an unusual character or nature*”;
- “*risk of which a consumer could not reasonably be expected to be aware*”;
- “*risk ... which an ordinarily alert consumer could not reasonably be expected to contemplate, in the circumstances*”;
- “*risk that could result in serious injury or death*”.

14.5 Unfair, Unreasonable or Unjust Aspects of the Contract

Section 48(1) prohibits a supplier from acts and omissions that are “*unfair, unreasonable or unjust*” with regard to pricing, terms, marketing, waiver of consumer’s rights, waiver by consumers of the liability of the supplier and so on. The sub-sections are the following.

15 OLDER PERSONS ACT

The Older Persons Act¹⁶³ (“OPA”) is directly relevant as it enacts rights for persons who are older persons who gamble.

15.1 Older Persons - Disabilities Impacting Equality & Dignity when Gambling

Older persons are a significant gambler demographic. Medical and academic research shows that the ability of older gamblers to gamble on an equal basis without unfair discrimination can be impacted by disabling impairments they suffer from, like Alzheimer’s Disease, Dementia, stroke (in terms of effects on cognition) and Parkinson’s Disease.

15.2 Parkinson’s Disease and Disordered Gambling

With regard to Parkinson’s Disease¹⁶⁴ and gambling behaviour, medical research has conclusively shown that effects of certain medications prescribed to older persons who sufferer the effects of Parkinson’s Disease do directly cause “impulse control disorders” and can result in disordered gambling behaviour. This specific disability is referenced below.

15.3 OPA - Purpose

(a) any document required in terms of that subsection; or

(b) any similar document applied to those goods in terms of another public regulation.

¹⁶³ Older Persons Act, No 13 of 2006. Assented to 29 October 2006. Published in Government Gazette Vol. 497 dated 2 November 2006 No. 29346

¹⁶⁴ Parkinson’s Disease (“PD”) is described as a devastating degenerative neuropsychiatric disease. It “is accompanied by relatively high rates of depression, and a sizable proportion of patients with PD have anxiety and/or apathy”. Lee X. Blonder and John T. Slevin; Emotional Dysfunction in Parkinson's Disease; Behav Neurol. 2011 January 1; 24(3): 201–217. doi:10.3233/BEN-2011-0329

The OPA emphasizes the dignity, equality and related rights and interests of older persons on the grounds that they are regarded as a vulnerable group in society.

15.4 OPA - Objects

The OPA's objects¹⁶⁵ are to maintain an older persons' status, protect and maintain their rights, shift the emphasis of care to communities, regulate care services and combat abuse of older persons.

15.5 OPA - General Principles

The OPA's general principles in section 5 subsections (1) - (3). In subsection (2) key principles include those to inter alia "respect the older person's inherent dignity"; to "treat the older person fairly and equitably"; and to "protect the older person from unfair discrimination on any ground, including on the grounds of the health status or disability of the older person".¹⁶⁶

15.6 OPA - Proceedings, Actions, Decisions In Matter Concerning Older Person

The OPA requires at section 5 (3) that "[a]ll proceedings, actions or decisions in a matter concerning an older person must" inter alia "respect, protect, promote and fulfil the older person's rights, the best interests of the older person and the rights and principles set out in this Act" and "respect the older person's inherent dignity" and "treat the older person fairly and equitably".¹⁶⁷

¹⁶⁵ *Objects of Act*

2. The objects of the Act are to –
 - (a) maintain and promote the status, well-being, safety and security of older persons;
 - (b) maintain and protect the rights of older persons;
 - (c) shift the emphasis from institutional care to community-based care in order to ensure that an older person remains in his or her home within the community for as long as possible;
 - (d) regulate the registration, establishment and management of services and the establishment and management of residential facilities for older persons; and
 - (e) combat the abuse of older persons.

¹⁶⁶ **Older Persons Act**

General principles

5. (1) The general principles set out in this section guide-
 - (a) the implementation of all legislation applicable to older persons, including this Act; and
 - (b) all proceedings, actions and decisions by any organ of state in any matter concerning an older person or older persons in general.
- (2) All proceedings, actions or decisions in a matter concerning an older person must-
 - (a) **respect, protect, promote and fulfil the older person's rights, the best interests of the older person and the rights and principles set out in this Act**, subject to any lawful limitation;
 - (b) **respect the older person's inherent dignity**;
 - (c) **treat the older person fairly and equitably**; and
 - (d) **protect the older person from unfair discrimination on any ground, including on the grounds of the health status or disability of the older person**.
- (3) In any matter concerning an older person-
 - (a) **an approach which is conducive to conciliation and problem-solving should be followed** and a confrontational approach should be avoided; and
 - (b) **a delay in any action or decision to be taken must be avoided as far as possible**.

¹⁶⁷ **Older Persons Act**

General principles

5. (2) All proceedings, actions or decisions in a matter concerning an older person must-
 - (a) **respect, protect, promote and fulfil the older person's rights, the best interests of the older person and the rights and principles set out in this Act**, subject to any lawful limitation;
 - (b) **respect the older person's inherent dignity**;
 - (c) **treat the older person fairly and equitably**; and
 - (d) protect the older person from unfair discrimination on any ground, including on the grounds of the health status or disability of the older person.

15.7 Older Gamblers with Parkinson's: Consumer Protection & Non-Discrimination

Complainant restates that medical research conclusively reports that impulse control disorders (hereafter "ICD"), including compulsive gambling are associated with medication for Parkinson's Disease.¹⁶⁸ A study of 2005 concluded that "*dopamine agonist drugs appear to be uniquely implicated as a cause of pathological gambling.*"¹⁶⁹ The use of a dopamine agonist is the primary risk factor, and the researchers recommend that all patients treated with a dopamine agonist should be screened for a variety of ICDs.¹⁷⁰ Gamblers who are older persons are not currently cautioned by gambling service providers that if they are taking medication for Parkinson's Diseases they may be at risk, by:

- signage and notices;
- in screen prompts on machines and on digital displays;
- by advice, support, recommendations, information, relating to support offered and that gambling may be hazardous to their health and wellbeing.

16 COMMON LAW: GOVERNANCE, ETHICS, INDUCEMENT, HEALTH

The common law in the form of published decisions of Judges of the Constitutional Court, the Supreme Court of Appeal and the High Courts are directly applicable to process-addicted gamblers disabled by the psychiatric diagnosis of "Disordered Gambling" and those at risk to it. Rulings of these Courts have established key rights for these vulnerable gamblers as well as specific duties for gambling service providers who provide the service and machines and tables they can become process-addicted to.

Extracts from selected key decisions are reproduced for reference and convenience below.

16.1 Human Beings Not "Commodities to which a Price can be Attached"

¹⁶⁸ Eugenia Mamikonyan, MS, Andrew D. Siderowf, MD, MSCE2,3, John E. Duda, MD2,3, Marc N. Potenza, MD, PhD, Stacy Horn, DO, Matthew B. Stern, MD, and Daniel Weintraub, MD; Long-Term Follow-Up of Impulse Control Disorders in Parkinson's Disease; *Mov Disord.* 2008 January ; 23(1): 75–80. doi:10.1002/mds.21770. Authors state:

"Multiple impulse control disorders (ICDs), including compulsive gambling, sexual behavior, buying, and eating, have been reported to occur frequently in Parkinson's disease (PD). Estimates of ICDs in PD typically exceed those in the general population, in total affecting ~5% of patients at any given time and between 5 and 10% at some point during the course of the disease.

Case reporting and prospective studies have implicated dopamine agonist (DA) use as a primary risk factor for the development of ICDs in PD, although these disorders have also been linked with levodopa (L-dopa) use. Other risk factors for the development of ICDs may be younger age at PD onset and a pre-PD history of ICD behaviors or substance use disorders."

¹⁶⁹ M. Leann Dodd, MD; Kevin J. Klos, MD; James H. Bower, MD; Yonas E. Geda, MD; Keith A. Josephs, MST, MD; J. Eric Ahlskog, PhD, MD; Pathological Gambling Caused by Drugs Used to Treat Parkinson Disease; *Arch Neurol.*, September 2005; Volume 62, pages 1377-1381. Some of the authors' findings and conclusions are as follows:

"These 11 patients developed pathological gambling only after starting therapy with a dopamine agonist, either pramipexole (9 of 11 cases) or ropinirole (2 of 11 cases). The gambling resolved when the dopamine agonist was tapered or discontinued in 8 of the 11 cases; follow-up was not available in the other 3 cases. Although levodopa therapy might have been a contributory factor, none developed these problems when receiving levodopa mono-therapy, and 3 patients had not been treated with levodopa. The relationship of pathological gambling to dopamine agonist therapy in these cases is striking" – page 1380

"In summary, dopamine agonist drugs appear to be uniquely implicated as a cause of pathological gambling. Both our series and prior reports have especially linked this to administration of the selective dopamine D3 agonist pramipexole. Disproportionate stimulation of dopamine D3 receptors might be responsible for pathological gambling in these PD cases." – page 1381

¹⁷⁰ Daniel Weintraub, M.D., Andrew D. Siderowf, M.D., MSCE2, Marc N. Potenza, M.D., Ph.D., Joseph Goveas, M.D., Knashawn H. Morales, Sc.D., John E. Duda, M.D., Paul J. Moberg, Ph.D., and Matthew B. Stern, M.D.; Dopamine Agonist Use is Associated with Impulse Control Disorders in Parkinson's Disease, *Arch Neurol.* 2006 July ; 63(7): 969–973. Based on these authors' findings they recommend as follows:

"Our findings highlight the importance of screening for a variety of ICDs in PD patients treated with a dopamine agonist, particularly since only one-quarter of active ICD cases in this study had been identified clinically."

The Constitutional Court in 2001 in Dodo¹⁷¹ ruled that “[h]uman beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth”.¹⁷² The same Court in 2014 in Barnard¹⁷³ ruled that “human worth is impaired when persons are treated, not as ends in themselves, but as mere objects”.¹⁷⁴

16.2 Human Beings Never to be Treated “as Means to an End”

The Supreme Court of Appeal in 2001 in the criminal appeal S v A,¹⁷⁵ ruled that “[h]uman beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as a means to an end.”¹⁷⁶

16.3 Duty To Not Treat People With “Blunt Utilitarianism”

The Constitutional Court in Barnard¹⁷⁷ ruled that where a person is treated as “... a means to an end only”, or have their rights to not be discriminated against unfairly and their equality breached, this would be “blunt utilitarianism”¹⁷⁸ and cautioned that “[a]n atomistic approach to individuals, self-worth and identity is not appropriate”.¹⁷⁹

¹⁷¹ S v Dodo (CCT 1/01) [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) (5 April 2001)

¹⁷² [38] *To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence (in the sense defined in paragraph 37 above) the offender is being used essentially as a means to another end and the offender’s dignity assailed. So too where the reformatory effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender’s humanity.*

¹⁷³ South African Police Service v Solidarity obo Barnard (CCT 01/14) [2014] ZACC 23 (2 September 2014)

¹⁷⁴ [172] Philosophical thinking on human dignity by, for example, Immanuel Kant has influenced this Court’s jurisprudence, including the emphasis that “human worth is impaired when persons are treated, not as ends in themselves, but as mere objects”. Human dignity is not only concerned with an individual’s understanding of her self worth, but more broadly affirms the inherent – and equal – worth of all human beings. The recognition of this right represents a break from a past which systematically denied the dignity of most South Africans. Because the right to human dignity affirms the intrinsic worth of every person, it is foundational to several other rights in the Bill of Rights. The right to and value of dignity therefore also inform constitutional interpretation and adjudication at multiple levels.

¹⁷⁵ S v A (88/2000) [2001] ZASCA 126 (23 November 2001) at paragraph [30].

¹⁷⁶ [30] *The amicus rightly pointed out that our Constitution, as well as international treaty obligations, require the government and the courts to take special steps to protect the public in general and women in particular against violent crime. The Constitutional Court has given these obligations emphasis in recent decisions (S v Baloyi (Minister of Justice and another intervening) and Carmichele v Minister of Safety and Security), and in the sentencing process in they must be accorded appropriate weight. But Ackermann J has also sounded a timely reminder to sentencing courts:*

‘To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as a means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect upon others, bears no relation to the gravity of the offence ..., the offender is being used essentially as a means to another end and the offender’s dignity assailed. So too where the reformatory effect of the punishment is predominant, and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in the shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender’s humanity.’

¹⁷⁷ South African Police Service v Solidarity obo Barnard (CCT 01/14) [2014] ZACC 23 (2 September 2014)

¹⁷⁸ [173] The value of the individual is safeguarded in our jurisprudence. Every person should be treated as an end in herself and not as a means to an end only. This is what blunt utilitarianism would allow. The concept of dignity also concerns an individual’s sense of self-esteem, and encompasses the idea that one is permitted to develop one’s talents optimally.

¹⁷⁹ [174] An atomistic approach to individuals, self-worth and identity is not appropriate. This Court has recognised that we are not islands unto ourselves. The individual, as the bearer of the right to dignity, should not be understood as an isolated and unencumbered being. Dignity contains individualistic as well as collective impulses. Its collectivist attributes, including that we are “social beings whose humanity is expressed through . . . relationships with others”, find resonance in the South African idea of Ubuntu, which foregrounds “interdependence of the members of a community”.

16.4 Duty To Value Persons “For Who They Are”

The Constitutional Court in 2014 in Government of the Republic of South Africa and Others v Grootboom and Others¹⁸⁰ cautioned (in a case that related to children) that they “... *could become stepping stones to housing for their parents instead of being valued for who they are*”.¹⁸¹

16.5 Commercial Practice of Inducing Engagement in Harmful & Addictive Behaviour

In 2012 the Constitutional Court in British American Tobacco¹⁸² considered the commercial practices of a corporate entity alleged to have used commercial expression to induce harmful and addictive behavior. The Court questioned this business practice by finding that “[w]hen commercial expression is used ... for the purpose of inducing people to engage in harmful and addictive behaviour, its value becomes tenuous.”¹⁸³

16.6 Human Beings Have Equal Worth in a “Just and Caring Society”

The Constitutional Court in 2004 in Van Heerden¹⁸⁴ ruled that the purposes of the Constitution were to “*restore and protect the equal worth of everyone*” and “*establish a caring and socially just society*”. The Court noted that the Constitution “*commits our society to “improve the quality of life of all citizens and free the potential of each person*”.¹⁸⁵

16.7 Perception that “Disfavoured” Groups are “Less Worthy of Protection”

¹⁸⁰ (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000)

¹⁸¹ 70 The judgment of the High Court amounts to this: (a) section 28(1)(c) obliges the state to provide rudimentary shelter to children and their parents on demand if parents are unable to shelter their children; (b) this obligation exists independently of and in addition to the obligation to take reasonable legislative and other measures in terms of section 26; and (c) the state is bound to provide this rudimentary shelter irrespective of the availability of resources. On this reasoning, parents with their children have two distinct rights: the right of access to adequate housing in terms of section 26 as well as a right to claim shelter on demand in terms of section 28(1)(c).

71 This reasoning produces an anomalous result. People who have children have a direct and enforceable right to housing under section 28(1)(c), while others who have none or whose children are adult are not entitled to housing under that section, **no matter how old, disabled or otherwise deserving they may be**. The carefully constructed constitutional scheme for progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the state on demand. Moreover, there is an obvious danger. **Children could become stepping stones to housing for their parents instead of being valued for who they are**.

¹⁸² British American Tobacco South Africa (Pty) Ltd v Minister of Health (463/2011) [2012] ZASCA 107; [2012] 3 All SA 593 (SCA) (20 June 2012)

¹⁸³ [25] *I have already indicated that any right in the Bill of Rights may be limited by a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account the relevant factors, including the nature of the right, the importance of the limitation and its nature and extent. The right to commercial speech in the context of this case is indeed important. But it is not absolute. When it is weighed up against the public health considerations that must necessarily have been considered when imposing the ban on advertising and promotion of tobacco products it must, I think, give way. The seriousness of the hazards of smoking far out weigh the interests of the smokers as a group. As was said in Canada (Attorney-General) v JTI-MacDonald Corp:*

‘When commercial expression is used ... for the purpose of inducing people to engage in harmful and addictive behaviour, its value becomes tenuous.’

The remarks of McLachlin CJ in the JTI-MacDonald case quoted above suggest that the smokers are not a monogenous group. Amongst them there are those that are trapped in the habit and wish to get out of it. There are also those who have given up and would not like to relapse into the old habit of smoking again. The impugned prohibition is aimed at discouraging all tobacco users, without exception, **in the interest of public health**.

¹⁸⁴ Minister of Finance and Other v Van Heerden (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC); [2004] 12 BLLR 1181 (CC) (29 July 2004) at paragraph [23].

¹⁸⁵ [23] *For good reason, the achievement of equality preoccupies our constitutional thinking. When our Constitution took root a decade ago our society was deeply divided, vastly unequal and uncaring of human worth. Many of these stark social and economic disparities will persist for long to come. In effect the commitment of the Preamble is to **restore and protect the equal worth of everyone**; to heal the divisions of the past and to **establish a caring and socially just society**. In explicit terms, the Constitution **commits our society to “improve the quality of life of all citizens and free the potential of each person”**.*

Gambling research ¹⁸⁶ has found that ‘problem gambling’ (and under DSM 5 now ‘Disordered Gambling’) “*appears to attract considerable public stigma, resulting in deleterious effects on the health and use of treatment services amongst those affected*”, which “... *strengthens the division between those perceived as ‘normal’ and ‘others’ who are not*”. The stigma in turn was found to cause “*stereotyping, prejudice and discrimination, [and the sufferer] may experience the mental health effects of diminished self-worth and self-efficacy, withdraw from social support, and reject treatment and other interventions if they internalise publicly stigmatising beliefs as self-stigma*”. ¹⁸⁷

The Constitutional Court in 1998 in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* ¹⁸⁸ in the majority judgment recognized the position of “*disfavoured*” groups in society that are “*subordinated*” and stigmatized and “*marked with deviance and perversity*”, regarded as “*less worthy of protection as individuals*” and generally prejudiced by society.

The Constitutional Court and the Supreme Court of Appeal have both found that a number of subordinated groups to be marginalized, stigmatized and prejudiced: selected examples are cohabiting partners; ¹⁸⁹ cannabis users; ¹⁹⁰ female sex workers; ¹⁹¹ children born to unmarried parents; ¹⁹² persons whose HIV / AIDS status is unlawfully disclosed; ¹⁹³ persons who have refugee status; ¹⁹⁴ persons subject to criminal proceedings; ¹⁹⁵ persons who have been or are erroneously convicted of a criminal offence; ¹⁹⁶ persons prejudiced or stigmatized as a result of their sexual orientation, ¹⁹⁷ and persons who have been subjected to sexual abuse. ¹⁹⁸

17 INTERNATIONAL LAW

¹⁸⁶ The Public Stigma of Problem Gambling: Its Nature and Relative Intensity Compared to Other Health Conditions; Nerilee Hing, Alex M. T. Russell, Sally M. Gainsbury, Elaine Nuske [Centre for Gambling Education and Research, Southern Cross University, PO Box 157, Lismore, NSW 2480, Australia], published in *Journal of Gambling Studies* DOI 10.1007/s10899-015-9580-8.

Downloadable at <http://link.springer.com/article/10.1007%2Fs10899-015-9580-8>

¹⁸⁷ Recreational gambling is a popular and normalised activity in many societies. In contrast, problem gambling **appears to attract considerable public stigma, resulting in deleterious effects on the health and use of treatment services amongst those affected**. Public stigma is the reaction of society to people with a stigmatising condition and the formation of negative attitudes towards the stigmatised population (Corrigan 2004). It occurs when a negative attribute is publicly perceived, with those affected then judged, labelled and devalued, and either discredited if their stigmatising condition is known, or discreditable if hidden (Fernandez Y-Garcia et al. 2012; Goffman 1963). **Public stigma therefore strengthens the division between those perceived as ‘normal’ and ‘others’ who are not** (Rusch et al. 2005). Public stigma is thought to be particularly damaging for the health and wellbeing of stigmatised individuals. As well as facing stereotyping, prejudice and discrimination, they may experience the mental health effects of diminished self-worth and self-efficacy, withdraw from social support, and reject treatment and other interventions if they internalise publicly stigmatising beliefs as self-stigma (Corrigan and Watson 2002a, b). Stigma can also impact negatively on adjustment and growth, compromising mental wellbeing.

Public stigma is apparent through its effects, especially on use of healthcare services. Stigma commonly deters individuals from acknowledging problems for fear of self-identifying as ‘a problem gambler’ (Hing et al. 2012; Suurvali et al. 2009). Many people keep gambling problems hidden to avoid social rejection through disclosing their ‘spoiled identity’ (Goffman 1963; Hing et al. 2014). The shame associated with having a gambling problem, the self-stigma of admitting it, fear of public stigma once disclosed, and stigma of attending treatment can all delay and deter treatment-seeking (Hing et al. 2014). Stigma is the most cited reason for avoiding professional treatment for mental health problems, including problem gambling (Corrigan 2004; Gainsbury et al. 2014; Rockloff and Schofield 2004; Tavares et al. 2002). Stigma reduction measures are needed to reduce negative health expectancies for stigmatised individuals and to improve treatment-seeking and recovery from problem gambling

¹⁸⁸ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998).

¹⁸⁹ *Volks NO v Robinson and Others* (CCT12/04) [2005] ZACC 2; 2005 (5) BCLR 446 (CC) (21 February 2005).

¹⁹⁰ *Prince v President of the Law Society of the Cape of Good Hope* (CCT36/00) [2002] ZACC 1; 2002 (2) SA 794; 2002 (3) BCLR 231 (25 January 2002).

¹⁹¹ *S v Jordan and Others* (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002).

¹⁹² *Shibi v Sithole and Others* (CCT 50/03, CCT 69/03, CCT 49/03) [2004] ZACC 18; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).

¹⁹³ *NM and Others v Smith and Others* (CCT69/05) [2007] ZACC 6; 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC) (4 April 2007).

¹⁹⁴ *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* (CCT 39/06) [2006] ZACC 23; 2007 (4) BCLR 339 (CC); (2007) 28 ILJ 537 (CC) (12 December 2006).

¹⁹⁵ *Sanderson v Attorney-General, Eastern Cape* (CCT10/97) [1997] ZACC 18; 1997 (12) BCLR 1675; 1998 (2) SA 38 (2 December 1997).

¹⁹⁶ *S v Manamela and Anor* (Director-General of Justice Intervening) (CCT25/99) [2000] ZACC 5; 2000 (3) SA 1; 2000 (5) BCLR 491 (14 April 2000).

¹⁹⁷ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998).

¹⁹⁸ *Van Zijl v Hoogenhout* (348/03) [2004] ZASCA 84; [2004] 4 All SA 427 (SCA) (27 September 2004).

17.1 Interpretation and International Law

The Constitution in section 233 requires a reasonable interpretation that is consistent with international law. In Singh v Minister of Justice and Constitutional Development and Others¹⁹⁹ the North Gauteng High Court, sitting as an Equality Court, noted that when a Court interprets legislation, what is demanded is “*any reasonable interpretation that is consistent with international law*”.²⁰⁰ In the same decision²⁰¹ the Court had regard²⁰² to the purpose²⁰³ and the preamble²⁰⁴ of the United Nations Convention on the Rights of Persons with Disabilities (hereafter “UN CRPD”).²⁰⁵

17.2 International Law - Vulnerable Gamblers

International law in the context of gambling includes the following:

- United Nations Convention on the Rights of Persons with Disabilities (“UNCRPD”);²⁰⁶
- African Charter on Human and Peoples Rights (“African Charter”);²⁰⁷ and
- United Nations Committee on Economic, Social and Cultural Rights’ General Comment No. 5.²⁰⁸

17.3 United Nations Convention on the Rights of Persons with Disabilities

To promote, protect and ensure the human rights and freedoms of persons with disabilities, the United Nations (“UN”) General Assembly adopted a “*Convention on the Rights of*

¹⁹⁹ Singh v Minister of Justice and Constitutional Development, Director General for the Department of Justice & Constitutional Development and the Magistrates Commission (57331_2011) [2013] ZAEQC 1; 2013 (3) SA 66 (EqC); (2013) 34 ILJ 2807 (EqC) (23 January 2013)

²⁰⁰ [202] A further provision of the Constitution that integrates international law into our law reinforces this conclusion. It is s233, which, as we have already noted, demands any reasonable interpretation that is consistent with international law when legislation is being interpreted. There is thus no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law. We do so willingly and in compliance with our constitutional duty.”

²⁰¹ Singh v Minister of Justice and Constitutional Development, Director General for the Department of Justice & Constitutional Development and the Magistrates Commission (57331_2011) [2013] ZAEQC 1; 2013 (3) SA 66 (EqC); (2013) 34 ILJ 2807 (EqC) (23 January 2013)

²⁰² [34] Furthermore the duty to advance and promote the position of disabled people are clearly mentioned in the Convention on the Rights of Persons with Disabilities (CRPD) which South Africa ratified on 30 November 2007 and the African Charter on Human and Peoples Rights (African Charter).

²⁰³ [35] The purpose of the (CRPD) according to Article 1 is, to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

²⁰⁴ [36] The preamble to the (CRPD) recognizes the need “to promote and protect the human rights of all persons with disabilities, including those who require more intensive support” and notes concern about:

“The difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status.

²⁰⁵ [34] Furthermore the duty to advance and promote the position of disabled people are clearly mentioned in the ... African Charter on Human and Peoples Rights (African Charter).

²⁰⁶ [34] Furthermore the duty to advance and promote the position of disabled people are clearly mentioned in the ... African Charter on Human and Peoples Rights (African Charter).

²⁰⁷ [34] Furthermore the duty to advance and promote the position of disabled people are clearly mentioned in the ... African Charter on Human and Peoples Rights (African Charter).

²⁰⁸ [40] ... This is stated explicitly in General Comment No. 5 of the United Nations Committee on Economic, Social and Cultural Rights, dealing with persons with disabilities. Clause 9 of the general comment states:

“The obligation of State parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take a positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide- range of specially tailored measures will be required.” (Own underlining)

Persons with Disabilities” (“UNCRPD”) in December 2006. Over the years, South Africa has ratified many Conventions relating to human and labour²⁰⁹ rights.

On 30 November 2007, South Africa ratified the UNCRPD. Once 20 parties had ratified the UNCRPD, its rights and duties came into force, which happened on 3 May 2008. As a signatory, South Africa was then committed to domesticate its legislation to align with its international obligations as imposed by the UNCRPD’s provisions.

17.3.1 UNCRPD: Purpose

The purpose of the UNCRPD is “... *to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity*”.

17.3.2 UNCRPD: Definition of Persons with Disabilities

Article 1 defines “*people with disabilities*”²¹⁰ to include “... *those who have long-term ... mental ... impairment ...*”, which applies to process-addicted vulnerable gamblers diagnosed with “Gambling Disorder”, or gamblers at risk to it.

17.3.3 UNCRPD: Definition of Disability Discrimination

The UNCRPD supports its purpose by defining acts and omissions that amount to disability-related discrimination. Its definition of “*discrimination on the basis of disability*”²¹¹ is wide. It covers “*any distinction, exclusion or restriction*” that has the “*purpose or effect*” of “*impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms*”. The underlying emphasis is equality: equal “*recognition*”, equal “*enjoyment*” and equal “*exercise*” on an “*equal basis with others*”.

The UNCRPD also specifically defines “*discrimination on the basis of disability*” to include “*denial of reasonable accommodation*”.²¹² This also forms part of the Equality Act’s definition of unfair discrimination on the prohibited ground of disability in section 9. As this paper shows, in gambling, the right to “reasonable accommodation” and the duty to provide it are key aspects of unfair discrimination to vulnerable process-addicted gamblers disabled psychiatrically by “Disordered Gambling”.

17.3.4 States Ratifying the UNCRPD Must Align Legislation to Its Obligations

²⁰⁹ Conventions of the International Labour Organisation (“ILO”) which address a wide range of labour rights.

²¹⁰ UN CRPD: Article 1: Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

²¹¹ UNCRPD: Article 2: Definitions: “Discrimination on the basis of disability”:

“Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

²¹² See UNCRPD: Article 2: Definitions: “Discrimination on the basis of disability”

As South Africa's primary legislation to promote equality, and because it has general application over legislation with specific application, the Equality Act's disability-related provisions are sufficiently general to promote the UNCRPD's purpose, and to align South Africa's general equality legislation with the country's UNCRPD obligations.

The next step of the ratification process – legislatively aligning legislation that has specific application with UNCRPD obligations – has for the last 8 years been obligatory for legislators in Parliament and for government Ministries. In the instances of the National Gambling Act and provincial gambling legislation, alignment does not appear to have happened.

17.3.5 Gambling Legislation Not Aligned with UNCRPD Obligations

The effect for vulnerable process-addicted gamblers who are disabled psychiatrically by “Disordered Gambling” and unable to cease gambling, the harm to that group of disabled people, and for distressed gamblers like Mr. Williams, carries on unchecked, unmediated and unregulated. National and provincial gambling legislation seems in breach of the gambling conduct they prohibit.

17.4 African Charter on Human and Peoples Rights

In the Equality Court's Singh decision²¹³ the Court had regard to the African Charter on Human and Peoples Rights (hereafter “African Charter”).²¹⁴

17.5 United Nations Committee on Economic, Social and Cultural Rights

In the same way, in the Singh decision²¹⁵ the Equality Court also referred to the United Nations Committee on Economic, Social and Cultural Rights' General Comment No. 5.²¹⁶

18 GAMBLING PROVIDER RIGHTS

How do the constitutional rights of process-addicted mentally ill gamblers disabled by “Disordered Gambling” intersect with the constitutional rights of gambling industry licensees and service providers? What does the law provide where a right that a vulnerable gambler has might deprive a gambling service provider of rights?

18.1 JURISTIC PERSONS AND CONSTITUTIONAL AND PROPERTY RIGHTS

²¹³ Singh v Minister of Justice and Constitutional Development, Director General for the Department of Justice & Constitutional Development and the Magistrates Commission (57331_2011) [2013] ZAEQC 1; 2013 (3) SA 66 (EqC); (2013) 34 ILJ 2807 (EqC) (23 January 2013)

²¹⁴ [34] Furthermore the duty to advance and promote the position of disabled people are clearly mentioned in the ... African Charter on Human and Peoples Rights (African Charter).

²¹⁵ Singh v Minister of Justice and Constitutional Development, Director General for the Department of Justice & Constitutional Development and the Magistrates Commission (57331_2011) [2013] ZAEQC 1; 2013 (3) SA 66 (EqC); (2013) 34 ILJ 2807 (EqC) (23 January 2013)

²¹⁶ [40] ... This is stated explicitly in General Comment No. 5 of the United Nations Committee on Economic, Social and Cultural Rights, dealing with persons with disabilities. Clause 9 of the general comment states:
"The obligation of State parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take a positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide- range of specially tailored measures will be required." (Own underlining)

Licensees are juristic persons, and the constitution affords them rights: section 8(4) of the Constitution provides that “A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.” The Constitution in s 25 ensures that “No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property”.²¹⁷

The Constitutional Court in First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance (Wesbank)²¹⁸ found that “... denying companies entitlement to property rights would “... lead to grave disruptions and would undermine the very fabric of our democratic State”. It would have a disastrous impact on the business world generally, on creditors of companies and, more especially, on shareholders in companies”. The Court concluded that “[T]he property rights of natural persons can only be fully and properly realised if such rights are afforded to companies as well as to natural persons”²¹⁹

18.2 INDIVIDUAL RIGHTS, SOCIAL RESPONSIBILITIES AND THE PUBLIC INTEREST

The Court in Wesbank²²⁰ cited academic opinion²²¹ that “[T]he meaning of section 25 has to be determined, in each specific case, within an interpretative framework that takes due cognisance of the inevitable tensions which characterize the operation of the property clause. This tension between individual rights and social responsibilities has to be the guiding principle in terms of which the section is analysed, interpreted and applied in every individual case.”²²²

²¹⁷ Section 25 Property

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”

²¹⁸ First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (16 May 2002)

²¹⁹ First National Bank of SA Limited t/a Wesbank at para [41] – [45]:

The property challenge issues

[41] **A preliminary question is whether FNB, as a juristic person, is entitled to the property rights protected by section 25 of the Constitution. In this regard section 8(4) of the Constitution provides as follows:**

“A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.”

[42] *In the First Certification case an objection was raised that, inconsistently with Constitutional Principle II, the extension of the rights guaranteed by the Bill of Rights to juristic persons would diminish the rights of natural persons. This Court rejected the objection in the following terms:*

“... [M]any ‘universally accepted fundamental rights’ will be fully recognised only if afforded to juristic persons as well as natural persons. For example, freedom of speech, to be given proper effect, must be afforded to the media, which are often owned or controlled by juristic persons. While it is true that some rights are not appropriate to enjoyment by juristic persons, the text of NT 8(4) specifically recognises this. The text also recognises that the nature of a juristic person may be taken into account by a court in determining whether a particular right is available to such person or not.”

[43] **We are here dealing with a public company.** It is trite that a company is a legal entity altogether separate and distinct from its members, that its continued existence is independent of the continued existence of its members, and that its assets are its exclusive property. Nevertheless, a shareholder in a company has a financial interest in the dividends paid by the company and in its success or failure because she “... is entitled to an aliquot share in the distribution of the surplus assets when the company is wound up”. No matter how complex the holding structure of a company or groups of companies may be, ultimately – in the vast majority of cases – the holders of shares are natural persons.

[44] **More important, for present purposes, is the universal phenomenon that natural persons are increasingly forming companies and purchasing shares in companies for a wide variety of legitimate purposes, including earning a livelihood, making investments and for structuring a pension scheme. The use of companies has come to be regarded as indispensable for the conduct of business, whether large or small. It is in today’s world difficult to conceive of meaningful business activity without the institution and utilisation of companies.**

[45] **Even more so than in relation to the right to privacy, denying companies entitlement to property rights would “... lead to grave disruptions and would undermine the very fabric of our democratic State”. It would have a disastrous impact on the business world generally, on creditors of companies and, more especially, on shareholders in companies. The property rights of natural persons can only be fully and properly realised if such rights are afforded to companies as well as to natural persons. I therefore conclude that FNB is entitled to the property rights under section 25 of the Constitution, its provisions having been quoted in paragraph 25 above. I accordingly proceed to consider the property challenge.**

²²⁰ First National Bank of SA Limited t/a Westbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Westbank v Minister of Finance [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC)

²²¹ AJ van der Walt, *The Constitutional Property Clause* Juta: Kenwyn, 1997 (Van der Walt 1997) and *Constitutional Property Clauses: A Comparative Analysis* Juta: Kenwyn, 1999 (Van der Walt 1999)

²²² First National Bank of SA Limited t/a Westbank at [50]:

The Court ruled that “[t]he purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions”.²²³

18.3 BALANCING INTERESTS & PROMOTING THE CONSTITUTIONAL VISION

The Constitutional Court in 2005 in Port Elizabeth Municipality v Various Occupiers²²⁴ commented on what a Court was called upon to do to balance competing interests: “[The Act] expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern.”

18.3.1 “Infus[ing] Elements Of Grace And Compassion

The Court’s balancing of competing constitutional rights of two parties – in Complainant’s disputes a vulnerable mentally ill person and a large corporate entity – requires a Court to “infuse elements of grace and compassion into the formal structures of the law”.²²⁵

18.3.2 “Balanc[ing] Competing Interests In A Principled Way”

In a Court’s balancing process a Court is “... called upon to balance competing interests in a principled way”.²²⁶

18.3.3 Caring.. Good Neighbourliness ... Shared Concern

In a Court’s balancing process a Court will “...promote the constitutional vision of a caring society based on good neighbourliness and shared concern”.²²⁷

[50] The preamble to the Constitution indicates that one of the purposes of its adoption was to establish a society based, not only on “democratic values” and “fundamental human rights” but also on “social justice”. Moreover the Bill of Rights places positive obligations on the state in regard to various social and economic rights. Van der Walt (1997) aptly explains the tensions that exists within section 25:

“[T]he meaning of section 25 has to be determined, in each specific case, within an interpretative framework that takes due cognisance of the inevitable tensions which characterize the operation of the property clause. This tension between individual rights and social responsibilities has to be the guiding principle in terms of which the section is analysed, interpreted and applied in every individual case.”

The purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions.

²²³ First National Bank of SA Limited t/a Westbank at [50]:

[50]

...
The purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions.

²²⁴ Port Elizabeth Municipality v Various Occupiers (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (1 October 2004)

²²⁵ Port Elizabeth Municipality v Various Occupiers (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (1 October 2004)

[37] Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.

²²⁶ Port Elizabeth Municipality v Various Occupiers paragraph [37] - See footnote reference above

²²⁷ Port Elizabeth Municipality v Various Occupiers paragraph [37] - See footnote reference above

18.4 PROPERTY SHOULD SERVE THE PUBLIC GOOD

The Constitutional Court concluded in *Wesbank*²²⁸ that the Constitutional property clause in section 25 “*should also serve the public good is an idea by no means foreign to pre-constitutional property concepts.*”²²⁹

18.5 S 25: PROTECTING PROPERTY RIGHTS & SERVING PUBLIC INTEREST

The Constitutional Court ruled in *Wesbank*²³⁰ that the purpose of the Constitutional property clause in section 25 of the Bill of Rights is “*protecting existing private property rights as well as serving the public interest.*”²³¹

18.6 WHAT KIND OF PROPERTY DESERVES PROTECTION?

The question of “... *what kind of property deserves protection under the property clause, ...*” was decided by Constitutional Court in June 2015 in *Shoprite Checkers*.²³² The property-related question was whether “... *a commercial trading licence that allows selling wine in a grocery store constitutes property under section 25 of the Constitution*”.²³³

18.7 PROPERTY WORTHY OF PROTECTION NOT ONLY PRIVATE PROPERTY

The Court in *Shoprite Checkers* ruled that “...*to determine what kind of property deserves protection under the property clause cannot be restricted to private law notions of property. To do so would exclude other potential constitutional entitlements that may deserve protection from the ambit of protection under the property clause.*”

²²⁸ *First National Bank of SA Limited t/a Westbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Westbank v Minister of Finance* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC)

²²⁹ *First National Bank of SA Limited t/a Westbank*

[52] *When considering the purpose and content of the property clause it is necessary, as Van der Walt (1997) puts it –*

“... to move away from a static, typically private-law conceptualist view of the constitution as a guarantee of the status quo to a dynamic, typically public-law view of the constitution as an instrument for social change and transformation under the auspices [and I would add ‘and control’] of entrenched constitutional values.”

That property should also serve the public good is an idea by no means foreign to pre-constitutional property concepts.

²³⁰ *First National Bank of SA Limited t/a Westbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Westbank v Minister of Finance* (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (16 May 2002)

²³¹ *First National Bank of SA Limited t/a Westbank*

[50] *The preamble to the Constitution indicates that one of the purposes of its adoption was to establish a society based, not only on “democratic values” and “fundamental human rights” but also on “social justice”. Moreover the Bill of Rights places positive obligations on the state in regard to various social and economic rights. Van der Walt (1997) aptly explains the tensions that exist within section 25:*

“[T]he meaning of section 25 has to be determined, in each specific case, within an interpretative framework that takes due cognisance of the inevitable tensions which characterize the operation of the property clause. This tension between individual rights and social responsibilities has to be the guiding principle in terms of which the section is analysed, interpreted and applied in every individual case.”

The purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions.

²³² *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs And Tourism, Eastern Cape and Others* (CCT 216/14) [2015] ZACC 23 (30 June 2015)

²³³ *Shoprite Checkers (Pty) Limited*: paragraphs [1] and [4]:

[1] *This case raises the question whether a commercial trading licence that allows selling wine in a grocery store constitutes property under section 25 of the Constitution. If it does, can it be said that the legislative termination of the licence, coupled with the opportunity to continue selling wine together with other liquor at separate premises but not in grocery stores, amount to deprivation of property?*

[4] *The question of property is fiercely contested in South African society. There is, as yet, little common ground on how we conceive of property under section 25 of the Constitution, why we should do so, and what purpose the protection of property should serve. This exposes a potential fault line that may threaten our constitutional project. This judgment suggests that our evolving conversation on this issue should continue to seek our conception of property within the framework of values and individual rights in the Constitution. It further asserts that the level of constitutional protection should depend on the kind of constitutional interest involved and the core purpose associated with that type of property interest.*

The Court concluded that “*Extending our conception of property to embrace constitutional entitlements beyond the original ambit of private common law property will ensure that the property clause does not become an obstacle to the transformation of our society, but central to its achievement.*”²³⁴

18.7.1 Key Criterion: Constitution’s “Objective Normative Values”

The Court ruled in Shoprite Checkers that Constitutional values should be used for determining which property rights might, and which rights might not, deserve protection: “*The objective normative values of the Constitution thus require us to determine what kind of property deserves protection under the property clause, by reference to the Constitution itself.*”²³⁵

18.7.2 [H]olding Property ... Obligation Not To Harm The Public Good

The Court ruled in Shoprite Checkers that “... *the recognition that the holding of property also carries with it a social obligation not to harm the public good. The function that the protection of holding property must thus, broadly, serve is the attainment of this socially-situated individual self-fulfilment.*”²³⁶

18.7.3 “... Exercise, Protection Or Advancement Of ... Rights

The Court ruled in Shoprite Checkers that “... *where the holding of property is related to the exercise, protection or advancement of particular individual rights under the Bill of Rights,*

²³⁴ Shoprite Checkers (Pty) Limited: paragraph [44] and [46]:

[44] *A conception of property that accords with those founding values is what should animate the question of determining the kind of property that deserves protection. In Pillay, Langa CJ quoted with approval this passage of Ackermann J in Ferreira v Levin:*

Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible.

Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.

[46] *What flows from this is, first, that to determine what kind of property deserves protection under the property clause cannot be restricted to private law notions of property. To do so would exclude other potential constitutional entitlements that may deserve protection from the ambit of protection under the property clause. It could also inadvertently lead to a failure to subject private law notions of property to constitutional scrutiny in order to ensure that they accord with constitutional norms. Extending our conception of property to embrace constitutional entitlements beyond the original ambit of private common law property will ensure that the property clause does not become an obstacle to the transformation of our society, but central to its achievement. In all of this, the fundamental values of dignity, equality and freedom play a central role. Our conception of property must be derived from the Constitution.*

²³⁵ Shoprite Checkers (Pty) Limited: paragraph [50]:

[50] *The objective normative values of the Constitution thus require us to determine what kind of property deserves protection under the property clause, by reference to the Constitution itself. The fundamental values of dignity, equality and freedom necessitate a conception of property that allows, on the one hand, for individual self-fulfilment in the holding of property, and, on the other, the recognition that the holding of property also carries with it a social obligation not to harm the public good. The function that the protection of holding property must thus, broadly, serve is the attainment of this socially-situated individual self-fulfilment. The function of personal self-fulfilment in this sense is not primarily to advance economic wealth maximisation or the satisfaction of individual preferences, but to secure living a life of dignity in recognition of the dignity of others. And where the holding of property is related to the exercise, protection or advancement of particular individual rights under the Bill of Rights, the level of the protection afforded to that holding will be stronger than where no relation of that kind exists.*

²³⁶ Shoprite Checkers (Pty) Limited: paragraph [50]:

[50] *The objective normative values of the Constitution thus require us to determine what kind of property deserves protection under the property clause, by reference to the Constitution itself. The fundamental values of dignity, equality and freedom necessitate a conception of property that allows, on the one hand, for individual self-fulfilment in the holding of property, and, on the other, the recognition that the holding of property also carries with it a social obligation not to harm the public good. The function that the protection of holding property must thus, broadly, serve is the attainment of this socially-situated individual self-fulfilment. The function of personal self-fulfilment in this sense is not primarily to advance economic wealth maximisation or the satisfaction of individual preferences, but to secure living a life of dignity in recognition of the dignity of others. And where the holding of property is related to the exercise, protection or advancement of particular individual rights under the Bill of Rights, the level of the protection afforded to that holding will be stronger than where no relation of that kind exists.*

*the level of the protection afforded to that holding will be stronger than where no relation of that kind exists.”*²³⁷

18.7.4 Position Of Natural Person V Juristic Person

The Court ruled in Shoprite Checkers that, since the claim to the right is linked to Constitutional values, “...*If a natural person had been in the position of Shoprite, she would have had an easier task of convincing a court that the grocer’s wine licence granted by the State enabled her to conduct a business vocation of her choice that was essential to her living a life of dignity in that there was a “relationship between [her] work and [her] human personality as a whole”.*”²³⁸

18.7.5 Strongest Protection: Property Enhances / Protects Values

The Court ruled in Shoprite Checkers that, with regard to deprivation of property, “... *[t]hat examination must be done in the context of the normative approach to which the strongest protection of property will be related where its protection best enhances or protects fundamental values or rights under the Constitution”.*”²³⁹

A gambling service provider may seek to base a claim to protection of property on the loss of revenues caused by respecting the rights of process-addicted gamblers who are mentally ill and disabled by the effects of the psychiatric diagnosis of “Disordered Gambling”. The loss of revenues will need to be founded business operations that addict gamblers to the process of gambling, take no steps to identify gamblers that are or are at risk of process-addiction, and take no steps to counsel or support gamblers to prevent them becoming process-addicted – and incentivizes addicted gambler play and rewards it. In such circumstances it appears that a Court would be unlikely to come to the rescue of the gambling service provider.

19 ONE OF THE THREE “DESIGNATED GROUPS” OVERLOOKED

²³⁷ Shoprite Checkers (Pty) Limited: paragraph [50]:

[50] *The objective normative values of the Constitution thus require us to determine what kind of property deserves protection under the property clause, by reference to the Constitution itself. The fundamental values of dignity, equality and freedom necessitate a conception of property that allows, on the one hand, for individual self-fulfilment in the holding of property, and, on the other, the recognition that the holding of property also carries with it a social obligation not to harm the public good. The function that the protection of holding property must thus, broadly, serve is the attainment of this socially-situated individual self-fulfilment. The function of personal self-fulfilment in this sense is not primarily to advance economic wealth maximisation or the satisfaction of individual preferences, but to secure living a life of dignity in recognition of the dignity of others. And where the holding of property is related to the exercise, protection or advancement of particular individual rights under the Bill of Rights, the level of the protection afforded to that holding will be stronger than where no relation of that kind exists.*

²³⁸ Shoprite Checkers (Pty) Limited: paragraph [64]:

[64] *If a natural person had been in the position of Shoprite, she would have had an easier task of convincing a court that the grocer’s wine licence granted by the State enabled her to conduct a business vocation of her choice that was essential to her living a life of dignity in that there was a “relationship between [her] work and [her] human personality as a whole”.* So the correct question to ask, as noted above, is whether her interest in the business licence would qualify as property protected under section 25(1). This is still an objective enquiry. It is not the subjective assertion of the person involved that determines the outcome, but the court’s assessment of the objective validity of that assertion. I do not find it too difficult to imagine that a person who wishes to run a small business might have found the opportunity to run a grocery store, with the added advantage of selling wine, as the single chance to run a business successfully, without which it might otherwise have been difficult to do so. But it would, objectively, be a step too far to say that it would be impossible to do so.

²³⁹ Shoprite Checkers (Pty) Limited: paragraph [79] and [80]:

[79] *The complexity of relationships between means (deprivation) and ends (purpose of the law); between the purpose of the law and the person holding property; and between the purpose of the law and the nature of the property and extent of the deprivation, mentioned in FNB, may now be examined more closely. That examination must be done in the context of the normative approach to which the strongest protection of property will be related where its protection best enhances or protects fundamental values or rights under the Constitution.*

[80] *And it is here where the lack of deprivation of any entitlement to other fundamental rights, or diminution of any interest served by the values of the Constitution, may come into play. If the deprivation is of property closely connected to fundamental rights and constitutional values, then sufficient reason for the deprivation should approximate proportionality. If not, rationality might suffice.*

Transformational legislation has been enacted to address historical discrimination and economic exclusion to remedy and improve the material circumstances of three historically disadvantaged groups: black people and women and *people with disabilities*. This legislation aims to redress the effects of past discrimination, promote dignity and equality in civil society²⁴⁰ as well as in employment,²⁴¹ and to economically empower.²⁴²

19.1 Equal Treatment for Some Groups

For gambling service providers, for *groups other than process-addicted mentally ill disabled gamblers*, appreciating and complying with their non-gambling legislation rights and recognizing the reality of change and realization the choice to comply were not a problem.

Some obvious examples: gambling service providers enthusiastically embraced, respected, promoted and complied with the rights of black people and women under Broad Based Black Economic Empowerment legislation.²⁴³ Gambling service providers unreservedly committed to compliance with the Employment Equity Act's duty to not discriminate against and to affirm black people and women and persons of Chinese South African origin.²⁴⁴ Gambling service providers also take care to not discriminate on grounds prohibited under Equality legislation.²⁴⁵

19.2 The One Omitted Group: Vulnerable Process-Addicted Mentally Ill Gamblers

The obvious group omitted is mentally ill gamblers who suffer from the disabling mental illness of "Disordered Gambling".

For them, dignity, equality, freedom (psychological integrity) and Ubuntu all appear to have been withheld. For them, unfair general discrimination and unfair disability discrimination appear to be standard practice. For them, consumer protection does not appear to exist.

19.3 Unfair Discrimination

Not doing so for vulnerable mentally ill disabled gamblers would be likely to be ruled as unfair direct discrimination, indirect discrimination,²⁴⁶ systemic discrimination²⁴⁷ and adverse impact discrimination.²⁴⁸

²⁴⁰ In the field of civil society, the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000) as amended.

²⁴¹ In the field of employment, the Employment Equity Act, 1998 (Act No 55 of 1998) as amended.

²⁴² In the economic field, the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003) as amended.

²⁴³ In the economic field, the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003) as amended.

²⁴⁴ In the field of employment, the Employment Equity Act, 1998 (Act No 55 of 1998) as amended.

²⁴⁵ In the field of civil society, the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000) as amended.

²⁴⁶ Examples of *indirect* discrimination:

City Council of Pretoria v Walker (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998)

[43] In interpreting section 8 of the interim Constitution it seems to me to be of importance to have regard to the fact that it contains both an equal protection clause and an anti-discrimination clause. The purpose of the anti-discrimination clause, section 8(2), is to protect persons against treatment which amounts to unfair discrimination; it is not to punish those responsible for such treatment. In many cases, particularly those in which **indirect discrimination is alleged**, the protective purpose would be defeated if the persons complaining of discrimination had to prove not only that **they were unfairly discriminated against** but also that the **unfair discrimination was intentional**. **This problem would be particularly acute in cases of indirect discrimination where there is almost always some purpose other than a discriminatory purpose involved in the conduct or action to which objection is taken. There is nothing in the language of section 8(2) which necessarily calls for the section to be interpreted as requiring proof of intention to discriminate as a threshold requirement for either direct or indirect discrimination.** Consistent with the purposive approach that this Court has adopted to the interpretation of provisions of the Bill of Rights, **I would hold that proof of such intention is not required in order to establish that the conduct complained of infringes section 8(2).** Both elements, **discrimination and unfairness, must be determined objectively** in the light of the facts of each particular case. This seems to me to be consistent not only with the language of the section, but also with the equality jurisprudence as it has been developed by this Court. It is also consistent with the presumption in section 8(4) which would be deprived of much of its force if proof of intention was required as a threshold requirement for the proof of discrimination.

[44] This does not mean that absence of an intention to discriminate is irrelevant to the enquiry. The section prohibits “unfair” discrimination. The requirement of unfairness limits the application of the section and permits consideration to be given to the purpose of the conduct or action at the level of the enquiry into unfairness. This is made clear in the passage cited above from the judgment of Goldstone J in Harksen’s case. It is also made clear in that case **that an objective test has to be applied in deciding** whether or not discrimination has been unfair.

[45] What is of importance at this stage of the enquiry is the interplay between the discriminatory measure and the person or group affected by it. As pointed out by O’Regan J in Hugo:

‘The more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair.

Similarly, the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair.’ ”

²⁴⁷ Examples of *systemic* discrimination:

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998) at paragraph 124 gave examples of “*members of groups subject to systemic disadvantage*” when the violation of their right to dignity took place not “... *because of closely held characteristics, but because of the situation they find themselves in*”:

[124] Contrary to the Centre’s argument, the violation of dignity and self-worth under the equality provisions can be distinguished from a violation of dignity under section 10 of the Bill of Rights. The former is based on the impact that the measure has on a person because of membership of an historically vulnerable group that is identified and subjected to disadvantage by virtue of certain closely held personal characteristics of its members; it is the inequality of treatment that leads to and is proved by the indignity. The violation of dignity under section 10, on the other hand, contemplates a much wider range of situations. It offers protection to persons in their multiple identities and capacities. This could be to individuals being disrespectfully treated, such as somebody being stopped at a roadblock. ***It also could be to members of groups subject to systemic disadvantage, such as farm workers in certain areas, or prisoners in certain prisons, such groups not being identified because of closely held characteristics, but because of the situation they find themselves in.*** These would be cases of indignity of treatment leading to inequality, rather than of inequality relating to closely held group characteristics producing indignity.

Hoffmann v South African Airways (2000) 21 ILJ 2357 (CC)

28 “The appellant is living with HIV. People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to **systemic disadvantage and discrimination**. They have been stigmatised and marginalised. As the present case demonstrates, they have been denied employment because of their HIV positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society’s response to them has forced many of them not to reveal their HIV status for fear of prejudice. This in turn has deprived them of the help they would otherwise have received. People who are living with HIV/AIDS are one of the most vulnerable groups in our society. Notwithstanding the availability of compelling medical evidence as to how this disease is transmitted, the prejudices and stereotypes against HIV positive people still persist. In view of the prevailing prejudice against HIV positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatisation and I consider this to be an assault on their dignity. The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. For this reason, they enjoy special protection in our law.

²⁴⁸ Examples of *adverse impact* discrimination:

Harksen v Lane NO and Others (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997)

[50] At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on section 8 of the interim Constitution. They are:

- (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
 - (b)(i) Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which **have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner**.
 - (b)(ii) If the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.
- (c) If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2). If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution).

President of the Republic of South Africa and Another v Hugo (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997)

[77] What kinds of facts are likely to discharge the burden of rebuttal imposed on the President by s 8(4)? I would make three observations here. First, the fact that discrimination is unintended or in good faith does not render it fair. **Once the subject action or legislation is found to create adverse effects on a discriminatory basis, there is no further requirement**, eg of bad faith or malice. My second observation is that the “rebutting” factors can seldom, if ever, in themselves be discriminatory or otherwise objectionable. True as it may be that our society currently exhibits deeply entrenched patterns of inequality, these cannot justify a perpetuation of inequality.

[112] To determine whether the discrimination is unfair it is necessary to recognise that although the long-term goal of our constitutional order is equal treatment, insisting upon equal treatment in circumstances of established inequality may well result in the entrenchment of that inequality. There are at least two factors relevant to the determination of unfairness: **it is necessary to look at the group or groups which have suffered discrimination in the particular case and at the effect of the discrimination on the interests** of those concerned. **The more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair.** Similarly, the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair. In determining the effect of the discrimination, the reasons given by the agency responsible for the discrimination will be only of indirect relevance. However, should the discrimination in any particular case be held to be unfair, the reason for the discriminatory act may well be central to an investigation into whether the discrimination is nevertheless justified in terms of section 33 of the interim Constitution.

S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002)

[57] The appellants argued that to the extent that section 20(1)(aA) criminalises only the conduct of the prostitutes and not that of the client, it is in breach of section 8 of the Constitution. The proper approach to section 8 of the interim Constitution was confirmed and summarised in *Harksen v Lane NO and Others*. There are two enquiries: the first is to consider whether the impugned provision differentiates between people or categories of people and if it does, whether it does so rationally. The second is to consider whether a differentiation is made, directly or indirectly on a ground which could be said to have the **potential to impair human dignity or to affect people adversely in a comparably serious manner**. If the differentiation is on such a ground, the question that then arises is whether it is unfair or not.

20 INDUSTRY RESPONSES, STAKEHOLDERS AND SOCIETY

The reported public reaction on social media to Mr. Williams' tragic suicide reflected a care and concern about Mr. Williams, the casino gambler who had committed suicide. The public reportedly expected the casino to have responded differently, which it reportedly did not.

The tragedy and lost of a customer's life has – for gambling service providers – drawn new attention to apparent major deficits in their governance, compliance, reputational, risk, and management arrangements. In turn it brings new legal scrutiny on social justice. Mr. Williams, by his untimely demise, has placed two realities before gambling service providers: the reality that a *change* has happened, and the reality that a *choice* needs to be made.

20.1 Reality of Change

For gambling service providers, the reality of the change is an unexpected realization that vulnerable process-addicted mentally ill gamblers disabled by the effects of the psychiatric diagnosis of "Disordered Gambling" actually have rights as they gamble – and that providers have a duty to afford these rights when they gamble.

20.2 Reality of Choice

For gambling service providers, the reality of choice is the discomfiting appreciation that they have two alternatives: to comply with the rights of vulnerable process-addicted mentally ill gamblers disabled by the effects of the psychiatric diagnosis of "Disordered Gambling" and to discharge their duties to them – or instead to ignore these gamblers' legal rights and disregard gambling service providers' duties to them.

20.3 Nothing Left to Lose

A vulnerable process-addicted mentally ill gambler disabled by the effects of the psychiatric diagnosis of "Disordered Gambling" may simply carry on gambling over a period or periods until they have nothing left to lose. For gamblers, musicians have appreciated the consequences of the behavior and symbolized it in lyrics.²⁴⁹ For gambling service providers, Mr. Williams' death illustrates its consequences.

Psychologists describe the reality of gambling until no financial resources remain in this way: "Problem gamblers, those with addictions will keep playing until there is nothing left to lose. And those losses have much more direct effect on their lives than alcohol and drug addictions. When someone has drug or alcohol problems, they may still be able to cover up the effects, at least for a while, so losses do not become prevalent. But gambling involves money and only money. So, once a person starts losing, their cars, homes and college funds will start disappearing almost immediately. Preventing this sort of thing from happening is where counselors and therapists come in."²⁵⁰

²⁴⁹ Alan Parsons Project: "*You've Got Nothing Left to Lose*" (from the 1980 album "*The Turn Of A Friendly Card*"):
You gave the best you had to give / You only have one life to live,
You fought so hard you were a slave / After all you gave there was nothing left to save,
Chorus: *You've got nothing left to lose (you've got nothing left to lose),*
No you've got nothing left to lose (who'd wanna be standing in your shoes).

²⁵⁰ Marston DC. and Maple TL (2016) *Comparative Psychology for Clinical Psychologists and Therapists: What Animal Behaviour can Tell Us about Human Psychology* (Jessica Kingsley Publishers Philadelphia USA)

20.4 Indifference

The Constitution, non-gambling legislation with general application, the common law and applicable international conventions all expect citizens and legal entities to care and to act in ways that are right and proper and will promote dignity, equality, freedom and ubuntu and not discriminate unfairly on the ground of *disability* toward the social group that process-addicted gamblers disabled by the effects of the psychiatric diagnosis of “Disordered Gambling” are members of.

A key governance, compliance, risk and reputational issue is why gambling service providers’ responses to process-addicted mentally ill gamblers disabled by the consequences of “Disordered Gambling” appear to be unconstitutional, discriminatory, inequitable, unaligned with consumer protection and apparently non-compliant.

Inaction may be a signal of the indifference of gambling service providers about the position and circumstances of vulnerable gamblers. Indifference might signify a disregard for the vulnerable gamblers’ rights and interests enshrined in the Constitution and national legislation with general application. Disregard might imply an intention to maintain business practices that appear to constitute indirect and systemic and adverse impact discrimination.

An unwillingness to change might signify to roleplayers in the gambling industry and stakeholders associated with it that process-addicted gamblers are seen as failed persons because they are irresponsible losers²⁵¹ and their conduct justifies treating them as commodities²⁵² and as means to an ends of the gambling service provider.²⁵³

21 PROCESS-ADDICTED GAMBLERS: A MODERN DAY APARTHEID?

For 400 years of South African history, one powerful group has almost continuously dispossessed and exploited another vulnerable group, under legislation that legalized the practices and legitimated the consequences. During the apartheid years (and historically long before that time), Black people were subjected to exploitation, exclusion, indignity, unfair discrimination, abuse, psychiatric harm and stigma – all on the basis of their race.

21.1 Apartheid’s Calculus

During the apartheid period, principles that would justify apartheid were used as the basis of legislation that enacted no rights for vulnerable Black people, and established no legal duties toward them. These arrangements authorized and permitted a powerful economic group to profit from vulnerable Black workers’ labour power, by dominating, controlling, misusing and exploiting black workers and destroying black communities, black family life and hopes of financial security. The harm was systemic and legislators, government, regulators and business were complicit.

Apartheid’s realities – unequal power, severe inequality, vulnerability exploitation, and wealth transfer – all appear to find a disquieting contemporary reflection in today’s gambling

²⁵¹ Because the industry aphorism states that ‘Winners Know When to Stop’.

²⁵² See again *S v A*, in which the Constitutional Court ruled that “[h]uman beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as a means to an end.”

²⁵³ See again the Constitutional Court ruling in 2001 in *Dodo* which ruled that “[h]uman beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth”.

industry; the vulnerable black worker is easily substituted by the vulnerable process-addicted mentally ill gambler disabled by psychiatric illness.

Under South African gambling legislation – not substantively different from many other countries – the apparent disregard for the rights and interests of process-addicted disabled gamblers appears to be another example of the dissolution wrought by powerful groups upon vulnerable exploitable powerless ones. What the architects of apartheid had planned and intended.

21.2 Apartheid's Mirror

Apartheid's treatment of black people appears to find clear reflection in gambling service providers' apparent treatment of process-addicted mentally ill gamblers disabled by the effects of the psychiatric diagnosis of "Disordered Gambling".

Economically, apartheid's business goal was to control and profit financially from black workers as a source of labour. Gambling service providers' business goal appears to be to control and profit financially from process-addicted mentally ill gamblers disabled by the effects of the psychiatric diagnosis of "Disordered Gambling" as a source of revenue.

Apartheid's gambling reflection appears to have the same features in a different setting: the gambling service provider recognizes the process-addiction, knows the mentally ill gamblers inability to cease gambling, sees the devastation the psychiatric illness wreaks, uses devices and machines designed to take advantage of that incapacity, rewards and incentivizes addicted gamblers to continue wagering until their financial resources are depleted. From this there are clear communalities with apartheid and shared realities of apartheid.

21.2.1 Common Capitalization on Vulnerability

The legal position of process-addicted gamblers under gambling legislation appears to be comparable with that of Black workers under apartheid legislation. A common vulnerability due to race and due to mental illness. A common dependency on others to not discriminate and damage. A common domination by powerful groups.

21.2.2 Common Commoditization of a Person

The commonalities of apartheid and gambling treatment appear to be clear. A common use of a person as a means to generate a continuous revenue stream and a means to realize a profit. A common commoditization and tradability of a human being. A common utility as a means to the ends of others. A common depersonalization and dehumanization and ultimate expendability.

21.2.3 Common Discrimination

It appears apartheid's discrimination of the ground of race finds its reflection in gambling's discrimination on the grounds of disability. Common experiences of discrimination on the ground of an immutable characteristic. A shared stripping of human dignity and the right to be treated equally. And a common stigmatization and devaluation.

21.2.4 Common Utilitarian Calculus

The financial calculus seems unashamedly utilitarian: the known and visible harm to process-addicted gamblers may be regarded as outweighed by the financial benefits of the revenues accrued by gambling service providers, provincial governments and civil society. The revenue generation economics are in this instance not apartheid's arithmetic of the need for cheap black labour power, but the need for a predictable and profitable revenue stream from addicted gamblers.

21.2.5 Common Depersonalization and Family Destruction

The psychological commonalities of black people's experience under apartheid and process-addicted gamblers experience in gambling service provider venues appear all too clear. Common psychological experiences of being denied dignity, equality, freedom and ubuntu. Common pervasive anxieties, distress, harm and prejudice. A common destruction of family life and relationships with spouses and children. A common inability to have personal autonomy and to self-actualize. A common inability to have personal control due to immutable events that cannot be controlled.

22 SUICIDE, GAMBLING & MEANING: LESSONS FOR CHANGE

Intuitively, for human beings, maybe only in death come the lessons. But Mr. Williams, this casino's gambling customer, through the tragedy of his death, will make an important posthumous contribution to change and improvement in the business of licensed gambling providers.

That will ameliorate a cause of mental illness with catastrophic consequences in the lives of disordered gamblers who suffer ongoing distress similar to what his must have been.

22.1 Reappraisal and Change

So for licensed gambling providers, there appear to be lessons to learn, reappraisals to do and changes to make. Public relations strategy is up for review: by reviewing social media communication strategy; by improving employee awareness of a duty to respond sensitively and respectfully to customer tragedy; by developing the necessary capacity through training human resources for competency.

Then they might strategically review gambling business operations and equipment for compliance with Constitutional rights and duties, and the duties established by all non-gambling legislation that has general application and supersedes and takes precedence over any gambling legislation. Then they might decide to consider the consequences for them and customers of past, present and future non-compliance risk exposure.

22.2 Probability

Gambling's probability theory could never have predicted the odds: that the tragic death of a problem gambler by suicide through self-immolation in a casino would begin a process that would ultimately entirely change the relationship between process-addicted mentally ill gamblers and the gambling service providers who offer the devices and machines that are

designed to keep a process-addicted gambler wagering on them as long and intensively as possible and in this way causes mentally susceptible gamblers to become addicted to using them to the extent that they cannot cease gambling and become severely mentally ill.

For gambling service providers, the constitution, the non-gambling legislation with general application, the common law and the international conventions impact their business critically. These legal requirements all introduce an entirely new ‘game’: a legal one in which player rules are transparent and known and are founded on values, ethics, morality, legality and equity – with odds that favour the process-addicted gambler.

In terms of game theory, gambling devices are designed – and gambling games are programmed – for the exact opposite outcome: as the odds always favour the house, the longer a process-addicted mentally ill disabled gambler continues to gamble, the further the gambler’s wagers will regress to the mean, the greater the expectation becomes that the house will take revenues, and the greater the process-addicted gambler’s expectation to lose. As the gambler does not know and has not been informed of any these realities, the gambler is not in any position to be able to “gamble responsibly”.

When the tragedy of a gambler’s suicide in a casino and non-gambling legislation intersect ‘the tables turn’, the odds reverse and the expectation is other way around: the gambling service provider has no table ‘house edge’, there is no machine retention percentage – the new game’s rules are legality, values, ethics, equity, fairness and equality. So these new odds produce a new expectation: that a process-addicted gambler can expect to be accorded dignity, equality, freedom of psychological integrity, not be unfairly discriminated against and will be protected as a consumer.

22.3 Black Swans

So for licensed gambling service providers, the effect of the tragedy of Mr Williams’ suicide is an unanticipated ‘outlier’ for business operations and risk management: one of Taleb’s ‘black swan’ events. Gambling legislation establishes no statutory duty on gambling service providers to promote equality, dignity, freedom, Ubuntu, non-discrimination and consumer protection for process-addicted gamblers mentally ill and disabled by “Disordered Gambling”.

Instead the gambling industry and gambling legislation placed the responsibility as well as the onus on the mentally ill gambler to gamble responsibly: and to stigmatize the gambler who had not as a failure because “*Winners Know When to Stop*” despite knowing that the process-addict had not because they could not. This aphorism appears to overlook the reality of process-addiction and mental illness, and simply stigmatizes mentally ill gamblers who may see themselves as ‘losers’, failures and worthless – a breach of their constitutional right to dignity. Similarly imposing on the process-addicted mentally ill gambler a duty to “*Gamble Responsibly*” appears to be a contradiction in terms and a breach of the principles and duties imposed on gambling service providers by non-gambling legislation with general application.

23 STARTING AN OVERDUE CONVERSATION

Now non-gambling legislation – the Constitution, the Equality Act, the Mental Health Care Act and the CPA – reverse the onus and place responsibility where it needs to be. The

statutory duties imposed on gambling service providers compels gambling them to now become the 'winners' that process-addiction and mental illness prevented disabled gamblers from becoming: gambling service providers need to be "winners who know when to start caring" who commit to comply with a National Responsible Gambling Provider Programme.

In probability theory and calculating the odds for the occurrence of an event, sometimes you just get it wrong. For licensed gambling providers, the precursor for change was a vulnerable gambler: the tragic death of Mr. Williams, a casino customer who will be remembered for his life, how his life ended in a casino, and how the end of his life began a process of change for gamblers in the same circumstances he experienced.

Probability and odds are calculated on the form and the course. In this case, the gambling provider knew a vulnerable process-addicted gambler's form, and knew non-gambling legislation's course. But missed them both. Taleb's black swan event.

Now gambling providers have a new legal compliance and risk obligation – to promote the rights of their most vulnerable customers, based on constitutional and equality and consumer protection legislation. Can non-gambling law change gambling? What were the probabilities of that; what would the odds have been that it might?

Social justice for vulnerable groups usually never starts early, and typically never happens fast. But the Constitution and the non-gambling legislation with general application compel gambling service providers to change. When the public becomes aware of the need for change, the vox populi is very likely to demand it. Shareholders of listed gambling service providers are compelled to require it. Investors will begin to expect it. Good governance obligations compel boards to ensure it. Compliance and risk forces executives to deliver it. Civil society and organized labour will become involved. And the courts will be guided by the constitution and equality legislation to order compliance and to interdict breaches.

A compliance conversation is long overdue. The harm to vulnerable mentally ill psychiatrically disabled gambling customers is obvious. The compliance obligations for gambling service providers are self-evident. The financial risks to gambling service providers appears to be clear. The reputational risks appear obvious. Roleplayers should start a conversation that produces strategic industry solutions for licensed gambling providers that will be constitutional, equitable, non-discriminatory and also protective of consumers.

Licensed gambling industry providers and roleplayers will need to do the ethical, moral, constitutional, legal, fair and lawful thing for their customers – before the Courts order it or interdict non-compliance to prevent further harm, inequality, discrimination and social costs.

For Peter Williams, and vulnerable process-addicted mentally ill gamblers disabled by "Disordered Gambling", the need for gambling service providers to take up their role and begin the process of change seems to be the ethical, moral and constitutional step every gambling service provider should begin now.

They Don't Really Care About Us – Michael Jackson²⁵⁴

Skin head ... dead head, Everybody gone bad
Situation ... aggravation, Everybody allegation
In the suite ... on the news, Everybody dog food
Bang bang ... shot dead, Everybody's gone mad
All I wanna say is that
They don't really care about us
All I wanna say is that
They don't really care about us

²⁵⁴ <http://www.azlyrics.com/lyrics/michaeljackson/theydontcareaboutus.html>