THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case No.68/2000

In the matter between:

THE NATIONAL GAMBLING BOARD	**Appellant**
and	
THE FREE STATE GAMBLING BOARD	**1st Respondent**
THE PREMIER OF THE FREE STATE PROVINCE	**2nd Respondent**
THE MEMBER OF THE EXECUTIVE COMMITTEE FOR ECONOMIC AFFAIRS FINANCE AND REVENUE OF THE FREE STATE	**3rd Respondent**
THE MINISTER OF ECONOMIC AFFAIRS OF THE RSA	**4th Respondent**
THE MINISTER OF SAFETY AND SECURITY OF THE GOVERNMENT OF THE RSA	**5th Respondent**
99 OTHER RESPONDENTS	**6th to 104th Respondent**

Court: VIVIER, HARMS, SCHUTZ, SCOTT and CAMERON JJA
Heard: 19 MARCH 2001
Delivered: 26 MARCH 2001

Subject: Gambling: special licences for gambling machines

JUDGMENT

HARMS JA/

HARMS JA:

[1] Is a special gambling licence, say for slot machines, issued in terms of the Free State Gambling and Racing Act 6 of 1996 so special that its other provisions or those of the National Gambling Act 33 of 1996 do not apply to it? Lichtenberg JP answered the question in the affirmative. Dissatisfied, the National Gambling Board sought leave to appeal but despite his finding that there were reasonable prospects of success the learned Judge refused leave because, according to him, the Board had no interest in the matter and therefore no *locus standi.* The Board then sought the leave of this Court which in turn referred the application for argument and the parties were instructed to argue the merits of the appeal at the same time.

[2] Casinos, racing, gambling and wagering (excluding lotteries and sports pools) are functional areas of concurrent national and provincial legislative competence (schedule 4 of the Constitution) which means that both the national and provincial legislatures have original legislative competence in respect of these matters and the one does not have precedence over the other. In interpreting such legislation regard should be had to s 150 of the Constitution:

"When considering an apparent conflict between national and provincial legislation, or between national legislation and a provincial constitution, every court must prefer any reasonable

interpretation of the legislation or constitution that avoids a conflict, over any alternative interpretation that results in a conflict."

Only in the case of a real conflict the one may prevail over the other, which one depending upon the circumstances (s 146 of the Constitution; cf s 126(3) of the interim Constitution). As will become apparent there is, as far as this judgment is concerned, no such conflict.

[3] The National Gambling Board (hereinafter referred to as "the National Board") is a body established by the National Gambling Act ("the National Act") and, with a view to the effective regulation of certain matters relating to casinos, gambling and wagering, one of its objects is to promote uniform norms and standards applying generally throughout the Republic (s 10(a)). In order to achieve its objects -

"(a) . . .

(b) the Board shall from time to time advise the Minister on the maximum number of any kind of gambling licences to be awarded in the Republic or in any one province;

(c) the Board may advise and provide guidelines to the provincial authorities on the regulation and control of gambling or wagering activities, including-

(i) the manner and nature of the regulation and control of gambling activities in general or in connection with a specific gambling activity;

(ii) the granting, issuing, suspension, withdrawal and amendment of gambling licences;

(iii) the criteria to be complied with before any gambling licence is granted;

(iv) -(vi) . . .

(vii) the types, minimum standards and qualities of gambling equipment which may be used by any licensee; . . .."

(S 11 with added underlining.) It should already be noted that the Act does not define or limit the concept of "gambling licence" although "gambling" is defined in very wide terms to include the playing of any game played with gambling machines or gambling devices for money (s 1).

[4] The National Act also provides for a general policy underlying gambling in the Republic. The following paragraphs of s 13(1) are of significance for present purposes:

"(1) Subject to the provisions of this Act, gambling in the Republic shall be regulated in accordance with the following principles:

. . .

(i) matters relating to gambling activities shall be performed in accordance with norms and standards determined by the Minister, with due regard to the findings and recommendations of the Board, by regulation made in terms of section 17 (1) (b);

. . .

(k) the maximum number of gambling machines, other than gambling machines in casinos, which may be licensed in the Republic or in any particular province shall be prescribed by regulation made in terms of section 17;

(l) gambling machines referred to in paragraph (k) shall be linked to a central electronic monitoring system for the purposes of the monitoring and detection of significant events associated with each gambling machine;

. . .."

[5] During 1998, before any regulations were made in terms of s 17 and before a central electronic monitoring system was established, the Free State Gambling and Racing Board ("the Free State Board") invited applications for special licences for the operation of slot machines (a type of gambling machine) in the Free State for a period of one year. A large number of applications were made and deposits paid. This upset the National Board and it prevailed upon the Free State Board to launch an application in the High Court for a declaratory order to the effect (although not so worded) that it was not entitled to issue special licences before the promulgation of the s 17 regulations and the functioning of the central monitoring system. The National Board was joined as the first respondent and it filed an affidavit in support of the relief sought. Apart from other interested public bodies and functionaries, each of the ninety-nine applicants was cited as further respondents. One of them (the fourteenth respondent) brought a counter-application for an order obliging the Free State Board to consider all the pending applications for special licences without delay and to inform the applicants of the outcome of

their applications. [1]

[6] The Court below dismissed the Free State Board's application and granted the counter-application. In order to understand its reasoning it is necessary to turn to the Free State Gambling and Racing Act (to be referred to as the "Free State Act") under which the Free State Board was established. Chapter 3 deals with licencing. Section 21 states that no licence can be granted under the Act unless the Free State Board takes cognisance of the provisions of or norms and standards determined under the National Act and recommendations of the National Board under that Act which may relate to the granting of such licence. The word "licence" is defined in s 1 as a licence referred to in s 23 and the latter lists the kinds of licences that may be granted, including casino and limited gaming machine operator or site licences. (As an aside, gaming machines are defined in similar terms as gambling machines in the National Act.) Section 24 deals with the general requirements of licence applications, s 25 with application fees, s 26 with objections, s 27 with the fact that applications and objections should be open to public inspection, s 28 with investigations and police reports and s 29 with temporary licences in respect of incomplete premises. The special requirements relating to the types of

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[1] Relevant regulations have since been promulgated (RG 6977 published in the Government Gazette of 21 December 2000) but they do not affect the outcome of the appeal.

licences listed in s 23 are set out successively in sections 30 to 37.

[7] Thereupon follows s 38 which deals with special licences:

"(1) Notwithstanding any other provision of this Act, the board may, on application in the manner determined by the board, issue to any person, for specified dates, a special licence, subject to such conditions as the board may determine.

(2) The provisions of sections 24 and 26 shall not apply in respect of an application referred to in subsection (1)."

Special licences are not listed in s 23. Relying upon the opening phrase of ss (1), the Court below held that this section stands completely independently of the rest of the Act; the provisions of the National Act and the Free State Act relating to the gambling industry as a whole could not be applicable to special licences; consequently, special licences for gambling machines can be granted irrespectively of any other provision of the Free State Act or those of the National Act.

[8] Before considering the reasoning, it is necessary to determine whether the Free State Board's invitation to the public to apply for special licences which would be valid for a period of one year was in any event beyond its competence. A licence for a period of say, one year, is not one for "specified dates". A date in the context of s 38 is a specified day and not an extended period such as a year. The consequences of a contrary approach can be illustrated by way of a simple example. The National Act provides in

s 13(1)(j) that the maximum number of casino licences that may be granted in the

Free State is four. (It was not suggested that this created a conflict with the Free State Act.) However, on the Free State Board's approach, if it so wishes, it may grant any number of casino licences provided it is done under s 38 for "specified dates", even be they ten or fifty years. The object of the section is to make provision for *ad hoc* licences and not to enable the Board to circumvent the other provisions of the Act. It follows that the Free State Board was not entitled to invite or consider applications, and eventually issue, special licences for a period of a year.

[9] Reverting to the judgment of the Court below, the fallacy which underlies it is to be found in the assumption that a special gambling licence is not a gambling licence as envisaged by s 23, and that s 21 does not apply to it. In my judgment such a licence is only special in the sense that it is be for specified dates. The opening words of s 38(1), "notwithstanding any other provision" must be read in context and, if so read, merely qualify "for specified dates". The "other" excluded provisions are those like s 29 which deals with temporary licences in respect of incomplete premises or s 52 which deals in general terms with the duration of licences; both are inapplicable to

special licences. Because of the limited term and operation of special licences, the Free State Board may determine the manner of the application (s 24 is excluded), and the formalities relating to objections do not apply (s 26 is also excluded). But since it remains a gambling licence it has to comply with the general provisions of the Act. Were it otherwise, serious anomalies would arise. Contraventions of licence conditions would not be punishable because s 86, which deals with offences relating to licences, refers to licences in general terms. Likewise, any person disqualified to hold a licence in terms of s 22 would nevertheless be qualified to hold a special licence.

[10] Since s 21 obliges the Free State Board to take cognisance of the provisions of or norms and standards determined under the National Act, the next question to consider is whether it has done so. The underlined words in s 11 (referred to in par 3 above) make it abundantly clear that the National Act is intended to apply to any kind of gambling licence. Whether specially or otherwise licenced, the maximum number of gambling machines is to be prescribed in ministerial regulations and to be linked to a central monitoring system. Unless the necessary regulations prescribe the maximum number of gambling machine licences for the Free State and until the central monitoring system is in place, the Free State Act could not have been implemented in relation to gambling machines. By undertaking to issue special licences in the

absence of the regulations and a central monitoring system, the Free State Board acted prematurely and beyond the scope of its authority. I do realise that this interpretation may limit the field of application of special licences but that would fit into the general scheme of the Act. I do not believe, for instance, that these licences were ever intended to be issued in respect of a casino.

[11] It follows that the Court below erred in dismissing the Free State Board's application and in granting the counter-application. Instead, it should have issued a declaration in favour of the Free State Board and the counter-application should have been dismissed.

[12] A complicating factor in upholding the appeal at this stage is that the Free State Board (the original applicant) declined to appeal and that the National Board (a respondent which did not ask for relief but supported the application) wishes to do so. As mentioned, Lichtenberg JP held that the National Board had no interest in the litigation and that it can therefore not appeal.

"The question of *locus standi* is in a sense a procedural matter, but it is also a matter of substance. It concerns the sufficiency and directness of interest in the litigation in order to be accepted as litigating party (*Wessels en Andere v Sinodale Kerkkantoor Kommissie van die Nederduitse Gereformeerde Kerk, OVS* 1978 (3) SA 716 (A) at 725H; *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369

(A) at 388B-E). The sufficiency of interest is 'altyd afhanklik van die besondere feite van elke afsonderlike geval, en geen vaste of algemeen geldende reëls kan neergelê word vir die beantwoording van die vraag nie . . . .' (*Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 534D)."

Gross and Others v Pentz 1996 (4) SA 617 (A) 632 B-D. The learned Judge relied upon the fact that it does not lie within the competence of the National Board to grant special licences. That misses the point. That Board cannot issue any gambling licences, special or otherwise. It nevertheless has a direct and material interest in the matter. Such interest appears from the provisions of s 21 of the Free State Act. Moreover, its interest is apparent from its objects and functions, some of which have already been mentioned. It is deeply involved in the administration of and policing under the National Act. It has a say before generally applicable regulations may be promulgated.

[13] A related argument upheld by the Court *a quo* is that since this Board was not an applicant, neither the dismissal of the application nor the grant of the counter-application were orders made against it; it has nothing to appeal against. The point is without substance. Since I have held that the National Board has an interest in the order and that it was adversely affected thereby, it has to follow that it is entitled to appeal. That would have been the

position even if it were not a party to the application because it is recognised that a third party may, depending on his interest in the matter, appeal against a judgment in a suit *inter alios*, i e between other parties (Voet 49.1.3; *Kethel v Kethel's Estate* 1949 (3) SA 598 (A) 602; *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) 652). As the latter case illustrates, it happens not infrequently that a court of appeal orders the joinder of a non-party for purposes of the appeal. That person can then join either as appellant or respondent or may abide the decision of the court. The fact that the National Board was not originally cited as co-applicant is also of no consequence. Parties with joint interests may be joined either as applicants or respondents: cf Isaacs *Beck's Theory and Principles of Pleadings in Civil Actions* 5th ed 14. For instance, if a co-owner wishes to interdict a third party from infringing their joint proprietary rights, he can join the other co-owner either as applicant or respondent, and in either event the interdict will be granted in favour of both owners.

[14] It follows that the Court below erred in dismissing the application for leave to appeal. The National Board is entitled to its costs in this regard in that Court against all those who had joined in opposition. Normally it would also have been entitled to such costs in this Court. The case before us justifies a departure from the normal rule. Entwined with the application for leave to

appeal is a misconceived application for condonation which relates to the proceedings before the Court below and which is of no concern to us. In addition the application does not comply with the rules because it is not succinct and to the point and was accompanied by a mass of unnecessary documents. To signify our disapproval I propose to make no order in relation to these costs.

[15] In respect of the main application, a costs order was made against the Free State Board in favour of the applicants for licences who took part in the proceedings. The National Board did not ask for costs and consequently no order was made for or against it. It is bound by that election. In the absence of an appeal by the Free State Board and since the National Board has no interest in the costs order against the Free State Board, this order has to stand.

[16] The costs of the appeal should be borne by those respondents who took part in the appeal. They are Respondents fourteen, seventy-eight and ninety. The costs of two counsel are justified.

[17] In the result the following order is made:

(a) The application for leave to appeal is granted, each party to bear its own costs.

(b) The appeal is upheld to the extent that par 1(a) and 2 of the order of the

Court below are set aside and substituted with an order

(i) declaring that the applicant is not entitled to consider or award the special slot machine licences applied for by the 6th to 104th respondents

(ii) dismissing the counter-application of the fourteenth respondent.

(c) The costs of the application for leave to appeal before the Court below (including the costs of two counsel) are to be paid by the 14th, 23rd, 26th, 37th, 42nd, 46th, 59th, 78th, 85th and 90th respondents jointly.

(d) The costs of appeal (including the costs of two counsel) are to be paid by the 14th, 78th and 90th respondents jointly.

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L T C HARMS
JUDGE OF APPEAL

AGREE:

VIVIER JA
SCHUTZ JA
SCOTT JA
CAMERON JA