THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 889/2018

In the matter between:

KWAZULU-NATAL BOOKMAKERS' SOCIETY	**FIRST APPELLANT**
GAUTENG OFF-COURSE BOOKMAKERS' ASSOCIATION	**SECOND APPELLANT**

and

PHUMELELA GAMING AND LEISURE LTD	**FIRST RESPONDENT**
KENILWORTH RACING (PTY) LTD	**SECOND RESPONDENT**
GOLD CIRCLE (PTY) LTD	**THIRD RESPONDENT**
GAUTENG GAMBLING BOARD	**FOURTH RESPONDENT**
KWAZULU-NATAL GAMING AND BETTING BOARD	**FIFTH RESPONDENT**
EASTERN CAPE GAMBLING AND BETTING BOARD	**SIXTH RESPONDENT**
LIMPOPO GAMBLING BOARD	**SEVENTH RESPONDENT**
NORTH WEST GAMBLING BOARD	**EIGHTH RESPONDENT**
MPUMALANGA GAMBLING BOARD	**NINTH RESPONDENT**
WESTERN CAPE GAMBLING BOARD	**TENTH RESPONDENT**
FREE STATE GAMBLING AND LIQUOR BOARD	**ELEVENTH RESPONDENT**
NORTHERN CAPE GAMBLING BOARD	**TWELFTH RESPONDENT**

THE NATIONAL GAMBLING BOARD	**THIRTEENTH RESPONDENT**
THE NATIONAL LOTTERIES BOARD	**FOURTEENTH RESPONDENT**
GIDANI (PTY) LTD	**FIFTEENTH RESPONDENT**
ITHUBA HOLDINGS (PTY) LTD	**SIXTEENTH RESPONDENT**
THE PREMIER, KWAZULU-NATAL	**SEVENTEENTH RESPONDENT**

Neutral citation: *KwaZulu-Natal Bookmakers' Society v Phumelela Gaming and Leisure Ltd* (889/2018) [2019] ZASCA 116 (19 September 2019)

Coram: Navsa, Tshiqi, Swain, Van der Merwe and Molemela JJA

Heard: 26 August 2019

Delivered: 19 September 2019

Summary: National Gambling Act 7 of 2004 – meaning of totalisator betting on sports – Lotteries Act 57 of 1997 – meaning of 'sports pool' – does not include totalisator betting on horse racing and other sports – provinces entitled to regulate and control totalisator betting on horse racing and other sports.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Molopa-Sethosa J):

The appeal is dismissed with costs, such costs to include the costs of two counsel where employed.

JUDGMENT

Swain JA (Navsa, Tshiqi, Van der Merwe and Molemela JJA concurring):

[1] The issue to be decided in this appeal is whether bookmakers, in addition to their right to take bets on horse racing, possess the sole right to take bets on other sports, to the exclusion of totalisator operators, who are said to be confined to taking bets on horse racing.

[2] The claim by the bookmakers is based upon the argument that totalisator betting on sports other than horse racing, falls within the definition of a 'sports pool' in s 1 of the Lotteries Act 57 of 1997 (the Lotteries Act). The first appellant, the KwaZulu-Natal Bookmakers' Society, together with the second appellant, the Gauteng Off-Course Bookmakers' Association, being voluntary associations whose members hold bookmaker's licences (hereafter collectively referred to as 'the bookmakers'), contend that on a proper interpretation of the Lotteries Act, the legislature has prohibited totalisator betting on sports other than horse racing in the absence of a sports pool licence, issued in terms of the Lotteries Act.

[3] The first respondent, Phumelela Gaming and Leisure Ltd (Phumelela), the second respondent, Kenilworth Racing (Pty) Ltd (Kenilworth) and the third respondent Gold Circle (Pty) Ltd (Gold Circle), (hereafter collectively referred to as

the ‘tote respondents’), operate totalisator betting in relation to horse racing and other sports events. Phumelela and Kenilworth maintain that they do so in accordance with licences to conduct and operate totalisators, issued to them by the relevant provincial Gambling Boards. It is not disputed that Gold Circle lawfully does so in KwaZulu-Natal, in terms of a totalisator licence, issued by the KwaZulu-Natal Gaming and Betting Board in accordance with the KwaZulu-Natal Gaming and Betting Act 8 of 2010 (the KwaZulu Act).

[4] The bookmakers by way of application proceedings launched in the Gauteng Division of the High Court, Pretoria, challenged the validity of the licences held by Phumelela and Kenilworth, on the basis that the relevant provincial statutes did not authorise the holder of a totalisator licence to take bets on sporting events, other than horse racing. As regards Gold Circle, the appellants accepted that the KwaZulu Act did provide for such express authorisation, but submitted that the KwaZulu Act purported to deal with an area over which a provincial legislature did not enjoy legislative competence. Joined as further respondents were the various provincial gambling boards, the National Gambling Board and the National Lotteries Board. Gidani (Pty) Ltd and Ithuba Holdings (Pty) Ltd were also joined as the first and second operators of the National Lottery, as was the Member of the Executive Council for Finance in KwaZulu-Natal (the MEC), who was responsible at the time the proceedings were instituted, for the administration of gaming and betting in KwaZulu-Natal. The Premier of KwaZulu-Natal (the Premier), was subsequently substituted as the seventeenth respondent, when he assumed responsibility for the portfolio.

[5] The relief sought by the bookmakers in the court a quo was the following:

(a) An order declaring that Phumelela and Kenilworth were unlawfully operating a totalisator sports betting operation in contravention of their totalisator licences and/or the Lotteries Act.

(b) An interdict restraining Phumelela and Kenilworth from unlawfully operating a totalisator sports betting operation in contravention of the Lotteries Act.

(c) An order directing the fourth to twelfth respondents, being the various provincial gambling boards, to the extent necessary, to take all appropriate steps to withdraw any permissions that may have been granted to Phumelela and Kenilworth and which unlawfully purported to authorise the operation of totalisator sports betting operations.
(d) An order directing the tote respondents and the MEC (now the Premier) to pay the costs, jointly and severally, including the costs of two counsel.

[6] Before the court a quo (Molopa-Sethosa J), the application was successfully opposed by the tote respondents and the Premier. The application was dismissed on the ground that tote betting on horse racing and other sports, fell within the exclusionary clause in the definition of a 'sports pool', contained in the Lotteries Act. The court a quo rejected the bookmakers' argument that in the absence of a sports pool licence issued in terms of the Lotteries Act, on a proper interpretation of the definition, the Lotteries Act had prohibited tote betting on sports other than horse racing. Central to this finding by the court a quo, was the fact that when the Lotteries Act was passed, Phumelela was 'already offering totalisator betting in respect of sports such as soccer and rugby in terms of provincial legislation'. The court a quo therefore decided that the purpose of the Lotteries Act in this regard, was not only to preserve the totalisator system of betting in respect of horse racing, but also in respect of all sports.

[7] However, the court a quo did not decide the central argument of the tote respondents, which is also advanced on appeal, that the Lotteries Act does not apply to tote betting on sports, which is governed by the National Gambling Act 7 of 2004 (the National Gambling Act). The tote respondents submitted that the National Gambling Act expressly refers to tote betting and empowers provincial authorities to license tote betting on any event, or combination of events. The tote respondents submitted that the provincial legislation does not limit tote betting to horse racing and consequently these statutes and the licences issued to the tote respondents, by the provincial gambling boards, permit totalisator betting on all sports. The appeal is with the leave of the court a quo.

[8] Consequently, the first issue to be decided is the meaning of a 'sports pool' as defined in the Lotteries Act and the meaning of 'totalisator betting', in the National Gambling Act. Thereafter it must be decided whether totalisator betting on sports, other than horse racing, falls within the definition of a 'sports pool'. In doing so, the correct approach to statutory interpretation as set out in *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) para 28, must be followed;

'[a] fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity.' (Footnotes omitted.)

[9] Gold Circle and the Premier submitted that the context in which the Lotteries Act and the National Gambling Act were passed must include a consideration of the legislation which had previously regulated gambling and wagering, as well as the constitutional setting. A consideration of this legislation is said to be of importance in determining the purpose of the Lotteries Act and the National Gambling Act, as well as the meaning of a sports pool in the Lotteries Act and totalisator betting in the National Gambling Act. They maintained that such an exercise makes it clear that totalisator betting has always been recognised as differing from sports pools.

[10] Gold Circle submitted that the legalised forms of gambling are divided into two sections in terms of s 104(1)*(b)*(i), read with Schedule 4 of the Constitution. First, lotteries and sport pools that are regulated nationally in terms of the Lotteries Act by the National Lotteries Board and second, gambling, casinos and wagering (including all wagering on horse racing and sporting events) that are regulated concurrently at both the national and provincial level. This distinction is said to be reflected in the fact that totalisators of all kinds were regulated by the provinces and that the rights of the provinces and the totalisator operators, in relation to tote betting on sports, other than horse racing, existed before the passing of the Lotteries Act.

[11] In marked contrast, the approach of the bookmakers to the interpretation of what constitutes a 'sports pool' in the Lotteries Act is linguistic, without regard being had to prior legislation regulating gambling and wagering. With regard to the significance of the Constitution, the bookmakers submitted that in terms of s 104(1)*(b)*(i), read with Schedule 4 of the Constitution, the power of provincial legislatures to pass legislation dealing with lotteries and sports pools, is precluded. The bookmakers therefore contended that it is incumbent on the court to interpret the legislation to conform to the Constitution, unless that interpretation was not reasonably open to the court. Accordingly, where a provincial statute might be read so as to allow tote betting on sporting events other than horse racing, this should be read restrictively, so as to exclude it.

[12] In my view, a consideration of the prior national and provincial legislation, regulating gambling and wagering, is essential to a proper interpretation of the definition of a 'sports pool', in the Lotteries Act. The legislative history of a statute may be used as an aid in its interpretation. As stated in *Joosub Ltd v Ismail* 1953 (2) SA 461 (A) at 466 D, 'The history of the sub-section may throw light on the proper construction of the words.' The first act to be considered is the Gambling Act 51 of 1965 (the 1965 Gambling Act) which came into force on 1 July 1969, in terms of which lotteries and sports pools were prohibited. A 'lottery' was defined as a scheme where a prize could be won by lot, dice or other method of chance and a 'sports pool' was defined as:

'any scheme under which –

(a) any person is invited or undertakes to forecast the result of any sporting event or series or combination of sporting events (whether or not in conjunction with any event other than a sporting event or series or combination of events other than sporting events) in competition with other participants; and

(b) a prize is to be awarded to the competitor who forecast the said result correctly or whose forecast is more nearly correct than the forecasts of other competitors, or a number of prizes are to be awarded on the basis of aforesaid,

and for the purposes of this definition the forecast of a result includes not only the forecast of the person or team that is to be victorious or otherwise, but also any forecast relating to the

system of scoring employed in the sporting event concerned, or to any person responsible for the score.'

[13] Gold Circle submitted that the key feature of a 'sports pool' as defined in the 1965 Gambling Act, was that it involved the awarding of prizes to competitors who were invited to make predictions about sports events in contrast to betting, whether totalisator betting or bookmaker betting, which required the staking of money and the receipt of the dividend based on the amount staked, or pay-out based on the odds fixed. According to the Premier, of significance is that a sports pool did not involve the pooling of money and the award of a dividend but instead a prize, which did not bear any relation to amounts paid by the competitors to participate. These distinguishing features between a sports pool and totalisator betting, were central to the argument of the tote respondents and the Premier, that the Lotteries Act does not apply to totalisator betting on sports, as this form of betting does not fall within the definition of a sports pool.

[14] Of significance in relation to the legislative competence of the provinces to control and regulate betting and wagering, was a savings provision in s 10*(a)* of the 1965 Gambling Act, which provided that nothing in that Act restricted the powers conferred under paragraph 8 of the First Schedule, or paragraph 12 of the Second Schedule, to the Financial Relations Act 65 of 1976 (the Financial Relations Act). These schedules dealt with '[s]ources through which a provincial council could raise revenue and in respect of which it had power to legislate either directly, or because such power had been transferred to the provinces by the President'.

[15] Paragraph 8 of the First Schedule to the Financial Relations Act gave power to provinces in respect of '[l]icensing of totalisators and the imposition on the licensees of a duty in respect of the takings thereof; and licences, taxes and fees in connection with horse and other racing, betting and wagering, and the dissemination of information as to betting and wagering'. The Second Schedule dealt with '[m]atters the control of which and the power to legislate in respect of which may be transferred by the State President to a province'.

[16] Paragraph 12 of the Second Schedule to the Financial Relations Act permitted the devolution of control to provinces in respect of:

'The restriction, regulation and control of horse racing, the prohibition, restriction, regulation and control of other racing and *the restriction, regulation and control of betting and wagering (whether as to circumstances, locality or premises)*, the prevention, control and regulation of the dissemination of information as to betting within the province and the licensing of any instrument, machine or contrivance, commonly known as a totalisator and the imposition of a duty in respect of the takings thereof, upon the licensees.' (Emphasis added.)

The former provinces were therefore afforded the power to regulate and control betting and wagering, as to circumstances, locality or premises. I accordingly agree with the submission by Gold Circle, that despite the prohibition on a 'sports pool' in the 1965 Gambling Act, the express reference to the Financial Relations Act in this Act made it clear that it was the provinces that regulated betting and wagering, including totalisator betting and they could determine what forms of betting to licence, or to prohibit. In other words, the prohibition on a 'sports pool' should not be construed as impinging on the provincial power to regulate totalisator and other betting in general.

[17] Prior to the passing of the 1965 Gambling Act and the Financial Relations Act in 1976, the former Province of Natal had in 1957, promulgated the KwaZulu-Natal Regulation of Racing and Betting Ordinance 28 of 1957 (the Ordinance). The Premier submitted that its promulgation serves as an example of the historical legislative competence of provinces, in respect of betting and wagering and specifically totalisator betting, as opposed to sports pools. Section 28 of the Ordinance permitted a racing club to offer betting through totalisators and provided for 'betting on horse races, sporting events and any other event or contingency'. The definition of 'bet' or 'a bet' in s 2 was broadly defined as the 'staking of any money or valuable thing relating to any horse race, or sports, or on any other event or contingency whatsoever'. The promulgation of the Ordinance by the former Province of Natal, was quite clearly the exercise of a wide power to regulate betting and wagering within that province. Consequently, the purpose of the savings provision in

the 1965 Gambling Act by reference to the Financial Relations Act, was to ensure the preservation of the legislative competence of the provinces in this regard.

[18] The power of the former provinces to regulate and control betting, including totalisator betting and wagering then found expression in ss 126(1) and 126(2) of the Interim Constitution Act 200 of 1993. These sections accorded to provinces the competence to make laws for the functional areas specified in Schedule 6, which included 'casinos, racing, gambling and wagering'. As a result, according to the Premier, a number of provinces exercised their expanded legislative competence at this time and promulgated gambling legislation which permitted tote gambling on sporting events other than horseracing. In terms of s 1 of the Gauteng Gambling Act 4 of 1995, 'totalisator' was defined as 'a system of betting on a sporting event or any other lawful event or contingency. . .'. In the Limpopo Casino and Gaming Act 4 of 1996 'totalizator' was defined as 'a system of betting on a sporting event' without any limitation. Likewise, in the Eastern Cape Gambling and Betting Act 5 of 1997, 'totalisator' was defined as a bet 'on any event or combination of events'.

[19] This expanded legislative competence on the part of the provinces resulted in the amendment in KwaZulu-Natal of the Ordinance with effect from 1 December 1994, to include within the definition of 'totalisator', bets on sporting events other than horse racing. The definition specifically included sport bets on any sporting event. As a further exercise of this legislative competence, KwaZulu-Natal then passed the KwaZulu-Natal Gambling Act 10 of 1996 which created a licensing regime for gambling within the province. It defined 'gambling' broadly as follows:

'[E]ngaging in any activity whereby money or any other thing of value is staked on the unknown result of a future event at the risk of losing all or a portion of the money or valuable thing so staked for the sake of a return . . . .'

[20] The Premier therefore correctly submitted that totalisator betting on sports other than horse racing was permitted by the province of KwaZulu-Natal, in accordance with its provincial legislative competence as reflected in the Financial Relations Act as well as the Interim Constitution, before the Final Constitution came

into force in 1997. In addition, according to the Premier, when the Final Constitution was enacted the terms 'lottery' and 'sports pool' had therefore acquired specific meanings, quite distinct from the concept of totalisator betting which had been regulated by the provinces for over a century. According to the Premier, the exercise by the provinces of their Constitutional legislative competence regarding 'gambling and wagering' including totalisator betting on sports, meant that these rights had accrued and vested in the provinces at the time the Constitution and the Lotteries Act came into force. Gold Circle submitted that this legislative context is essential in construing the Lotteries Act and understanding the distinction drawn in the Constitution between wagering and sports pools. An interpretation that distinguishes between a sports pool and provincial betting on sports, it is submitted, is the only interpretation that does this.

[21] The Constitution in s 104(1)*(b)*(i) read with Schedule 4, provides that an area of concurrent competence between national and provincial legislatures is: '[c]asinos, racing, gambling and wagering, excluding lotteries and sports pools'. As pointed out above, Gold Circle, relying upon the views of Professors M Carnelley and S Cornelius *Gambling and Sport in South Africa*, in Anderson et al *Sports Betting: Law and Policy* (2009) at 720, submitted that the Constitution draws a clear distinction between lotteries and sport pools on the one hand and gambling, casinos and wagering, on the other. The authors state the following:

'The Constitution of the Republic of South Africa, 1996, divides the legalized forms of gambling into two Sections:

Lotteries and sport pools that are regulated nationally in terms of the Lotteries Act by the National Lotteries Board;

Gambling, casinos and wagering (including the wagering on horse racing and sporting events) that are regulated concurrently at both the national and provincial level.'

Gold Circle submitted that this distinction in the Constitution is reflected in the legislation, in terms of which the Lotteries Act regulates lotteries and sports pools and the National Gambling Act and provincial legislation regulates wagering, consisting of both bookmaker betting and totalisator betting, on all events.

[22] The approach of the bookmakers is, however to deny that the Lotteries Act and the National Gambling Act, reflect such a distinction. This is because central to their argument, is that tote betting on sporting events other than horseracing, falls within the definition of a sports pool in the Lotteries Act. As pointed out above, they emphasised that the power of provincial legislatures to pass legislation dealing with lotteries and sports pools is precluded. Any such legislation would be susceptible to being struck down as unconstitutional. In response, the Premier submitted that inherent in the bookmakers' approach is the withdrawal of power and rights from the provinces, which had accrued under the prior legislation referred to above, to regulate and control 'gambling and wagering' including totalisator betting on sports. It is submitted that such an interpretation runs counter to established principles of statutory interpretation.

[23] It is against the background of the Constitution and the legislative history that I return to the central issue in the appeal, namely, a determination of the meaning of a 'sports pool' as defined in the Lotteries Act and the meaning of 'totalisator betting' as defined in the National Gambling Act. Thereafter it must be determined whether totalisator betting on sports other than horse racing, falls within the definition of a 'sports pool' in the Lotteries Act.

[24] In terms of s 4 of the National Gambling Act which deals with 'Bets and wagers', provision is made in s 4(2) for totalisator betting, which is defined as follows:

'A person places or accepts a totalisator bet when that person stakes money or anything of value on the outcome of an event or combination of events by means of –

(a) a system in which the total amount staked, after deductions provided for by law or by agreement, is divided among the persons who made winning bets in proportion to the amount staked by each of them in respect of a winning bet; or

(b) any scheme, form or system of betting, whether mechanically operated or not, that is operated on similar principles.'

Consequently, in totalisator betting the payout that each of the winners receive is determined by the amount staked by each of them in their winning bets, in proportion to the total amount staked by all of the persons participating in an event, or

combination of events, after any deductions from the total amount staked, in terms of any law or agreement. As the Premier correctly pointed out, totalisator betting in any form, is by its very nature part of 'gambling and wagering' and has been recognised as such, for some time.

[25] A 'sports pool' is defined In the Lotteries Act as follows:

'"sports pool" means any scheme, *excluding any scheme or competition in respect of horse racing which is authorised by the board, or which is conducted in the same format and manner and under the same circumstances as a scheme or competition in respect of horse racing that existed prior to 18 June 1997*, under which-

(a) any person is invited or undertakes to forecast the result of any series or combination of sporting events in competition with other participants; and

(b) a prize is to be awarded to the competitor who forecasts the said result correctly or whose forecast is more nearly correct than the forecasts of other competitors, or a number of prizes are to be awarded on the basis aforesaid,

and for the purposes of this definition the forecast of a result includes not only the forecast of the person, animal, thing or team that will be victorious or otherwise, but also any forecast relating to the system of scoring employed in the sporting event in question, or to the person who will be responsible for the score.' (Emphasis added.)

[26] Leaving aside the meaning and extent of the highlighted exclusionary clause, to which I will return, a sports pool is any scheme in which any person is invited or undertakes to forecast the result of any series, or combination of sporting events in competition with other participants and a prize is awarded to the competitor who forecasts the said result correctly, or whose forecast is more nearly correct than the forecasts of other competitors.

[27] In my view, totalisator betting on horse racing and other sports does not fall within the definition of 'sports pool' in the Lotteries Act, for the following reasons:

(a) Historically and before the passing of the Lotteries Act and the National Gambling Act, the provinces enjoyed provincial legislative competence in respect of totalisator betting on sports, which is a form of wagering. This legislative competence is reflected in the Constitution, which draws a clear distinction between lotteries and

sport pools on the one hand and gambling, casinos and wagering, on the other. This distinction is then reflected in the legislation, in terms of which the Lotteries Act regulates lotteries and sports pools and the National Gambling Act and provincial legislation regulates wagering, consisting of both bookmaker betting and totalisator betting, on all events. The distinction between sports pools and totalisator betting ensures that the national regulation of lotteries and sports pools, does not impinge upon the provincial legislative competence in respect of totalisator betting on sports.

(b) The Lotteries Act did not repeal the 1965 Gambling Act but did repeal the prohibition on 'lotteries' and 'sports pools' previously contained in s 2 of this Act. Save for the exclusionary clause, the Lotteries Act, however, retained the definition of 'sports pool' in the 1965 Gambling Act, which emphasises the inherent distinction between sports pools and totalisator betting of all types. In totalisator betting the individual amount staked by the winning participant who correctly forecasts the result of a sporting event, together with the total amount staked by all of the participants, determines the dividend payable. That cannot be equated with a sports pool where there is no accumulation of a pool or dividend to be paid, but instead a prize which invariably bears no relationship to the amounts staked. In addition, the definition of 'prize' was amended from 'any movable or immovable property' in the 1965 Gambling Act, to read 'the prize awarded to the winner of a lottery' in the Lotteries Act. The Premier therefore correctly submitted that the definition makes it clear that a sports pool is a type of lottery, because a lottery as defined is the 'distribution of prizes by lot or chance'. Tote betting does not distribute prizes by lot or chance, which is the essence of a lottery. A bet wins because the eventuality predicted occurs.

(c) I also agree with the submission by Gold Circle, that if the purpose of the Lotteries Act was to prohibit totalisator betting on sports events, it would have utilised the clear legislative language of totalisator betting when defining a sports pool, because this type of betting had been operated and regulated in the provinces for some time. The vested private rights of the totalisator operators and the public law rights of the provinces, which had been regulating and obtaining tax from totalisator betting on all sports events, would be affected. The withdrawal of power and rights from the provinces which had accrued under the prior legislation referred to above,

to regulate and control ‘gambling and wagering’ including totalisator betting on sports, runs counter to established principles of statutory interpretation. This indicates that the purpose of the Lotteries Act, was not to govern or prohibit the provincial licensing of totalisator betting, on sports events.

(d) I also agree with the submission by Gold Circle that the National Gambling Act, which was passed after the Lotteries Act, accepts that totalisator betting on any event or combination of events, without limitation is authorised, provided that it is licensed by the provinces. Implicit in this must be the acceptance by the national legislature that totalisator betting on sports does not amount to conducting a sports pool.

[28] I therefore disagree with the submission by the bookmakers that there are two notable features of the definition of a ‘sports pool’, that support their argument that totalisator betting on sports other than horse racing, falls within the definition and is therefore prohibited in terms of the Lotteries Act. The first is that the definition of a ‘sports pool’ is broadly cast, in that it refers to ‘any scheme’ and ‘any scheme’ is linked to two things, namely, it must be a scheme under which ‘any person is invited or undertakes to forecast the result’ and second, a prize is to be awarded to the competitor who forecasts the result correctly. The bookmakers submit that this is what the tote respondents do, in relation to taking bets on the sports of soccer and rugby, which is prohibited in terms of the Lotteries Act.

[29] The erroneous interpretation of the bookmakers results from a disregard of the historical legislative context in which the Lotteries Act and the National Gambling Act were passed. It also disregards the distinction drawn in the Constitution between lotteries and sport pools on the one hand and gambling, casinos and wagering, on the other which is reflected in the legislation, in terms of which the Lotteries Act regulates lotteries and sports pools and the National Gambling Act and provincial legislation regulates wagering, on all events. It also fails to have regard to the inherent differences between a sports pool and totalisator betting on sports. Significantly, as pointed out by Gold Circle, the bookmakers offer no rationale as to the purpose of the alleged distinction in the national legislation, to exclude the

provincial licensing of totalisator betting on sports other than horse racing and yet allow provincial bookmaker betting on any sports, without limitation.

[30] In any event, totalisator betting on horse racing and sports falls within the exclusion contained in the definition of 'sports pool' in the Lotteries Act, for the reasons set out below. For the convenience of the reader, the provisions of the exclusionary clause are reproduced:

'"sports pool" means any scheme, excluding any scheme or competition in respect of horse racing which is authorised by the board, or which is conducted in the same format and manner and under the same circumstances as a scheme or competition in respect of horse racing that existed prior to 18 June 1997. . . .'

(a) The primary consideration is the language used in the exclusionary clause. The words used must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. Of particular importance in construing the exclusionary clause are the rules of punctuation and particularly the use of the comma. In R W Burchfield *Fowler's Modern English Usage* 3 ed at 162 when dealing with the use of the comma, provides as follows in point 7:

'7 A restrictive (or defining) relative clause does not require a comma. A non-restrictive (or non-defining) relative clause, i.e. one which by its nature supplies extra information, does.'

The relative clause, 'excluding any scheme or competition in respect of horse racing which is authorised by the board', because of the presence of the word 'which', quite clearly restricts and defines the meaning of the words 'any scheme'. The subsequent relative clause, '. . . or which is conducted in the same format and manner and under the same circumstances as a scheme or competition in respect of horse racing that existed prior to 18 June 1997', preceeded as it is by the presence of the comma after the word 'board', indicates a non-restrictive meaning in the context of the definition as a whole. This relative clause therefore supplies extra information as to the meaning of the words 'any scheme' ie any scheme which is conducted in the same format and manner and under the same circumstances as a scheme in respect of horse racing, but which is not restricted to a horse racing scheme.

(b) I disagree with the submission by the bookmakers that the two 'which is' phrases introduce the two limbs of the exclusion, which qualify the subject, namely, 'any

scheme or competition in respect of horse racing' and that the use of the words 'which is' in both parts of the sentence, must be taken as a deliberate decision by the legislature to indicate that the subject 'any scheme or competition in respect of horse racing', is qualified in two ways, so that both limbs of the exclusion pertain only to horse racing. This argument fails to have regard to what Fowler describes as the use of 'which' as a relative pronoun, at the head of restrictive and non-restrictive clauses. The word 'which' in the phrase 'which is authorised by the board' is quite clearly used restrictively, ie horse racing that is authorised by the board. However, the subsequent use of the words 'or which', preceded by a comma, is used non-restrictively as it provides additional information as to an alternative meaning of the phrase 'any scheme', ie any scheme which is conducted in the same format and manner and under the same circumstances as a scheme in respect of horse racing, but which is not restricted to a horse racing scheme.

(c) I agree with the alternative submission by Phumelela and Kenilworth that for the interpretation of the bookmakers to be correct, the qualifier in respect of horse racing would have to be repeated at the start of the second leg of the exclusion, to qualify 'any scheme'. In other words, the definition would read as follows:

'"sports pool" means any scheme, excluding any scheme or competition in respect of horse racing which is authorised by the board, or *any scheme or competition in respect of horse racing* which is conducted in the same format and manner and under the same circumstances as a scheme or competition in respect of horse racing that existed prior to 18 June 1997.' (Emphasis added.)

Phumelela and Kenilworth are therefore correct in their submission that 'any scheme' does not have to be a horse racing scheme. To qualify for the exclusion, the scheme must be run in the same format and manner as a horse racing scheme before June 1997, but the scheme does not have to be horse racing, and may involve any sport. The point, according to Phumelela and Kenilworth, is that on this interpretation the qualifier 'in respect of horseracing' qualifies the format and manner of the scheme ('which is conducted in the same format and manner and under the same circumstances as a scheme or competition'), not the scheme itself ('any scheme'). Gold Circle therefore correctly submits that the competitions or schemes which were conducted in the same manner, form and circumstances as any scheme in respect

of horse racing prior to June 1997, and which are excluded from the definition of sports pools, are provincially licenced bookmaker and totalisator betting on horse racing and sports.

(d) The interpretation of the bookmakers not only fails to afford to the words used their correct grammatical meaning, but also fails to have proper regard to the context and purpose of the Lotteries Act, the National Gambling Act, as well as the Constitution. The nature and extent of the exclusionary clause becomes clear once it is accepted, as pointed out above, that the Constitution draws a clear distinction between lotteries and sport pools on the one hand and gambling, casinos and wagering, on the other and that this distinction is reflected in the legislation. In addition, as pointed out by the Premier, if the interpretation of the bookmakers were correct, it is difficult to see why the legislator did not simply formulate the exclusion to read; 'excluding totalisator betting on horse races, but including all other forms of totalisator betting'.

(e) The bookmakers' reliance on the Afrikaans text of the definition of a 'sports pool' in the Lotteries Act, as support for their interpretation, is also misplaced. They submit that a direct translation of the relevant portion reads as follows:

'"sports pool" means any scheme, excluding any scheme or competition in respect of horse racing which is conducted in the same format and manner and under the same circumstances as a scheme or competition in respect of horse racing that existed prior to 18 June 1997, or which is authorised by the board, under which. . . .'

On this basis the bookmakers submit that although the two limbs of the exclusion appear in a different order to those in the English text, it is clear that the two exclusions both relate to horse racing and that the Afrikaans text makes it clear that the subject of the scheme excluded from the prohibition on sports pools, is horse racing. There is therefore a conflict between the Afrikaans text and the English text and not a mere ambiguity between the two versions. As decided in *Du Plessis & others v De Klerk & another* 1996 (3) SA 850 (CC) para 44, the English text which was signed by the President, must therefore prevail.

(f) The answer to the bookmakers' reliance on the 2016 Final National Gambling Policy, of the Department of Trade and Industry (the DTI), which states that sports pools are constitutionally the sole mandate of the lottery and that operating

totalisator betting on sporting activities other than horse racing, must be discontinued, is the decision in *Akani Garden Route (Pty) Ltd v The Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) para 7, where the following was stated:

'[L]aws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between the Legislature and Executive will disappear.'

On a practical level, I agree with Gold Circle that if the DTI believes that totalisator betting on sports other than horse racing should not be licensed and regulated by the provinces, then it should make the necessary legislative changes in the Lotteries Act and the National Gambling Act. As pointed out by Gold Circle, totalisator betting on sports other than horse racing was openly conducted before the legislation was enacted and has been openly conducted for almost two decades, since it was enacted. If the DTI is of the view that provincially licensed totalisator operators should not be offering bets on sports, other than horse racing, then it is difficult to understand why no steps have been taken to prevent this. The long standing status quo in this regard, also leads to the compelling conclusion that the application brought by the bookmakers, was opportunistic and aimed at achieving a monopoly in respect of betting on sports, other than horse racing.

[31] Consequently, totalisator betting on sports does not fall within the definition of a 'sports pool' in the Lotteries Act and is regulated in terms of the National Gambling Act and the provincial legislation. This conclusion, renders a consideration of the validity of the nature of the relief sought by the bookmakers, unnecessary. In addition, as correctly conceded by the bookmakers, this finding means that the provincial legislation lawfully regulates and controls totalisator betting not only on horse racing, but also on other sports events. The provincial licences were therefore validly issued by the provincial gambling boards, to the tote respondents, in accordance with the provincial legislation.

[32] At the hearing of the appeal, the bookmakers challenged the so-called 'deemed authorisations', which Phumelela says were granted to it by some of the provincial gambling boards, in respect of its consolidated rules. The bookmakers strenuously argued that Phumelela only possessed the requisite approval from the provincial boards in the provinces of Gauteng, Mpumalanga and the Free State. It was submitted that Phumelela did not possess the requisite authorisation in the remaining provinces of Western Cape, Northern Cape, Eastern Cape, KwaZulu-Natal, Limpopo and North West.

[33] In order to properly understand this challenge, the relationship between the need for a totalisator licence as well as approved rules, requires to be understood. This is illustrated by a general example taken from the Gauteng Gambling Act 4 of 1995. Section 52 provides as follows:

'No person shall conduct the business of a totalisator or betting pool without a totalisator licence.'

Section 53(2) provides as follows:

'The holder of a totalisator licence shall conduct totalisators and betting pools in accordance with rules made by such holder and which have been approved.'

A totalisator operator therefore requires a totalisator licence, as well as rules made by the totalisator operator which have been approved by the relevant provincial gambling boards, to conduct the business of a totalisator.

[34] The challenge arises from the answering affidavit of Phumelela and Kenilworth in which it was stated that because of the delay of the provincial gambling boards (other than Gauteng, Mpumalanga and the Free State), in approving Phumelela's consolidated 'Revised Operational Totalisator Betting Rules', it wrote to these boards recording that in the absence of any contrary indication from them, it would assume they had no objection to Phumelela offering the bets reflected in the proposed rules. No response was received to these letters so Phumelela maintained that the consolidated rules were deemed to have been approved. The bookmakers submitted that this conduct amounted to 'self-help' on the part of Phumelela, which is an affront to the rule of law and constituted no authorisation at all.

[35] In response Phumelela pointed out that the only challenge raised by the bookmakers in their notice of motion and founding affidavit, was that the tote respondents did not possess the requisite licences, alternatively, that any licences they possessed were invalid. The challenge was never directed at a lack of authorisation of the consolidated rules of Phumelela and this was not the case it was called upon to meet.

[36] Although the bookmakers accepted they had not attacked the validity of the consolidated rules of Phumelela, in their notice of motion or founding affidavit, they maintained they were now entitled to do so. However, no formal challenge to the validity of the consolidated rules was raised in their replying affidavit, nor was notice given that amended relief would be sought in this regard.

[37] Of particular concern is that none of the provincial gambling boards opposed or took part in the proceedings, with the result that no information was provided by them with regard to the status of the applications by Phumelela for the approval of its consolidated rules. If this challenge had been clearly formulated in the notice of motion and the founding affidavit, a response from one or more of the provincial gambling boards, may have been of assistance in resolving this challenge.

[38] The bookmakers referred to a number of authorities, in support of their contention that a challenge to the validity of the consolidated rules of Phumelela should be entertained, at this stage. In support of a submission that it was not an inflexible rule, that an applicant was not entitled to amplify a case in the replying affidavit, reference was made to *Lagoon Beach Hotel v Lehane* [2015] ZASCA 210; 2016 (3) SA 143 (SCA) para 16. It is correct that the rule is not an inflexible one and whether an applicant will be entitled to amplify a case in the replying affidavit, depends on the facts of each case. In *Lehane* this court decided that the facts of that case justified a relaxation of the rule. Reference was also made to the decisions in *Malan v City of Cape Town* [2014] ZACC 25; 2014 (6) SA 315 (CC) para 73 and *Pretoria Portland Cement Co Ltd & another v Competition Commission & others* 2003 (2) SA 385 (SCA) para 63, as support for the proposition that in certain

circumstances, it may be incumbent upon a respondent to deal with new evidence contained in a replying affidavit. Again, whether a respondent is obliged to do so must depend upon the facts of each case. Finally, reference was made to the decision in *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623G-H as authority for the proposition that it is the duty of the court to take the point of illegality *mero motu*, even if it is not pleaded or raised. However, it was added that a court:

‘ . . . can and will only do so if the illegality appears *ex facie* the transaction or from the evidence before it, and, in the latter event, if it is also satisfied that all the necessary and relevant facts are before it.’

Because of the absence of any information from the relevant provincial gambling boards as to the fate of the applications by Phumelela for the approval of its consolidated rules, all of the necessary and relevant facts concerning the alleged unlawful conduct on the part of Phumelela, are not before this court.

[39] I am satisfied on the facts, that Phumelela was not obliged to deal with a challenge to the validity of its consolidated rules, when the case it was called upon to meet, was a challenge to the validity of its licences. This was an entirely different challenge to that advanced in the notice of motion and founding affidavit. In addition, no clear formulation of this challenge was set out in the bookmakers’ replying affidavit, nor in the heads of argument, to alert Phumelela. It was accordingly not incumbent upon Phumelela to deal with this issue. I am therefore of the view, that the bookmakers are not entitled to challenge the validity of Phumelela’s consolidated rules, at this late stage of the proceedings.

[40] I make the following order:

The appeal is dismissed with costs, such costs to include the costs of two counsel, where employed.

K G B Swain

Judge of Appeal

Appearances:

For Appellants:	G Marcus SC and M du Plessis SC (with T Palmer and S Lushaba) Instructed by: J H Nicolson Stiller & Geshen, Durban Lovius Block, Bloemfontein
For First and Second Respondent:	A Cockrell SC (with J Mitchell) Instructed by: Roodt Inc, Sandton Honey Attorneys Inc., Bloemfontein
For Third Respondent:	A Katz SC (with A Coutsoudis) Instructed by: Barkers Attorneys, Durban Matsepes Inc., Bloemfontein
For Seventeenth Respondent:	A M Annandale SC (with B Jackson) Instructed by PKX Attorneys, Pietermaritzburg McIntyre Van Der Post, Bloemfontein