



THE SUPREME COURT OF APPEAL  
REPUBLIC OF SOUTH AFRICA

## JUDGMENT

NOT REPORTABLE  
CASE NO 91/07

In the matter between

*CASINO ENTERPRISES (PTY) LTD (SWAZILAND)*

Appellant

and

*THE GAUTENG GAMBLING BOARD*

Respondent

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CORAM: HOWIE P, MPATI DP, NUGENT JA, HURT et SNYDERS AJA

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Date Heard: 7 March 2008

Delivered: 28 March 2008

Summary: Exception to claim – excipient not accepting plaintiff's facts but advancing contradictory facts on which to base averment of absence of crucial allegation in claim.

Neutral Citation: This judgment may be referred to as *Casino Enterprises (Pty) Ltd (Swaziland) v The Gauteng Gambling Board* (91/07) [2008] ZASCA 31 (28 March 2008).

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HOWIE P

## HOWIE P

[1] The long-running dispute between the parties in this appeal requires, and will hereafter hopefully receive, expeditious, practical and effective disposal. Unfortunately that outcome cannot be achieved by way of the legal process according to which the matter has come to this court.

[2] The appellant is a Swaziland company which operates an internet casino. The casino is licensed in Swaziland but not in South Africa. To attract gamblers in Gauteng the appellant advertised the casino on radio stations broadcasting in that province. The Gauteng Gambling Board (the Board) warned the broadcasters to desist as the advertisements, being in respect of an unlicensed casino, were in contravention of Gauteng and national legislation.<sup>1</sup> In compliance, the broadcasters withdrew the advertisements and refused to air any more.

[3] The appellant's response was to apply on motion to the High Court at Pretoria for an order declaring, in effect, that when Gauteng gamblers patronise the casino their gambling occurs in Swaziland so that neither such gambling nor advertising it contravenes the legislation.

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<sup>1</sup> The Gauteng Gambling Act 4 of 1995 and the National Gambling Act 7 of 2004.

[4] The application was launched in the Pretoria High Court in October 2004. It cited the Board as first respondent. (The other respondents do not feature in the litigation.) The Board opposed.

[5] In their papers both sides put up affidavits containing expert technical explanations as to the workings of internet gambling in order to motivate their respective experts' opposite conclusions as to whether the online gambling process took place solely in Swaziland or at least partly in Gauteng. In view of this conflict of opinion the appellant moved for referral to trial, the founding affidavit to stand as a simple summons. That was granted.

[6] Shortly afterwards the appellant's declaration was filed. It contains the following paragraphs.

'9. In terms of the Provincial Act, and particularly section 71(1) thereof, advertising for gambling in the Province is prohibited unless the advertiser holds a valid gambling licence in terms of the Provincial Act.

10. The gambling that takes place at the plaintiff's on-line casino:

does not take place in the Province; and

is not required to be licensed in terms of the Provincial Act.

11. Accordingly, the provisions of the Provincial Act do not prohibit any activities in the Province in respect of gambling at and on the plaintiff's on-line casino, and the

advertisement thereof within the Province is also not prohibited in terms of the Provincial Act.

12. In terms of the National Act no person may, among other things, engage in or make available an interactive game except as authorised in terms of the National Act or any other national law, nor may any person advertise or promote any gambling activity in a false or misleading manner or in a manner that is unlawful in terms of the National Act or applicable provincial law.

13. Gambling at the plaintiff's on-line casino:

13.1 is not an interactive game as contemplated by the National Act;

13.2 does not take place within the Republic of South Africa; and

13.3 is not unlawful in terms of the National Act or the Provincial Act.'

[7] The gist of the Board's exception is that the appellant's activities, to be lawful, require a casino licence issued under the National Act or the Gauteng Act and that the appellant fails to allege that it has such licence. The need for such licence is explained in the notice of exception as follows:

'16. The premises in the Republic to which the-on-line-casino games are disseminated, and made available for play, do not, and the plaintiff does not allege that the premises concerned, constitute licensed premises in terms of the National Act and the Provincial Act.'

[8] Contrary to what is required of an excipient, the Board does not accept the appellant's factual allegations. Instead, it impermissibly raises a

factual allegation of its own which contradicts the tenor of the appellant's case and then, on the strength of that contradictory allegation, proceeds to aver the omission by the appellant of an allegation allegedly essential to its claim. But there it errs again. The appellant's case is that it has no South African licence because it needs no such licence. It cannot be an adequate, much less decisive, legal answer to say that the appellant's claim is bad because it fails to allege what it specifically contends is unnecessary.

[9] Despite these errors of approach the board's exception succeeded. The declaration was set aside and leave to file an amended declaration was afforded. The appeal is with leave of the court below.

[10] In his judgement the learned Judge in that court (Hartzenberg J) said this:

‘[21] It has already been emphasized that the plaintiff's case is that it operates an on-line casino in Swaziland. That is accepted. It wants a declaratory order that “to the extent that gamblers in the Province of Gauteng gamble on the plaintiff's on-line casino” the gambling takes place in Swaziland and not in the Province. The fallacy with the argument is that if nothing happens in the Province, there is nothing that the court can sanction. There would therefore be no need for a declaratory order. It follows in my view that the plaintiff requires the sanction of gambling actions within the borders of the Province. Likewise it requires the sanction of advertisements in the Province to promote

gambling in the province. It does not allege that it has a South African licence to do so. The two Acts make it abundantly clear that it cannot do so without a licence. It therefore requires of the court to declare actions legitimate which the legislature has prohibited. I agree fully with what was said by du Plessis J in the unreported matter of *Otherchoice (Pty) Ltd v Independent Communications Authority of SA and Another*, Case no 19718/2003 in this division where he came to the conclusion:

“By requiring a person who renders a service in this country to be licensed albeit that that person is in a foreign country while rendering the service, our legislature is not prescribing to that person what he or she may do in the foreign country. The legislature is prescribing what the effect of what the person does may be in this country.”

[11] Then, having earlier referred to the definition of ‘interactive game’ in the National Act,<sup>2</sup> the Judge proceeded:

‘[22] I also do not agree with Mr Ginsburg that it is not possible to decide whether the plaintiff’s actions fall within the purview of section 11 of the National Act in that one does not know if it is an interactive game or not. An interactive game is played or made available over the internet on premises which are not licensed through a computer program or similar device. That is exactly what the plaintiff alleges that it makes available to gamblers in the Province. On that basis also the plaintiff fails to lay a basis that it has a cause of action for the relief it claims.’

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<sup>2</sup> The definition reads: ‘‘interactive game’ means a gambling game played or available to be played through the mechanism of an electronic agent accessed over the Internet other than a game that can be accessed for play only in licensed premises, and only if the licensee of any such premises is authorised to make such a game available for play.’

[12] I do not agree, with respect, that if no part of the appellant's online gambling process occurs in Gauteng there is no need for a declarator. It was the parties' conflicting views that prompted the appellant to seek an order declaring that its activities do not contravene the legislation. If its factual allegations are correct it is entitled to such a declarator. Counsel for the Board correctly conceded as much. In the circumstances there was no point in giving the appellant the opportunity to amend its claim for, on the facts alleged, no amendment was necessary or feasible.

[13] The court's reasoning seems to rest on an unexpressed inference that some of the appellant's gambling process must take place in Gauteng because that is where the process is made available.<sup>3</sup> However, the appellant's factual allegations – on which the exception had necessarily to be decided – do not justify that inference.

[14] Finally, it is plain that the appellant certainly does not allege that it makes an interactive game available in Gauteng.

[15] It follows from what I have said that the findings of the court below in favour of the Board are not supportable.

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<sup>3</sup> Section 8 of the National Act makes it unlawful, without a licence to 'engage in, conduct or make available' a gambling activity.

[16] Counsel for the Board sought nevertheless to argue that s 71(1) of the Gauteng Act prohibited advertisement of the appellant's casino even if its relevant activities occurred wholly outside the province. That argument cannot prevail. The subsection reads:

'No person shall, by way of advertisement or with intent to advertise, publish or otherwise disseminate or distribute any information concerning gambling in the Province in respect of which a licence in terms of this Act is not in force.' (My emphasis.)

In the first place the words underlined plainly convey that what may not be advertised is unlicensed gambling in the province; they qualify gambling, not advertising. Secondly, the aim and object of the Act is to control gambling within the province, not elsewhere. Nothing in the Act suggests that the provincial legislature had any interest or concern in barring the advertising of foreign gambling, the conduct and control of which would obviously be beyond its legislative reach.

[17] The appeal must therefore succeed. It remains to say, however, that there is a realistic prospect that evidence could well establish that at least part of the online gambling process in question takes place in Gauteng. It was no doubt this prospect that influenced the learned Judge to attempt to resolve the matter on the basis of what he saw as the likely factual position, without the procedural constraints of an exception. What requires



determination is the factual question as to how the plaintiff's system is made available to gamblers in Gauteng and what acts they perform in the province in order to use the system.

[18] Whether the further litigation should necessarily involve a trial, one is inclined to doubt. To judge by the affidavits on record there seems to be no likely dispute between the expert witnesses as to the manner in which the gambling system functions. The dispute seems rather to be whether players who engage in the activity can be said to be 'gambling' within the province. That is not a matter for the opinion of experts but is rather a matter for a court to decide by construing the meaning of that term in the legislation. It would seem to be a practical expedient to explore the possibility of a joint report from the experts as to the facts and, in the event of their being agreed, to compile a stated case on the basis of which argument on the legal issues can be properly informed.

[19] The parties are agreed that they seek no costs order in either court whatever the result of the appeal.

[20] The order is as follows:

1. The appeal is allowed.

2. The order of the court below is set aside and substituted for it is the following:

‘The exception is dismissed.’

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CT HOWIE  
PRESIDENT  
SUPREME COURT OF APPEAL

CONCUR:

MPATI DP  
NUGENT JA  
HURT AJA  
SNYDERS AJA