



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not Reportable

Case no: 624/22 and 630/22

In the matter between:

LOTTOSTAR (PTY) LTD

MPUMALANGA GAMBLING BOARD

HOLLYWOOD SPORTSBOOK

FIRST APPELLANT

SECOND APPELLANT

**(PARTY SEEKING LEAVE
TO INTERVENE AS THE
THIRD APPELLANT)**

and

ITHUBA HOLDINGS (PTY) LTD

NATIONAL LOTTERIES COMMISSION

BETTING WORLD (PTY) LTD

NATIONAL GAMBLING BOARD

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

**(PARTY SEEKING LEAVE
TO INTERVENE AS THE
FOURTH RESPONDENT)**

Neutral citation: *LOTTOSTAR (PTY) LTD and OTHERS v ITHUBA HOLDINGS (PTY) LTD and OTHERS* (Case no 624/22 and 630/22) [2023] ZASCA 119 (5 September 2023)

Coram: PONNAN, SALDULKER, WEINER and GOOSEN JJA and UNTERHALTER AJA

Heard: 18 August 2023

Delivered: 5 September 2023

Summary: Parties – joinder – to avoid causing unnecessary expense and delay and for expedience – court on appeal issuing directions as to future course of the appeal.

On appeal from: Mpumalanga Division of the High Court, Mbombela (Mashile J and Roelofse AJ, sitting as a full court):

JUDGMENT

Ponnan JA (Saldulker, Weiner and Goosen JJA and Unterhalter AJA concurring):

[1] At the outset of the hearing on 18 August 2023, counsel were required to address argument on a preliminary question: namely, whether it was open to us to enter into the merits and make an order on appeal, absent the joinder of certain other parties, who, so the appellants contended, have an interest in the result of these proceedings.

[2] The question arises for consideration against the following factual backdrop: The second respondent in the appeal, the National Lotteries Commission (the NLC), was established by s 2 of the Lotteries Act 57 of 1997 (the Lotteries Act). The first respondent, Ithuba Holdings (Proprietary) Limited (RF) (Ithuba), holds an exclusive licence to operate the National Lottery in terms of s 13 of that Act. In October 2016, the NLC, supported by Ithuba, brought an application against the first appellant, Lottostar (Pty) Limited (Lottostar), in the Mpumalanga High Court, Mbombela (the high court) for a declaratory order that the arrangement pursuant to which Lottostar offers bets on lotteries is illegal and occurs in contravention of s 57(2)(g) of the Lotteries Act.

[3] By virtue of a bookmaker licence issued in terms of s 32B of the Mpumalanga Gambling Act 5 of 1999 by the second appellant, the Mpumalanga Gambling Board (the MGB), Lottostar was authorised to conduct the business of a bookmaker in the

Province of Mpumalanga. Relying on the terms of the licence, Lottostar has been laying or taking fixed-odd bets on the outcome of lotteries. Contending that the licence did not authorise Lottostar to lay or take fixed-odd bets or indeed any other bets on lotteries, the NLC and Ithuba sought an order in the following terms:

- ‘1. Declaring that the first respondent’s scheme, plan arrangement or system whereby it offers bets, whether or not of a fixed-odd nature, on the outcome of lotteries is unlawful.
2. Interdicting the first respondent from offering bets, whether or not of a fixed-odd nature, on the outcome of any lottery.’

[4] The application was opposed by Lottostar. The MGB took the view that it was ‘enjoined to make relevant submissions to assist the Court in adjudicating [the] application’. It accordingly filed an answering affidavit and opposed the grant of the relief sought. During April 2017, the third respondent, Betting World (Pty) Ltd (Betting World), successfully applied to intervene as a respondent in the application on the basis that if the relief in prayer 1 were to be granted, it would have a direct and material impact on its rights and interests.

[5] Although various grounds were raised in opposition to the application, the high court (per Mphahlele J) confined itself to only one *in limine* point – namely, that the NLC had failed to comply with s 41 of the Constitution, as also the Intergovernmental Relations Framework Act 13 of 2005. On 15 May 2019, Mphahlele J upheld the point and issued the following order:

‘The parties are hereby directed to take the necessary steps, as contemplated in section 41(3) of the Constitution read with the provisions of the Intergovernmental Relations Framework Act, to resolve the dispute in consultation with the Minister of Trade and Industry.’

[6] The NLC and Ithuba sought leave to appeal against the order of Mphahlele J, which was refused by the learned judge. Leave was subsequently granted by this Court to appeal to the Full Court of that Division (the full court). The appeal succeeded before the full court, which set aside the order of the high court and substituted in its stead the following:

‘1.1 The scheme, plan, arrangement or system of Lottostar whereby it offers bets, whether or not of a fixed-odd nature, on the outcome of lotteries is declared unlawful;

1.2 Lottostar is interdicted from offering bets, whether or not of a fixed-odd nature, on the outcome of any lottery; and

1.3 Lottostar, the Board and Betting World are directed to pay the costs of Ithuba.’

[7] In the course of its judgment, the full court considered and dismissed yet a further point *in limine* to the effect that the relevant National Minister, the Minister of Trade and Industry, the relevant Members of the Executive Council of each of the other Provinces, the Provincial Gambling Authorities of the eight other Provinces and bookmakers holding licenses under the relevant Provincial Gambling Laws (collectively referred to as the further parties), should have been joined as parties to the proceedings before the high court.

[8] Both the NLC and Ithuba contended that a distinction must be drawn between necessary joinder, on the one hand, and joinder as a matter of convenience, on the other, and that in this instance we are concerned with the latter, where the failure to join does not amount to a non-joinder. This is so, the contention proceeded, because the relief sought was narrowly circumscribed, and consequently any order that issues will operate only as against Lottostar. However, whilst that may well have been so when the application commenced, matters have moved on considerably since then.

[9] After the grant of special leave to appeal by this Court, the National Gambling Board (the NGB), established in terms of the National Gambling Act 7 of 2004, and Hollywood Sportsbook Mpumalanga (Pty) Ltd (Hollywood), sought leave to intervene in the appeal, as the fourth respondent and third appellant respectively. The NGB asserted ‘. . . a point of no-joinder of, *inter alia*, the NGB was raised before the court *a quo* but [it] did not deal therewith. The [full court] . . . limited itself to the joinder of Betting World . . .’

[10] Hollywood is part of a group of companies conducting business as licensed bookmakers across the country. The Hollywood Group, through its subsidiaries, holds 94 retail licences issued by the respective gambling regulators across 7 provinces. Hollywood asserts that each subsidiary takes fixed-odd bets on the outcome of lotteries in terms of their licences with the support of the provincial boards.

[11] In support of the application for leave to intervene in the appeal, Hollywood states that:

‘21. The Full Court relied predominantly on sections 57(1) and 57(2)(g) of the Lotteries Act (paragraph 45 of the judgment) and on the definition of “*gambling*” in the Mpumalanga Gambling Act (paragraph 49 of the judgment) to find that the legislation does not permit the taking of bets on the outcome of lotteries.

. . .

23. The NGB’s position is that the Constitutional scheme and national legislation precludes the taking of bets on the outcome of lotteries. It thus views the taking of such bets as an offence and it regards provincial gambling boards which permit such activities in terms of their legislation and licences issued thereunder as committing “*a secondary offence*” (paragraph 18 of the founding affidavit).

24. The NGB thus adopts a position based on the Constitution which is contrary to that adopted by the boards it regulates, including the Mpumalanga Board (which seeks to overturn the judgment of the Full Court) and 8 other gambling boards across the country which permit fixed odds betting on the outcome of lotteries in terms of provincial gambling legislation.

25. In support of its contentions as regulator, the NGB wishes to raise points of law regarding the constitutional legislative competence of the Mpumalanga Board, the constitutional validity of the Mpumalanga Gambling Act, and the potential override of the Mpumalanga Act by the National Act by operation of sections 146 and 149 of the Constitution.

26. These issues were not part of either of the appellants' applications for special leave or Hollywood's intervention application and their implications are far-reaching.

27. The NGB recognises this. It points out that even if it were to be accepted that the Full Court judgment only affects the rights of the present appellants (a proposition which the NGB understandably appears to believe is doubtful), the decision of this Court on "*the interpretation of the interactive pieces of legislation will bind and affect the rest of the provinces and the country at large*" (paragraph 15.3.3. of the founding affidavit).

28. The breadth and significance of that effect is amplified considerably once the implications of the Constitutional arguments raised by the NGB are considered.

. . .

30. The NGB's primary argument is that, properly interpreted, the Mpumalanga Act does not permit the taking of bets on the outcome of lotteries. The NGB however seeks to go further and deal with the important constitutional consequences which arise if the Mpumalanga Act does permit the taking of bets on lotteries as the appellants contend.

. . .

34. The fundamental implication of the constitutional arguments on which the NGB seeks to engage this Court, is that all provincial gambling legislation that permits betting on lotteries is either unconstitutional or inoperative to the extent it does so. In the result, licences permitting such betting issued by all those provincial gambling boards are unlawful.

. . .

39. If this Court were to find that the Mpumalanga Gambling Act is unconstitutional, then it has an obligation under section 172(1)(a) of the Constitution to declare the act invalid to the extent of the inconsistency and frame remedial relief in terms of sections 172(1)(b).

40. A declaration of unconstitutional invalidity operates against the legislation and is therefore not confined to those already party to the appeal.

41. The effect of a declaration of invalidity would therefore not be limited to the offerings of the first appellant. By operation of law, a declaration would directly impact all offerings by Hollywood under the 9 licences granted in terms of the Mpumalanga Gambling Act, all offerings by Hollywood under licences granted in terms of other provincial gambling legislation, and its extensive business operations, financial obligations and many employees that rely on the revenue of these offerings.

...

46. The implications of the constitutional arguments raised, and any decision by this Court on those contentions, go far beyond the Full Court's approach and order.

47. They bear not only on constitutional validity and operation of the Mpumalanga Gambling Act and 9 licences issued in terms thereof, but on the validity of all provincial gambling legislation and all the licences issued to the Hollywood Group by other provincial Boards.'

[12] Where parties before a court reference matters that require consideration going beyond the original conception of the case, this may engage the interests of third parties not before the court. A court will in general order the joinder of parties, *inter alia*, to ensure that all parties interested in the subject-matter of the dispute and whose rights may be affected by its judgment are before it, so as to avoid a multiplicity of proceedings and to avoid a waste of costs. Substantial costs have already been incurred in the prosecution of the present proceedings and a great deal of court time has been invested in them. Those could probably be rendered worthless.

[13] As Fagan AJA pointed out in *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 656:

‘The question of joinder should surely not depend on the nature of the subject-matter of the suit . . . , but . . . on the manner in which, and the extent to which, the Court’s order may affect the interests of third parties’.

Indeed, as observed by the full court (per Cilliers AJ (Goldstein and Joffe JJ concurring) in *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (WLD) para 37:

‘There is a distinction between the case of a party whose rights are derived purely from ‘the right which is the subject-matter of the litigation’ and in which he has no legal interest, on the one hand, and the case where the third party has a right acquired *aliunde* the right which is the subject-matter of the litigation and which would be prejudicially affected if the judgment and order made in which he was not a party were carried into effect . . . ’

[14] As counsel readily acknowledged, the primary issues raised are essentially questions of law that are truly deserving of the attention of this court and from which not just the present, but also other similarly placed litigants, will likely benefit. They impact functional areas of concurrent national and provincial legislative competence (Schedule 4 of the Constitution). And, in interpreting such legislation, regard must be had to s 150 of the Constitution.¹

[15] Although the relief sought in this matter is narrowly framed, all indications are that this is very much in the nature of a test case, and that similar litigation will follow

¹ Section 150 provides: ‘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.’

that will implicate comparable provisions of the gambling legislation in force in the other provinces. In that event, so the submission goes, neither our reasoning on the questions raised in this matter, nor any order that issues, can simply be ignored in the adjudication of those matters. In the light of these considerations, it would appear on the face of it, that the non-joinder objection is a valid one.

[16] Thus, on the acceptance of the correctness of what has been stated by Hollywood, the interests of further parties should, at the very least, have been considered to determine whether their joinder was necessary, convenient or neither. The real difficulty is to know what to do now that the matter has reached an appellate stage, twice removed from the court of first instance. One seeks to avoid, as far as may be possible, the necessity of causing the parties unnecessary delay and further expense. Some six years have passed since the commencement of the matter. There seems to be little value in seeking to turn back the clock. Accordingly, to expedite finalisation of the matter, as also to avoid causing the parties unnecessary expense and delay, the expedient adopted in *Eden Village (Meadowbrook) (Pty) Ltd v Edwards* 1995 (4) SA 31 (A) at 47, modified perhaps to meet the exigencies of the present matter, commends itself.

[17] In the circumstances, the attorneys for the NLR and NGB are directed to: (i) notify each of the further parties of these proceedings and of the order granted by the full court and cause a copy of this judgment to be served on them; and (ii) indicate in that notice that a copy of all of the papers in the application will lie for inspection at their offices for a period of two weeks from the date of such notification (or will be available for electronic transmission); and (iii) thereafter, make a return, on affidavit,

to the Registrar of this court setting out what steps have been taken in compliance with the directions contained in (i) and (ii) above. In turn, each of the Provincial Gambling Authorities are required to bring these proceedings to the attention of any Bookmaker that offers bets, whether or not of a fixed-odd nature, on the outcome of any lottery, pursuant to a licence issued by such Authority under any comparable Provincial Legislation to the Mpumalanga Gambling Act. Each such further party is called upon, within two weeks of such notification, to indicate to the Registrar of this court whether or not they consent to be bound by the judgment of this court, notwithstanding the fact that they have not been cited as parties to the proceedings. In respect of those further parties, who express an unwillingness to be bound or who indicate that they wish to participate in the appeal, further directions will issue as to the future course of the proceedings. Pending the above, the adjudication of the appeal is stayed, with the costs standing over for later determination.

V M PONNAN
JUDGE OF APPEAL

Appearances

For the first appellant:	MM Oosthuizen SC and GJ Bensch
Instructed by:	Luneburg & Janse van Vuuren Inc., Mbombela Honey Attorneys, Bloemfontein.
For the second appellant:	M Mphaga SC and BJ Nodada
Instructed by:	The State Attorney, Pretoria The State Attorney, Bloemfontein.
Party seeking leave to intervene as the third appellant:	AM Annandale SC and J Mivanda
Instructed by:	Grant & Swanepoel Attorneys Inc., Pietermaritzburg Kramer Weihmann Attorneys, Bloemfontein.
For the first respondent:	A Cockrell SC and N Stein
Instructed by:	Maluleke Msimang Attorneys, Pretoria Bezuidenhouts Inc., Bloemfontein.
For the second respondent:	V Soni SC
Instructed by:	Maphosa Attorneys Inc., Johannesburg MC Radebe Attorneys, Bloemfontein
Party seeking leave to intervene as the fourth respondent:	T Skosana SC and K Maleka
Instructed by:	Mketsu & Associates Inc., Pretoria The State Attorney, Bloemfontein.