

SOUTH AFRICA / JUDGMENT

Deeps Betting Grounds (Pty) Ltd v Desert Palace Hotel Resort (Pty) Ltd and Another (142/2020) [2021] ZASCA 86 (21 June 2021)

[2021] ZASCA 86

COURT

Supreme Court of Appeal

BEFORE

Petse, Mocumie, Dlodlo, Ledwaba, Carelse

CASE / FILE NUMBER

142/2020

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 142/2020

In the matter between:

DEEPS BETTING GROUNDS (PTY) LTD

APPELLANT

and

DESERT PALACE HOTEL RESORT (PTY) LTD FIRST

RESPONDENT

THE NORTHERN CAPE GAMBLING BOARD SECOND

RESPONDENT

Neutral citation: Deeps Betting Grounds (Pty) Ltd v Desert Palace Hotel Resort (Pty) Ltd and Another (142/2020) [2021] ZASCA 86 (21 June 2021)

Coram: PETSE AP and MOCUMIE and DLODLO JJA and LEDWABA and CARELSE AJJA

Heard: 9 March 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 21 June 2021.

Summary: Civil procedure – Superior Courts Act 10 of 2013 – petition to appeal to the Supreme Court of Appeal not filed – leave to appeal dismissed – Conduct in contravention of sections 78, 79 and 80 of Northern Cape Gambling Act No 3 of 2008 –no valid gambling licence issued to conduct bookmaker's activities on premises.

ORDER

On appeal from: Northern Cape Division of the High Court, Kimberly (Sieberhagen AJ sitting as court of first instance):

1 The application for leave to appeal against the order of Dauds AJ dated 13 December 2019 is dismissed with costs.

2 The appeal against the order granted by Sieberhagen AJ is likewise dismissed with costs.

Ledwaba AJA (Petse AP, Mocumie and Dlodlo JJA and Carelse AJA concurring):

Introduction

[1] This appeal concerns the order of Sieberhagen AJ, sitting in the Northern Cape Division of the High Court, Kimberley (the high court), granted in favour of the first respondent, Desert Palace Hotel Resort (Pty) Ltd (Desert Palace) in the main application in terms of which the appellant, Deeps Betting Grounds (Pty) Ltd (Deeps Betting), was interdicted from operating any gambling activities on Erf 7195, Upington, known as 23 Scott Street, Upington (the premises) unless a valid gambling licence authorising gambling activities at the premises is issued by the second respondent, The Northern Cape Gambling Board (Gambling Board). Deeps Betting applied for leave to appeal against this order which the high court granted to this Court on 31 January 2020.

[2] Deeps Betting opposed the main application and filed a conditional counter-application in which it sought to hold the Gambling Board's

Chief Executive Officer liable for contempt of court and also an order compelling the Gambling Board to issue Deeps Betting with a gambling licence for the premises, in the event the main application succeeded. Desert Palace and the Gambling Board opposed the relief sought by Deeps Betting in the counter-application.

[3] After the main application was heard on 30 August 2019, the high court made the following order:

'1. The first respondent is interdicted from maintaining or operating the premises situated at Erf 7195, Upington, known as 23 Scott Street, Upington ("23 Scott Street") for the purpose of any gambling activity in or on 23 Scott Street is granted to it by the Second Respondent.

2. The first respondent is interdicted from permitting the said 23 Scott Street premises to be used for the purposes of any gambling activity other than an informal bet, including but not limited to bookmaking, unless a valid gambling licence that authorises that gambling activity in or on 23 Scott Street is granted to them by the second respondent.
 3. The first respondent is interdicted from permitting any individual in or on the said 23 Scott Street premises to engage in any gambling activity other than an informal bet, including but not limited to bookmaking, unless a valid gambling licence that authorises that gambling activity in or on 23 Scott Street is granted to them by the second respondent.
 4. The first respondent is to pay the costs of the application.
 5. The parties are directed to approach the registrar to obtain a date for adjudication of the first respondent's counterclaim under case number 1698/2019.'
- [4] The counter-application was heard by Dauds AJ on 1 November 2019. He subsequently dismissed it and refused to grant Deeps Betting leave to appeal against the dismissal of its counter-application. Deeps Betting's counsel in his heads of argument relating to the appeal sought leave of this Court to hear the appeal in respect of the main application together with the 'appeal' against the order of Dauds AJ in the counter-application. I have put the word 'appeal' in inverted commas for reasons that will become apparent later.

Background

facts

- [5] The following factual background is common cause and important for the proper understanding of this appeal. In 2017 Deeps Betting filed three applications against the Gambling Board relating to a gambling licence issued to Deeps Betting in respect of Erf 4965 in Upington. There was also a dispute regarding whether due process was followed when the licence was issued.
- [6] In the said applications Deeps Betting sought an order to amend the erf number on the licence to read Erf 7195, Upington, 23 Scott Street. It is not necessary for the adjudications of this appeal to deal in detail with the said applications. In the urgent application filed on 15 December 2017, Deeps Betting sought a declaratory order that the Gambling Board should grant a licence to it to conduct bookmaker's activities on the premises.
- [7] On 9 March 2018 Stanton AJ dismissed the urgent application and later granted Deeps Betting leave to appeal to this Court. On 9 March 2019, shortly before the appeal against the order of Stanton AJ was heard, Deeps Betting and the Gambling Board reached a settlement and their Deed of Settlement, signed on 27 February 2019, was made an order of court on 4 March 2019 by this Court.[1]
- [8] In the Deed of Settlement the parties, inter alia, agreed that:

‘2.1 [W]ithin 30 (thirty) days after the signing of this Agreement, the Gambling Board shall grant to Deeps Betting permission to conduct its bookmaker’s activities at the property known as Erf 7195, also known as 23 Scott Street, Upington, situated in the //Khara Hais Municipality, Division Gordonia, Northern Cape Province.

2.2 In lieu Deeps Betting will immediately – upon the signature of this document – withdraw its appeal and inform the Registrar of the Supreme Court of Appeal without delay of the Settlement.’

It is clear that in terms of the Deed of Settlement the Gambling Board was required to grant Deeps Betting permission to conduct bookmaker’s activities at the premises before the end of March 2019.

[9] In February 2018, before the judgment in Deeps Betting's urgent application was delivered, Desert Palace became aware that the premises was to be rezoned and utilised for gambling activities. Consequently, on 23 February 2018, it wrote to the Dawid Kruiper

Municipality (the municipality) to object to the proposed rezoning. On 28 February 2018, the municipality responded taking note of Desert Palace’s objection and informed the latter that the rezoning application had been granted. In July 2019 Desert Palace was informed that the renovations on the premises were at an advanced stage and shop fittings were installed at the premises. Desert Palace made enquiries and addressed a letter to Deeps Betting and the Gambling Board, but did not receive a satisfactory response. It then filed an urgent application, the main application, in the high court against Deeps Betting and the Gambling Board was cited as the second respondent. Deeps Betting opposed the main application and, as already mentioned, filed a conditional counter-application.

[10] The Gambling Board filed a notice to abide the decision in the main application, but opposed the relief sought by Deeps Betting in the counter-application. In the counter-application before Dauds AJ, Deeps Betting sought an order in the following terms:

‘The 2nd Respondent (Northern Cape Gambling Board) be ordered to immediately comply with the order of the Supreme Court of Appeal dated 04 March 2019 and paragraph 2.1 thereof [the SCA order] and grant to the Applicant [the 1st Respondent herein, namely, Deeps Betting Grounds (Pty) Ltd] any licence needed to conduct its bookmaker’s activities at the

property known as Erf 7195, also known as 23 Scott Street, Upington, situated in the //Khara Hais Municipality, division Gordonia,

Northern Cape Province.’

The counter-application was dismissed with costs and the application for leave to appeal suffered a similar fate.

Application for leave to appeal

[11] Since Deeps Betting's counsel in his heads of argument applied that this Court should also hear the 'appeal' in respect of the order of Dauds AJ in the counter-application, this Court dealt first with Deeps Betting's application for leave to appeal against the order of Dauds AJ in respect of the dismissal of its counter-application. Counsel invoked Safatsa[2] to argue that the appellant has a right to ask this Court to allow him to bring such an application at this very late stage.[3] The application was strongly opposed by Desert Palace and the Gambling Board. The Gambling Board in its heads of argument submitted

that this Court did not have jurisdiction to hear the 'appeal' against the judgment of Dauds AJ and that Deeps Betting should have,

within one month of the refusal of its application for leave to appeal, first sought leave in terms of s 17(2)(b) the Superior Courts Act[4] to appeal against the judgment of Dauds AJ which it admittedly failed to do.

[12] Deeps Betting's application based on Safatsa is devoid of merit. It is generally accepted that an appeal should be restricted to specified grounds of appeal. In Safatsa this Court dealt with a ground not covered by the terms of the leave granted by the trial court and emphasised that the appellant had no right to argue the appeal on grounds not covered in the notice of appeal. Nevertheless, the court accepted that an appellant may apply to an appellate court to enlarge the ambit of the appeal. Importantly, the court further clarified that this special

dispensation does not, for example, cover a situation where leave has been granted to appeal against sentence only and the appellant then seeks to appeal against the conviction as well.

[13] In *Harlech-Jones Treasure Architects CC v University of Fort Hare*[5], a case where a similar argument to that raised by Deeps Betting was advanced, the court said:

'It is, however, important to note the following:

- (1) In terms of s 29(4)(b), where the Court of a Provincial or Local Division has refused leave to appeal against its judgment or order, it is the Supreme Court of Appeal that must be approached for such leave (ie in terms of s 21(2) and (3), by way of application in the form of a petition addressed to the Chief Justice, to be considered by Judges designated by the Chief Justice). There is no provision in the Act for a Full Court of a Provincial Division to grant leave to appeal (save, impliedly, where it sits as a Court of first instance).
- (2) In excluding the grounds of appeal referred to in paras [41] and [43] above, Jones J to that extent refused leave to appeal.'

(Emphasis added.)[6]

- [14] The matter before us is distinguishable from what obtained in Safatsa, where additional grounds of appeal were entertained. In this case, Desert Palace does not seek to augment its grounds of appeal against the judgment of Sieberhagen AJ. What it seeks to do is to piggyback on this appeal in an attempt to bring its application for leave to appeal against the order of Dauds AJ in circumstances where not even the slightest attempt has been made to explain the inordinate delay in doing so.
- [15] Desert Palace applies to this Court to hear the appeal against the judgment of another Judge where leave to appeal was refused. In terms of the Superior Court Act, Deeps Betting should first have petitioned this Court. Deeps Betting not only failed to do so but also failed to proffer a satisfactory explanation supported by cogent reasons as to why the petition was not filed. Instead, it was content to raise the issue for the first time in its heads of argument. As a result, the belated application for leave to appeal, if it is such, should fail.

Appeal on merits of the main application

- [16] Deeps Betting's main argument for challenging the order of Sieberhagen AJ, is that in terms of this Court's judgment (referred

to in paragraph 7 above) in terms of which the settlement agreement was made an order of court, it has extant rights and its conduct in opening its gambling business at the premises was not unlawful.

- [17] Despite the fact that the Deed of Settlement had indeed been made an order of court, the Gambling Board did not actually issue Deeps Betting with a licence in compliance with that order. The Deed of Settlement explicitly states that within 30 (thirty) days after signature, the Gambling Board shall grant Deeps Betting permission to conduct its bookmaker's activities at the premises. It is common cause between the parties that Deeps Betting has to date not been issued with the requisite licence by the Gambling Board. On the contrary, the Gambling Board stated in its papers that it will not issue Deeps Betting with the requisite licence for the premises apparently on the ground that doing so would contravene the law.
- [18] It is interesting that Deeps Betting has not filed an application for contempt of court against the Gambling Board in respect of its failure to grant it permission or to issue it with the licence. Sections 78, 79 and 80 of the Northern Cape Gambling Act[7] (the Act) state that it is unlawful to engage in gambling activities, possess gambling machine devices and to operate on any premises for purposes of gambling activities without a licence.
- [19] The premises is situated within 500 metres of Upington High School. Regulation 7(c) of the Northern Cape Gambling Regulations[8] (the Regulations) reads as follows:

'7. Location of gambling and betting premises.-The Board may not issue a licence to an applicant if the

premises from which the licensed activities will take place, are, in the opinion of the Board

–

..

(c) on or in premises which are within 500 m of a school or a place of worship.’

On a simple reading of this regulation, the location of the premises offends against reg 7(c) of the Regulations.

[20] The order of Sieberhagen AJ interdicts Deeps Betting from conducting gambling activities unless a valid gambling licence has been issued, authorising gambling activities on the premises. Such a licence has not been issued. In terms of the clear provision of ss 78, 79 and 80 of the Act read with reg 7(c) of the Regulations, Deeps Betting would be acting unlawfully if it conducts business at the premises without a licence. Thus its reliance on this Court's order referred to in paragraph 17 above is misplaced. The order itself contemplates that Deeps Betting should be issued with a licence by the relevant Gambling Board before it can lawfully engage in gambling activities.

[21] I therefore make the following order:

1 The application for leave to appeal against the order of Dauds AJ dated 13 December 2019 is dismissed with costs.

2 The appeal against the order granted by Sieberhagen AJ is likewise dismissed with costs.

A P LEDWABA

ACTING JUDGE OF APPEAL

APPEARANCES

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[1] See: Deeps Betting Grounds (Pty) Ltd v The Northern Cape Gambling Board Case no: 492/18 (SCA).

[2] S v Safatsa and Others 1998

(1) SA 868 (A).

[3] The application was moved from the Bar and unsurprisingly counsel was hard-pressed to enlighten us as to why this woefully belated

application was not timeously brought in the ordinary way.

[4] Superior Courts Act 10 of 2013.

[5] Harlech-Jones Treasure Architects CC v University of Fort Hare 2002 (5) SA 32 (E).

[6] Para 51.

[7] Northern Cape Gambling Act No 3 of 2008.

[8] ‘Northern Cape Gambling Regulations GN 5, Provincial GN 1290, 18 March 2009.’

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