

SOUTH AFRICA / JUDGMENT

Desert Palace Hotel Resort (Pty) Ltd v Deeps Betting Grounds (Pty) Ltd and Another (1698/2019) [2019] ZANCHC 38 (30 August 2019)

[2019] ZANCHC 38

COURT

Northern Cape High Court, Kimberley

BEFORE

Sieberhagen

CASE / FILE NUMBER

1698/2019

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IN THE HIGH COURT OF

SOUTH AFRICA

(Northern

Cape High Court, Kimberley)

In

the matter between:

DESERT
PALACE HOTEL RESORT (PTY) LTD
Applicant
and
DEEPS
BETTING GROUNDS (PTY) LTD
T/
A SCOREBET
First Respondent
THE
NORTHERN CAPE GAMBLING
BOARD
Second
Respondent

Coram:

Sieberhagen, AJ

JUDGMENT

SIEBERHAGEN, Aj

Introduction

[1] The Applicant lodged an urgent application seeking an order that:

"2. 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 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 it by the Second Respondent.

3. First Respondent is interdicted from permitting the said 23 Scott Street premises to be used for the purpose 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.

4. 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;

5. First Respondent is ordered to pay the costs of the application."

[2] The First Respondent opposes the application and also filed a counter application in which the First Respondent seeks an order that the Second Respondent be compelled to comply with the order of the Supreme Court of Appeal as set out hereunder. The Second Respondent opposes the relief claimed in the First Respondent's counterapplication. From a practical point of view, the parties agreed that only the Applicant's application would be argued in front me because the First Respondent's counterapplication would be dependent on the order granted in respect of the Applicant's application and therefore this judgment only deals with the Applicant's application and the relief sought against the First Respondent.

[3] At the commencement of the proceedings, I requested the legal representatives of the Applicant and First Respondent to address me on the issue of urgency and found that the matter was urgent.

Factual

Background

- [4] The Applicant was granted a casino operator gambling licence by the Second Respondent. The Applicant's licence specifies the premises from which the Applicant is permitted to operate as Erf No. 1, Golf Course Road, Upington.
- [5] According to the Applicant, at the time of the application for the gambling licence the Second Respondent had insisted that the location of the premises on which the Applicant was going to be entitled to operate its gambling activities be not closer than 5 kilometres from the Upington main road.
- [6] During February 2018 it came to the attention of the Applicant that a portion of Erf 7195 also known as 23 Scott Street, Upington (hereinafter referred to as "23 Scott Street") had been rezoned to accommodate a gambling premises. The Applicant's attorney queried this and objected to the rezoning at the Dawid Kruiper Municipality. They were informed that two objections were received but that the rezoning was granted subject to specifications as requested by the objectors and subject to the requirements of the Second Respondent.
- [7] At that time, the Applicant was unable to establish if an application had been made to the Second Respondent for a gambling licence at 23 Scott Street. When the Applicant enquired at the Second Respondent, Applicant was informed that that the Second Respondent had taken the decision not to allow the First Respondent to operate a gambling establishment at 23 Scott Street as they were in contravention of the Northern Cape Gambling Regulations, Regulation 7(c) and the First Respondent was advised to seek alternative premises. Regulation 7(c) 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 licence 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. "

- [8] The Applicant was satisfied that no gambling licence would be granted to the First Respondent in respect of 23 Scott Street and instructed a professional land surveyor to measure the distances between both 23 Scott Street and Upington High School and Op die Voorpos Primary School. According to the land surveyor, the entrance of 23 Scott Street is situated 265 meters from Upington High School and situated 418 meters from Op die Voorpos Primary School.

Issues

[9] It is the Applicant's case that on 10 July 2019 it had received information that the First Respondent was busy shopfitting the premises at 23 Scott Street as a gambling premises. The deponent to the Applicant's founding papers visited the premises on 12 July 2019 and could see such shopfitting taking place. The Applicant was not aware of the publishing of a gambling licence and therefore made enquiries at the Second Respondent through its attorneys on 16 July 2019, 17 July 2019, 22 July 2019, 23 July 2019, 25 July

2019 and 26 July 2019 without any success.

[10] A local attorney's services was obtained and she attended at the office of the Second Respondent in Kimberley on 30 July 2019 and established that no gambling licence was granted for 23 Scott Street. Paragraph 4 of the letter from the local attorney to the Applicant's attorney reads as follows:

"Needless to say, after finally being able to discuss the matter with Advocate Heidi Dipico in her capacity as Acting CEO, who accepted our application in terms of PAIA, (a copy of which is attached), it was confirmed by Ms Dipico that no licence was granted for said premises (see the attached email dated 23 July 2019) confirming same, thus no advertisement was placed to their knowledge, with respect to your enquiry regarding the Deed of Settlement in the Supreme Court, as signed by their attorney and which you enquired as to whether same was authorized by the Board, it is our understanding that they did not consent to same per Regulation 7."

[11] Subsequent thereto the Applicant's attorney addressed a letter to the First Respondent on 30 July 2019 requesting an undertaking by 2 August 2019 that the First Respondent will not open a gambling operation at 23 Scott Street, because they were not issued with a gambling licence for the said premises, and failing which, the Applicant would approach the Court on an urgent basis interdicting the First Respondent from conducting unlawful gambling operations.

[12] In response thereto, the Applicant received a letter from the First Respondent's attorney on 31 July 2019, in which inter alia the following were stated:

"2. Secondly, the Board has obviously not provided your client with all the relevant facts. There is a very long history to our client ultimately opening its bookmaker business this coming Friday. Our client is the holder of a bookmakers licence to operate such a business in the area.

We suggest that you or your client contact the Gambling Board and ask for a thorough brief on the history of their dispute with our client relating to the premises. This we suggest especially since your client has apparently and already decided to proceed to court with an interdict. We suggest you do this because not only will such an application be opposed, but also because your application will be absent such facts based upon with respect

- an incorrect and rather naive grasp understanding of our client's rights.

As far as our client is concerned their opening this coming Friday has got nothing to do with your client, especially since the past litigation did not involve it. ... "

[13] The Applicant brought this application on 5 August 2019, stating that the First Respondent does not have a gambling licence for 23 Scott Street and that if the First Respondent intends to go ahead with its unlawful conduct, it would constitute an irremediable breach of the clear rights of the Applicant. The Applicant had no other satisfactory remedy to prevent the breach because, although the First Respondent's conduct amounted to a criminal offence, the South African Police Service does not have the power to close the First Respondent's proposed illegal activities and only a criminal investigation could be applied for, which would

take a substantial time to conclude.

[14] In opposition to the Applicant's application, the First Respondent states that the Second Respondent asserted that Regulation 7(c) of the Northern Cape Gambling Regulations prohibits the conducting of bookmaking activities from 23 Scott Street because it is located directly opposite Upington High School.

[15] The First Respondent had a different interpretation of what the true import of the Regulation meant and therefore launched proceedings against the Second Respondent under case number 3018/2017 in this Court to compel the Second Respondent to provide the First Respondent with the necessary authorisations, including a gambling licence, to conduct bookmaker activities at 23 Scott Street. The First Respondent's application was dismissed, but the Court a quo granted leave to appeal to the Supreme Court of Appeal.

[16] Shortly before the scheduled hearing in the Supreme Court of Appeal, the First and Second Respondents settled the matter. The Deed of Settlement was made an order of the Supreme Court of Appeal on 4 March 2019. The Court order reads as follows:

"Having read the record of the proceedings in the said Court on an appeal from the judgment of the Northern Cape Division of the High Court of South Africa, Kimberley, delivered on 09 MARCH 2018 (Case number 3018/2017) and having read the Deed of Settlement filed by the parties THEREAFTER, on this day, the following order is made:

The Deed of Settlement attached hereto, marked annexure 11A" is made an order of court."

[17] Paragraphs 2 and 2.1 of the Deed of Settlement contains the following clauses:

"2.

In full and final settlement of all claims the parties have against each other and concerning the subject matter of appeal referred to above:

2.1 within 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.

[18] It is the First Respondent's case that as a result of the court order of the Supreme Court of Appeal, the First Respondent cannot have any stronger right to operate its bookmaking activities from the premises, because by sanctioning the Settlement Agreement the five Justices of Appeal must have acquainted themselves with the merits of the application before making the order of court and making sure of the legality of not only its content

but also its effect.

[19] The First Respondent denies the Applicant's arguments that the gambling activities and the bookmaking activities at 23 Scott Street are unlawful. According to the First Respondent, the Second Respondent is in contempt of the Supreme Court of Appeal's order, the court order stands and because the order has not been overturned, the licence simply must be issued.

[20] As a result of the Second Respondent's contempt of the court order and the fact that the First Respondent was suffering significant financial losses, the First Respondent informed the Second Respondent that it would be opening its doors at 23 Scott Street on Friday 2 August 2019. The First Respondent was advised to litigate further with the Second Respondent should it wish to aver that such activities are unlawful.

[21] The First Respondent states that the Supreme Court of Appeal's order operates against the whole world to the extent that it provides rights to the First Respondent. According to the First Respondent it is entirely because of the Second Respondent's refusal to comply with the court order that the physical gambling licence has not been issued, but that that does not mean that the bookmaking activities of the First Respondent are unlawful.

[22] In addition thereto, the First Respondent avers that "Deeps Betting" is a sport betting facility and will not impact upon the Applicant's operations unless it also operates such an activity, but even then there is no basis for the complaint.

Arguments of behalf of the parties

[23] It was submitted on behalf of the Applicant, that the Applicant is entitled to an interdict because the Applicant has a clear right and because the First Respondent is not entitled to act unlawfully, without a gambling licence in competition with Applicant's gambling operations.

[24] In substantiation of the Applicant's clear right, it was argued that the Supreme Court of Appeal merely rubberstamped the Deed of Settlement by making the court order without proper consideration of the merits of the matter and without giving reasons for the Court order approving the settlement agreement, which sets aside the trial court's judgment. According to the Applicant, the judgment of the Court a quo under case number 3018/2017 is

a judgment in rem and accordingly the Supreme Court of Appeal could not have set aside the judgment by only a settlement agreement between the litigating parties on appeal[1].

[25] It was also argued that the Applicant has proved an injury actually committed or reasonably apprehended as stated in paragraphs 13 and 14 of the Applicant's founding affidavit which reads as follows:

"13. Any unlawful gambling in the Northern Cape Province, especially in the Upington area infringes upon Applicant's abovementioned rights as a lawful licenced gambling operator, it also amounts to unlawful competition with Applicant's gambling activities, irrespective of what form the illegal gambling activities take.

14. It is much more convenient for gamblers to gamble at premises in the town of Upington than having to travel more than 5 kilometers to Applicant's premises outside Upington. It is therefore paramount interest to Applicant that only lawful gambling is permitted in Upington itself." .

[26] Lastly it was submitted that there is the absence of similar protection by any other ordinary remedy as a result of the fact that neither the South African Police Service nor the Second Respondent have the authority to grant the relief claimed in this application.

[27] Counsel on behalf of the First Respondent submitted that the First Respondent's conduct is not unlawful because the order of the Supreme Court of Appeal affords rights to the First Respondent and until such time as the Supreme Court of Appeal's order is overturned, the First Respondent's activities are not unlawful.

[28] It was submitted that the Applicant had failed to prove that it suffers harm as a result of the First Respondent's conduct and merely made generic statements to that effect. The Applicant should have approached the Second Respondent, who could have taken further steps against the First Respondent and therefore the Applicant also failed to satisfy the Court that there is an absence of similar protection by any other ordinary remedy.

[29] With regard to the Applicant's submission in respect of the Court a quo's judgment in rem, it was submitted on behalf of the First Respondent, that the judgment under case number 3018/2017 did not pronounce upon either party's interpretation of Regulation 7(c) and therefore it cannot be suggested that the judgment was a judgment in rem.

Applicable Law and application of Law to the facts

[30] The requirements[2] for the right to claim a final interdict are:

30.1 a clear right;

30.2 an injury actually committed or reasonably apprehended; and

30.3 the absence of similar protection by any other ordinary remedy.

[31] Although both counsel furnished supplementary arguments in respect of the question as to whether the judgment of the Court a quo under case number 3018/2017 must be considered a judgment in rem or not, I will not be dealing with this dispute between the parties, because this Court is not tasked with determining

whether the Supreme Court of Appeal could have made the Deed of Settlement an order of Court. This is an

issue that should be dealt with by the parties in the Supreme Court of Appeal.

[32] In determining whether the First Respondent was acting unlawfully as alleged by the Applicant, I need to refer to sections 21(1), section 36(1), section 40, section 50 and section 80(1)(a) of the Northern Cape Gambling Act[3] which reads as follows:

"21.(1) The Board may, in writing under this Act grant -

.....

(h) a bookmaker licence; and...." A

"36.(1) license must specify

(a) the identity of the licensee;

(b) the activities that the license permits the licensee to engage in, conduct or make available to the public; and

(c) the premises at, in or from which the licensee is permitted to operate. "

"40.

(1) A license holder, an employee of the license holder or a person acting on behalf of the license holder must, on demand by an inspector or a police officer, produce the license or certificate concerned.

(2) A lisense holder must at all times prominently display a license issued in terms of this Act on the licensed premises."

"50. A bookmaker license is required by any person who directly or indirectly lays fixedodds bets or open bets with members of the public or other bookmakers, or takes such bets with other bookmakers."

"Unlicensed used of premises unlawful

80.(1) No person may

(a) maintain or operate any premises for the purposes of a restricted gambling activity, unless that gambling activity in, on or from those premises has been authorized in terms of a license under this Act or the National Gambling Act."

[33] Having regard to the abovementioned sections of the Northern Cape Gambling Act, I cannot agree with the First Respondent's argument that as a result of the order of the Supreme Court of Appeal, the bookmaking activities of the First Respondent are lawful.

[34] In the matter of Desert Palace Resort (Pty) Ltd v Northern Cape Gambling Board[4] the following were stated:

"[11] The Act does not define what a licence" is but merely states that it means a licence "issued" in terms of section 26. Section 26(1) makes provision for eleven kinds of licences. Section 26(2) requires of any licence that it be in writing. Critically a licence holder has a duty to display the licence on the licensed premises (section 45) and on demand to produce the "licence or certificate concerned" (section 46). Self-evidently this would not be possible without a licence holder being physically in possession of a document capable of being displayed or produced.

[12] The licence we are concerned with, as mentioned earlier, is a "casino operator licence". It is defined as "any licence issued in terms of section 48". Section 48 requires of such licences that they "be issued" that they are "link(ed) to the premises specified in the licence" and that they "authorise ... the playing in or on the premises or such parts of the premises as are specified in the licence. . .".

[13] So, unless the "issued" licence describes the "premises" from

where the casino is to operate, it will not comply with section 48. In my view the preceding paragraphs provide strong indications that the Legislature intended a "holder of a licence" as contemplated in section 81 of the Act to be capable of physically possessing a valid licence in the form of a document issued to it by the Board. Not only that, but its contents must display the authority granted to the casino operator.....

[15] It follows that for a casino operator to be a "holder of a licence" the Board must not only have approved its application for a licence, but also have physically issued a document to it."

[35] It is not in dispute that the First Respondent does not have a gambling licence (an issued document) and therefore is currently acting in contravention of section 80(1)(a) of the Northern Cape Gambling Act. I also cannot accept the submission made in First Respondent's supplementary note indicating that the Court a quo[5] had found in paragraph 31 of the judgment that the First Respondent was a holder of a licence and therefore allowed to conduct such activities in Upington. Paragraph 31 of the judgment reads as follows:

"In essence, Deeps Bettig is requesting that a letter from the Gambling Board to Deeps Betting, dated 13 February 2018, is admitted into evidence. Paragraph 2 of the letter reads as follows:

"We hereby wish to inform you that your application for annual renewal of your Bookmaker licence for the following towns Kimberley, Postmasburg, Upington, Colesburg, De Aar, Kuruman, Springbok were approved by the Board."

- [36] In paragraph 36 of the judgment, the Court a quo specifically stated that she was not persuaded that the letter dated 13 February 2018 bolters the First Respondent's application. In her view the letter constituted a renewal of the temporary licences and cannot be considered an approval in respect of Erf 7195, or an authorisation to conduct gambling activities on Erf 7195.
- [37] The order of the Supreme Court of Appeal remains in force until set aside. The settlement agreement stipulates that the Second Respondent must within thirty days after the signing of this agreement, grant to the First Respondent permission to conduct its bookmakers' activities at the property known as Scott Street 23, failing which the First Respondent would be entitled to approach a Court for the enforcement of the order through contempt proceedings.[6]
- [38] Nothing prevented the First Respondent from proceeding with contempt proceedings against the Second Respondent, but instead the First Respondent was advised to continue with their gambling activities without a gambling licence and to only litigate with the Second Respondent should the Second Respondent wish to assert that such activities would be unlawful. If First Respondent's conduct is lawful as alleged by the First Respondent, it is unclear why the First Respondent launched an urgent counterapplication against the Second Respondent as soon as they were in receipt of the Applicant's application.
- [39] In respect of the Applicant's averments that the First Respondent's conduct infringes upon Applicant's rights as a lawful licenced gambling operator and therefore amounts to unlawful competition with the Applicant's gambling activities, the First Respondent does not deny that the Applicant is prejudiced by the First Respondent's conduct. In paragraph 5 of the First Respondent's answering affidavit, the following were stated:
- "It is an abuse, motivated by the obvious intention to protect for Desert Palace a monopoly. The court should not be fooled by the terms of the Notice of Motion, and a facade argument that Deeps Betting will be allowed to conduct business in the event of it doing so lawfully. That is not the aim. It wants to close Deeps Betting business down urgently because of the financial detriment it will (lawfully) suffer. There is, firstly, no urgency to the application."
- [40] In addition thereto, the First Respondent did not respond to the Applicant's founding papers where it was stated that the Applicant has no other satisfactory remedy, but merely argued that the Applicant could have filed a complaint at the Second Respondent. It is however not in dispute, that neither the South African Police Service, nor the Second Respondent can make any order interdicting the First Respondent from continuing with its bookmaking activities at 23 Scott Street.

- [41] As a result of the abovementioned, I am satisfied that the Applicant has met the requirements for a final interdict. This interdict would however not have a final effect on the gambling activities of the First Respondent because the interdict will only be enforceable until a valid gambling licence authorising gambling activity in or on 23 Scott Street is granted by the Second Respondent to the First Respondent.
- [42] In addition thereto, I need to emphasize that the Court cannot condone the First Respondent's conduct of operating bookmaking activities without a licence (a physically issued document), because as enforcer of the law it goes against the conviction of the community and public policy[7].
- [43] No reasons were advanced why the costs should not follow the event and I can find no reason to differ from the general principles in this regard.

I make the following order:

1. AN ORDER IS GRANTED IN TERMS OF PRAYERS 2, 3, 4 AND 5 OF THE APPLICANT'S NOTICE OF MOTION DATED 5 AUGUST 2019;
2. 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.

AS SIEBERHAGEN

ACTING JUDGE

Obo the Applicant:

Adv. E.S. Grobbelaer (oio Engelsman Magabane Inc)

Obo the 1st Respondent:

Adv. S. Grabler SC (oio Van De Waff Inc)

Obo the 1st Respondent: Adv Ngcangisa (oio State Attorney)

[1] Airports Company South Africa v Big Duty Free (Pty) Ltd and others

[2018] ZACC 33a

[2] Setlogelo v Setlogelo 1914 AD 221 at 227

[3] Act 3 of 2008

[4]

[2007] 3 All SA 573 (SCA) at page 577 and .579

[5] Case number 3018/2017 delivered on 9 March 2018

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- [6] Eke v Parsons (CCT214/14) [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) (29 September 2015)
- [7] Liebenberg v Frater NO and Others, Drakenstein Municipality v Frater NO and Others (6214/2010, 19763/2010) [2010] ZAWCHC 203 (23 September 2010) par 15.
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