

SOUTH AFRICA / JUDGMENT

Kuisis and Another v Free State Gambling, Liquor and Tourism Authority and Others (A118/2018) [2020] ZAFSHC 73 (26 March 2020) [2020] ZAFSHC 73

COURT

Free State High Court, Bloemfontein

BEFORE

DAFFUE, RAMLAL

CASE / FILE NUMBER

A118/2018

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IN THE HIGH COURT

OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: A118/2018

In

the matter between:

BERNARD
PETER
KUISIS
1st Applicant
ERROL
MARTIN
THOMAS
2nd Applicant
and
FREE STATE GAMBLING,
LIQUOR AND
TOURISM
AUTHORITY
1st Respondent
THE CHAIRPERSON OF THE
BOARD OF THE
TOURISM
AUTHORITY
2nd Respondent
JOJO DANIEL FOKOU
TCHINDA

3rd Respondent
TSIETSI
MATHULE
4th Respondent

CORAM: DAFFUE, ADJP et RAMLAL, AJ
HEARD
ON: 2 MARCH 2020

JUDGMENT

BY: DAFFUE, ADJP

DELIVERED ON: 26 MARCH 2020

I

INTRODUCTION

[1] This is a review of the Free State Gambling and Liquor Authority’s decision to hold two bookmakers liable on several betting tickets issued during the 2015 Cricket World Cup.

II THE PARTIES

[2] The applicants are Mr BP Kuisis and Mr EM Thomas, two bookmakers conducting their businesses in Bloemfontein. The first

applicant, Mr Kuisis trades under the name and style of Berns Betting. He also holds a bookmaker’s licence for the second

applicant’s business. They were represented in this application by Advv I Goodman and J Mitchell.

[3] The respondents are:

3.1 The Free State Gambling, Liquor and Tourism Authority (“the Authority”), a juristic person established under s 4 of the Free State Gambling, Liquor and Tourism Act, 6 of 2010 (“the Gambling Act”), cited as 1st respondent;

3.2 The Chairperson of the Board of the Free State Gambling, Liquor and Tourism Authority (“the Board”), is cited as 2nd respondent;

3.3 Mr Jojo Daniel Fokou Tchinda, a major male person, cited as 3rd respondent and;

3.4 Mr Tsietsi Mathule, a major male person, cited as 4th respondent.

[4] The Authority gave notice to abide the court’s judgment. The 3rd respondent does not oppose the application. Only the 4th respondent opposes the application. He was represented by Mr MS Litheko, an attorney practising in Thaba Nchu.

III THE RELIEF CLAIMED

[5] Applicants apply for the following relief as fully set out in the notice of motion:

“1. Reviewing and setting aside the First Respondent’s decision(s) to hold the Applicants liable on the betting tickets attached to the founding affidavit as “FA1.1-18” and “FA2.1-3” (“the Tickets”)

2. Declaring that the applicants are not liable, in whole or in part, for payment of the sums reflected on the Tickets.
3. Ordering that the costs of this application be paid, jointly and severally, by any of the respondents who oppose the relief sought by the Applicants.”

IV THE GROUNDS OF REVIEW

[6] Applicants rely on numerous grounds of review which may be summarised as follows:

6.1 The Authority acted beyond its powers insofar as it, whilst being bound by the Operational Rules for Bookmakers, deviated from the rules without any statutory or regulatory Authority. If it followed the rules, it was bound to find that impossible bets, like the multiple-bet tickets in casu, are void. In addition it acted beyond its powers by holding applicants bound on the single-bet tickets which were losing bets.

6.2 The Authority failed to comply with the mandatory and material conditions for the statutory enforceability of gambling debts – a ground of review under the principle of legality - and if it did so it would have held the tickets to be void.

6.3 The Authority’s decision was materially influenced by an error of law insofar as its decision is a legal premise that the potential for tickets to mislead its customers – which could not reasonably have occurred here - outweighs the clear position in the rules that impossible tickets are void.

6.4 The Authority’s decision as is evident from its letters of December 2017 was taken for a reason not authorised by the Gambling Act, the regulations and the Operational Rules for Bookmakers. The principle of legality applies. The Authority is not imbued with equitable discretion when it comes to resolving disputes.

6.5 The Authority considered irrelevant considerations and failed to consider relevant considerations. It is irrelevant whether the punters may have misconstrued their tickets or whether applicants complied with the requirements of their wagering software. The tickets are void. The Authority failed to consider relevant factors such as that the punters were experienced gamblers and applicants’ standard terms and conditions. They also failed to consider the absurd and statistically meaningless pay outs reflected on the tickets.

6.6 The Authority’s decision is arbitrary. It did not refer to its initial decision to dismiss the punters’ complaints and did not afford rational reasons for departing from it.

6.7 The Authority's decision contravenes the law insofar as the punters' tickets were impossible and therefore void, but notwithstanding that the Authority resolved to hold applicants liable on the tickets.

6.8 The Authority's decision is not rationally connected to the purpose of its dispute resolution powers, the information before it and the reasons the Authority gave for its decision.

6.9 The Authority's decision is unreasonable insofar as it held applicants liable on the tickets in spite of the detailed regulatory framework.

[7] Notwithstanding these grounds of appeal, this judgment will deal with limited issues only as submitted during oral argument.

V THE OPPOSITION

[8] 4th Respondent admits that the Bookmakers' Operational Rules are binding on the parties, but denies that the odds on the tickets were erroneously generated and calculated and therefore resulting in absurd and statistically meaningless pay outs as submitted by the applicants. He denies that the tickets are void on the basis that there was no possibility of winning at the time each bet was made. The contingency as provided for in the rules is that it was not known which teams were "to proceed"

to the second leg of the tournament. Contrary to applicants' explanation of the bets as recorded on the tickets, 4th respondent submits that the tickets do not reflect which team would win pool A and/or pool B, but reflect the teams that will proceed to the next leg of the 2015 Cricket World Cup.

VI THE STANCE OF THE AUTHORITY

[9] As mentioned, the Authority and the chairperson of the Board do not oppose the relief sought. The Authority considered complaints lodged with it by 3rd and 4th respondents as well as other punters and resolved on 16 August 2016 to dismiss the punters' complaints. Its reasons will be dealt with in more detail later herein; suffice to mention at this stage that it concluded in respect of each complaint as follows:

"As the punter you did not stand a chance of winning and therefore the bets were void and the Bookmaker must refund the stake for the tickets."[1]

[10] On 28 December 2017, more than a year since its original decision, the Authority resolved that "the Bookmakers are indeed liable for the creation of the current complaints and the return of the stake alone is not sufficient." [2]

It also resolved that the applicants had to "tender to each of the complainants an acceptable monetary settlement, in resolution of the complaint."

It is important to take note that the Authority did not set aside its original decision that the bets were void. It did not resolve that applicants must pay out the “winnings” as indicated on the tickets. More will be said about this later herein.

VII BRIEF ANALYSIS OF THE MATERIAL UNDISPUTED FACTS

[11] The following is a brief analysis of the relevant history and material undisputed facts:

11.1 Applicants are Bookmakers and the Operational Rules for Bookmakers are applicable to them, the Authority and punters.

11.2 4th Respondent is an experienced punter who placed certain bets during the 2015 Cricket World Cup.

11.3 Two types of tickets are at issue: multiple-bet tickets and single-bet tickets.

11.4 In respect of the multiple-bets applicants accepted that the tickets were unfortunately printed in the first place. On their version they noticed an anomaly on its systems and took reasonable steps to rectify their software, cancel tickets and notify punters of void tickets, an issue which is vehemently denied by 4th respondent. Annexure “FA 1.11” is reproduced hereunder in order to explain later herein the two different viewpoints of the parties.

11.5 When the punters and the 4th respondent in particular presented their tickets for pay-out, applicant refused to pay because the tickets on their version were either void or invalid whereupon the 4th respondent and other punters lodged complaints during March 2015.

11.6 The Authority’s Board resolved to dismiss the punters’ complaints on 16 August 2016[3]. Pertaining to the multiple bets the Authority held that “the Bet Event played was either ‘to win Pool B’ or ‘win Pool A’” and that “these multiples are losing tickets as only one team in each pool won their respective Pools during the World Cup.”

It held that “the problem with these bets were that only one team can win a single pool in a world cup.” It continued, relying on rule 9 of the Bookmakers’ Rules, that “as the punter you did not stand a chance of winning and therefore the bets were void....”

Rule 9 is clear: in all cases there must be a possibility of either party to win at the time of the bet, failing which the bet shall be void.

11.7 The punters and 4th respondent in particular requested a hearing before the Authority to reconsider its decision. A hearing took place on 5 October 2017. On 28 December 2017 the Authority notified the applicants of its decision to hold them liable on the impossible tickets.[4] Clearly, it did not find that the “winnings” shall be paid, but that an acceptable monetary settlement should be reached. It did not change its initial decision that the tickets were void. That decision stands and there is no application to have it reviewed and set aside.

11.8 Following the Authority’s December 2017 decision, settlement negotiations were entered into with punters, but no agreements could be reached with 3rd and 4th respondents.

VIII POINT IN LIMINE

[12] Mr Litheko took a point in limine, arguing that applicants failed to pay the amount required in terms of regulation 146 with the Authority and therefore the application was prematurely brought. According to him the amount in dispute that had to be paid in trust before the application was issued, is R4 162 390.00. Mr Litheko submitted that the application should be dismissed with costs for this reason alone. The aforesaid figure is arbitrary. He presumably relies on a total figure insofar as the Authority might have held this to be payable, to wit the “winning” bets according to the punters. However, the Authority did not decide so as I have clearly explained above. Their complaints were dismissed in this regard. The first decision of the Authority pertaining to the invalid and void bets still stands. In any event, it was the Authority’s prerogative to raise this defence which it failed to do. The point in limine is dismissed.

IX APPLICABLE LEGISLATION AND CASE LAW

[13] The Gambling Act and the regulations promulgated under it as the Free State Gambling Regulations are applicable to the dispute.

Section 4(3) of the Gambling Act stipulates that the Authority’s powers and functions are vested in its Board. The decisions of the Board are subject to review under the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”).[5] No doubt, as the Board is a creature of statute, exercising public power and performing public functions, its decisions are also reviewable under the principle of legality[6].

[14] As mentioned above, rule 9[7] determines that in all cases there must be a possibility of either party to win at the time the bet is made, failing which the bet shall be void. Rule 12(1) provides that a bet shall be void if “due to a mutual error the parties to a bet are not ad idem (in agreement) as to the odds at which the bet is struck, the amount of the bet or the contingency on which the bet is placed.”

[15] Applicant’s counsel submitted that insofar as rule 12(1) applies in the case of no consensus between a bookmaker and a punter, it aligns with the position of the law of contract stipulating that a mutual mistake renders a contract void. Reliance was placed on *Allen v Sixteen Stirling Investments (Pty) Ltd*. [8] In *Spenmac (Pty) Ltd (formerly Bobcart (Pty) Ltd) v Tatrims CC* [9] the court approached the dispute before it as one involving mutual mistake. It found that both parties were under the mistaken

impression that there were only two units in the sectional title complex. Parties who are mutually mistaken are by definition

not ad idem. If the mistake of each of them is reasonable (*iustus*), the contract is void ab initio.

[10]

- [16] The Gauteng Gambling Board considered the same type of bets on the 2015 Cricket World Cup reflected on the same type of tickets and ruled that the bookmakers were not liable to pay out the bets.[11]
- [17] The Authority's first decision of 16 August 2016 has not been reversed or set aside on review. There is also no pending review application in respect thereof. This decision – that applicants are not liable on the tickets because they are void – still stands.[12]
- [18] If it can be held that the Authority's decisions are unlawful, a declaration of invalidity should follow and a just and equitable order shall be made.[13] If the court is in as good a position as the Authority to rule on applicants' liability on the tickets, it would be entitled to grant the order required instead of referring the matter back to the Authority.[14]

X EVALUATION OF THE EVIDENCE AND THE AUTHORITY'S DECISIONS

- [19] Mr Litheko submitted that the tickets pertaining to the multiple bets clearly reflect bets as to which teams "to proceed" to the next round. Therefore if the ticket attached as annexure "FA1.11" is considered, bets were placed on Australia and Sri Lanka "to proceed" in respect of pool A, whilst South Africa, India, Pakistan and the West Indies were bet on "to proceed" to the next round pertaining to pool B. It needs to be emphasised that the words "to proceed" appear in brackets after the names of all the teams referred to and that the words "World Cup 2015 to win pool A" and "World Cup 2015 to win pool B" appear on the ticket. Mr Litheko argued that no team with the name "World Cup 2015" played during the particular Cricket Tournament and therefore no bet could be placed on such a team to win either pool A or pool B. This is a fallacious argument.
- [20] It is necessary to consider the submissions on behalf of the applicants. It is submitted that they are not liable to pay on the tickets for three reasons:-

"(1) some of the tickets reflect impossible bets (there was no possibility of the bets winning at the time they were made);

- (2) There was no consensus between the parties on what was being bet on and the odds; and
- (3) other tickets reflect losing bets (the outcome bet on did no eventuate.)"

Applicants' explanation of the tickets makes proper sense. If the tickets with reference to "FA1.11" reproduced above is considered, bearing in mind the context and surrounding circumstances, there is in my view no doubt that the words "World

Cup 2015 to win Pool A" and "World Cup 2015 to win Pool B" are indicative of the contingency applicable. Only one team could win a pool. The same applies to the single bet tickets.

- [21] Applicants' submissions must be considered in light of the Authority's initial decision to dismiss the punters'

complaints because the tickets did not stand a chance of winning and therefore the bets were void. In its further decision after having reconsidered the matter, the Authority decided that the applicants are liable on the tickets and directed them to make reasonable offers to the punters. No doubt the Authority did not revisit its initial resolution that the multiple bets were void. If it was the case, it would have ordered applicants to pay the punters the amounts reflected in the “winning” tickets. Instead it apparently tried to resolve the matter on an equitable basis insofar as the tickets issued by applicants “can and was misconstrued by the punters” with reference to the words “to proceed”. It also found that the applicants “did not adhere to the specific market namely requirements of the Turfsport Wagering System”. Therefore an acceptable monetary settlement was suggested. This appears to be an unreasonable and vague ruling insofar as no dispute resolution process is available to settle the dispute in the absence of a monetary settlement between the parties. The Authority could not deviate from the Operational Rules for Bookmakers in order to come to its revised decision as mentioned. It assumed an equitable mediation role without any statutory or regulatory power to do so.

[22] Rule 12 clearly stipulates that a bet shall be void if due to a mutual error the parties to the bet are not ad idem as to the odds at which the bet is struck, the amount of the bet or the contingency on which the bet is placed. On anyone’s

version, i.e. applicants, 4th respondent and the Authority, there was no consensus. 4th Respondent claims that he bet on which teams would proceed from the respective pools to the quarter finals, whilst applicants aver that the tickets clearly reflect bets on which team would win each pool. I am satisfied that for this reason alone, the tickets are void. The Authority acted beyond its powers in purporting to hold applicants liable on them.

[23] It is common cause between the parties that the bets on multiple teams to win each pool were impossible bets. Rules 9(1) states that “there must be possibility for either party to win at the time the bet is made, failing which the bet... shall be void”. The Authority declared the punters’ multiple bet tickets void because they were impossible. That decision was not reversed, but applicants were merely directed to pay something more than the stakes, to be agreed upon, to the punters.

[24] The Authority had no authority to hold the applicants liable on the single bet tickets when the eventualities bet on did not occur. These were losing tickets.

[25] I agree with the applicants’ counsel that the Authority’s decision was materially influenced by an error of law. Implicit in its decision is the premise that the potential for tickets to mislead customers which could not reasonably occurred here, somehow outweighs the clear position in the rules that the tickets are either impossible bets (multiple bet tickets) or losing bets (the single bet tickets). Applicants are not liable to pay out on these tickets. It must also be taken into consideration that the potential for confusion relied upon by the Authority is irrelevant bearing in mind the fact that the 3rd and 4th respondents are experienced punters and any confusion would have arisen only after they had placed their bets. It is common

cause that the tickets were printed after bets had been placed. Therefore the wording on the tickets could not cause any confusion.

[26] I also agree with applicants' counsel that the Authority failed to consider the obvious absurd and statistically meaningless pay outs reflected on the tickets. If it applied its mind properly to the tickets, the odds and the pay outs reflected thereon, the absurdity of the pay outs would have been obvious. Applicants have explained in detail why the pay outs should be regarded as absurd and statistically meaningless. It is not necessary to repeat this. Respondent denies the applicants' version, but failed to tender any evidence in support of his allegation.

[27] We are not bound by resolutions taken by Gambling Boards, but it is important to note that the Gauteng Gambling Board considered the same type of bets on the Cricket World Cup and reflected on the same type of ticket. Just like here the bets were for which team would win each pool and like here, the bets were impossible because the punter bet on more than one team to win each pool. The Authority considered the reasoning and the ruling of the Gauteng Gambling Board who based its decision on rule 9 of the Operational Rules which equally binds the Authority when it made its initial decision. It should have stuck to this decision and not tried to come to an equitable solution.

X

CONCLUSION

[28] Insofar as a proper case has been made out, I am satisfied that the Authority's decision communicated on 28 December 2017 is unlawful and that a declaration of invalidity should follow. There is no reason to refer the matter back to the Authority as this court is in as good a position to make the decision. The tickets are void and applicants are not liable to pay out on them. This conclusion is in line with the Authority's first decision, which it never reversed, but merely modified to allow for a possible equitable settlement which did not materialise. Such first decision still stands and is not the subject of any review.

XI

ORDERS

[29] The following orders are granted:

1. The first respondent's decision, as confirmed in the letters of 28 December 2017, to hold the applicants liable on the betting tickets attached to the founding affidavit as annexures "FA1.1" to "FA1.18" and "FA2.1" to "FA 2.3" (the tickets) is reviewed and set aside as being null and void.
2. It is declared that applicants are not liable, in whole or in part, for payment of the sums reflected on the tickets.

3. 4th Respondent is ordered to pay the costs of the application.

J P DAFFUE, ADJP

I concur

A K RAMLAL, AJ

On behalf of Applicants : Advv I Goodman and

Adv Mitchell

Instructed by : EDWARD NATHAN SONNENBERGS

c/o McINTYRE & VAN DER POST

BLOEMFONTEIN

On behalf of 4th Respondent : Mr MS Litheko

Instructed by: LITHEKO MOTSOENENG INC

c/o MPHAFI KHANG INC

[1] Annexure FA 10.1 – 10. 3 attached to the founding affidavit

[2] Annexure FA 3.1 – 3.2

[3] Annexures FA10.1 – 10.3 to the founding affidavit

[4] Paragraph 10 and footnote 2 supra

[5] Section 135 of the Gambling Act

[6] Ahmed v Minister of Home Affairs 2019 (1) SA 1 (CC) at para 44

[7] The Operational Rules: Bookmakers

[8] 1974

(4) SA 164 (D) at 168D - G

[9] [2014] 2 All SA 549 (SCA) paras 29 - 31

[10] See in general: GB Bradfield, Christie's Law of Contract in South Africa, 7th ed at 375 -379

[11] Annexure SFA3 to the supplementary affidavit

[12] MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute 2014 (3) SA 481 (CC) at para 101

[13] Allpay Consolidated Investment Holdings (Pty) Ltd v CEO, South Africa Social Security Agency 2014 (1) SA 604 (CC) at para 56

[14] Gavric v Refugee Status Determination Officer 2019

(1) SA 21 (CC) at paras 143 – 155 and Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd 2015 (5) SA 245 (CC).

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