

SOUTH AFRICA / JUDGMENT

KwaZulu-Natal Bookmaker's Society and Another v Phumelela Gaming and Leisure Ltd and Others (38728/2015) [2018] ZAGPPHC 314 (7 May 2018)

[2018] ZAGPPHC 314

COURT

North Gauteng High Court, Pretoria

BEFORE

Molopa-Sethosa

CASE / FILE NUMBER

38728/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

GAUTENG, PRETORIA

CASE

NO:38728/2015

In

the matter between:

KWAZULU-NATAL

BOOKMAKERS' SOCIETY

1st Applicant

GAUTENG

OFF-COURSE BOOKMAKERS ASSOCIATION

2nd Applicant

and

PHUMELELA

GAMING AND LEISURE LTD

1st Respondent

KENILWORTH

RACING (PTY)

LTD

2nd Respondent

GOLD

CIRCLE (PTY)

LTD

3rd Respondent
KWAZULU-NATAL
GAMING AND BETTING BOARD
4th Respondent
EASTERN
CAPE GAMBLING AND BETTING BOARD
5th Respondent
GAUTENG
GAMBLING
BOARD
6th Respondent
LIMPOPO
GAMBLING BOARD
7th Respondent
NORTH
WEST GAMBLING BOARD
8th Respondent
MPUMALANGA
GAMBLING
BOARD
9th Respondent
WESTERN
CAPE GAMBLING
BOARD
10th Respondent
FREE
STATE GAMBLING AND LIQUOR BOARD
11th Respondent
NORTHERN
CAPE GAMBLING BOARD
12th Respondent
THE
NATIONAL GAMBLING BOARD
13th Respondent
THE
NATIONAL LOTTERIES BOARD
14th Respondent
GLDANI
(PTY)
LTD
15th Respondent
ITHUBA
(PTY)
LTD
16th Respondent
THE
MEC FOR FINANCE,
KWAZULU-NATAL
17th Respondent

JUDGMENT**MOLOPA-SETHOSA J**

[1] The applicants have launched an application in terms whereof they seek an order in the following terms:

"[1] Declaring that the first and second respondents are unlawfully operating a totalisator sports betting operation in contravention of their totalisator licences and/or the National Lotteries Act 57 of 1997 (hereinafter referred to as the "NLA");

[2] Granting an interdict restraining the first and second respondents from unlawfully operating a totalisator sports betting operation in contravention of the National Lotteries Act 57 of 1997.

[3] Directing the fourth to thirteenth respondents to the extent necessary, to take all appropriate steps to withdraw any permission

that may have been granted to the first and second respondents and which unlawfully purported to authorise the operation of totalisator

sports betting operations.

[4] Granting the applicant further and or alternative relief.

[5] Ordering the first and second respondents (and any of the third to seventeenth respondents who oppose this application) jointly and severally to pay the costs of the application, such costs to include those of two counsel."

[2] The application is opposed by the first, second, third and seventeenth respondents ("1st 2nd 3rd and 17th respondents respectively").

[3] The fourth to sixteenth respondents were not represented at the hearing of this matter, and have not filed opposing papers. The thirteenth (13th) and fourteenth ("14th") respondents have however filed notices to abide, but have also filed an "explanatory affidavits" on their own

interpretation.

[4] At the commencement of the hearing there was an application by the 17th respondent to substitute the premier KwaZulu-Natal

("KZN") for the MEC for finance-KZN, which application was not opposed by any of the parties before court, and an order was thus granted substituting the Premier KZN for the MEC for Finance, KZN. Therefore the 17th respondent before court is the Premier, KZN.

[5] All the parties confirmed that they all consent to the jurisdiction of this Division .

[6] The 3rd respondent brought an application for condonation for the late filing of its answering affidavit which application is opposed by the applicants. I deal with this aspect below.

[7] The applicants are bookmakers. They hold licences to offer bets to members of the public in relation to the outcome of horse racing and other sporting events. Those bets may be "fixed-odds bets" or "open bets".

[8] The first, the second and the third respondents hold licences to operate a totalisator. The third respondent-Gold Circle holds a totalisator licence for KZN; the second respondent holds a totalisator licence for the Western Cape; and the first respondent

holds a totalisator licence for all the other provinces. The first respondent-Phumelela operates the totalisator on behalf of second

respondent-Kenilworth. The first and second respondents shall be referred to collectively as "the Phumelela respondents".

[9] This application deals with whether the first and second respondent-the Phumelela respondents, are permitted to operate a totalisator sports betting operation, and/or sports pools.

[10] The applicants contend that only the holder of the licence to conduct the National Lottery may be the holder of a license to conduct a sports pool, and that it is the intention of the national legislature that the sports pool in question would be a national sports pool. They contend that the Lotteries Act 57 of 1997 ("the Lotteries Act") makes it clear that a single national lottery was brought into being to be conducted under authority of a single licence, and

that the licence is to be exclusive to the appointed lottery operator.

[11] The applicants further contend that the scheme of the Lotteries Act is fundamentally undermined by the conduct of the respondents that continue to operate sports pool betting unlawfully and in competition

with National Lottery, and that such undermining is not in the public interest.

[12] The applicants submit that in terms of a proper interpretation of the Lotteries Act, the Legislature has prohibited the operating of soccer (and other) sports pools such as those offered and operated by the sports pool respondents.

[13] The applicants further submit that the Provincial Gambling Boards, the National Gambling Board and the Lotteries board have failed to take action against the sports pool respondents to prevent continued unlawful competition; that therefore they are entitled to approach this Court to assist them in interdicting the respondents from conducting what they call 'prohibited activities'. They contend that this Court is enjoined to declare that the conduct of the sports pool operators is unlawful because their conduct is not authorised by law and is unconstitutional.

- [14] The Phumelela respondents do not dispute that they are offering rugby and soccer tote betting to the public. They however advance legal submissions around interpretation which differs to the interpretation proffered by the applicants. The applicants contend that with the interpretation advanced by the Phumelela respondents, the Phumelela respondents want to escape the clear wording of the Act and the constitutional scheme which prohibits the offering of sports pool betting on sports other than horseracing.
- [15] The applicants contend that the Phumelela respondents' interpretative argument is wrong. Further, that they have not been authorised by licences issued to them in all provinces of South Africa in terms of the relevant provincial legislation.
- [16] The applicants contend that the tote respondents were specifically invited in the applicants' replying affidavit to proffer evidence that they have been authorised if they had evidence, that they chose not to do so; i.e. that the Phumelela respondents did not avail themselves of an opportunity to deal with the applicants' averments in the replying affidavit. They contend that Phumelela's failure to do so supports the applicant's version that, the Phumelela respondents are not in fact authorised to conduct soccer and rugby tote betting. I deal with this point later.
- [17] The Phumelela respondents contend that the present application is an attempt by the applicants [bookmakers] to prevent them the totalisator operators from competing with them when it comes to offering bets in relation to sporting events other than horseracing; that the application amounts to a turf war.
- [18] Phumelela respondents submit that the outcome of the turf war will have profound ramifications , since it is them/the totalisator operators the first , second and third respondents (not the bookmakers) who administer horse-racing in South Africa and those operations would not be sustainable if the totalisator operator were unable to rely on sports- betting revenue.
- [19] With regard the third respondent-Gold Circle, the applicants contend that it is not permissible to allow the third respondent to be party to the proceedings when they only filed their opposing papers after pleadings had closed. The applicants submit that condonation should be refused. Having regard to the submissions made on behalf of the respondents. Condonation is granted to the third respondents. The reasons are dealt with below.

BACKGROUND

[20] The Phumelela respondents offer totalisator bets not only on horseracing but also on soccer and rugby bets ("the soccer and rugby Tote bets"). It is thus common cause that Phumelela as well as the 3rd respondent/Gold Circle offer and operate soccer and rugby bets around South Africa. Punters have the option of placing bets on the outcome of one, or a series of soccer and rugby games.

[21] When a bookmaker offers "fixed-odds bets", the odds are fixed at the moment when the bet is laid. In the case of totalisator bets", no odds are fixed and the eventual dividend pay-out depends on how many bets were placed into the pool and the number of winning punters. In *Grundlingh and Others v Phumelela Gaming and Leisure Limited* 2005 (6) SA 502 (SCA) the SCA explained this as follows at para 7:

"All the bets (tote bets) on a particular race (e.g. all the bets for a win in race no 1) are pooled. From the resulting (gross) pool or total, tax and administration expenses (which include the profit of the tote operator) are deducted. The net pool is divided equally between all the successful punters in proportion to their respective stakes. There is no betting risk to the totalizator or its operator. Subject to lawful deductions, the tote pays out in winnings (or dividends) what it has received in bets. As it was succinctly put in the papers (in lay terms) punters on the tote bet against each other; (whether that is the correct legal position is unnecessary to decide

- cf *Tote Investors Ltd v Smoker* supra); whereas a punter placing a bet with a bookmaker bets against that bookmaker. It is also clear that the odds on a tote bet are not fixed when the bet is laid because no odds are agreed. On the contrary, everything depends on how much money is wagered on the race, via the tote, and on how many winning tickets there are. The dividend can only be calculated after the race has been run."

[22] In essence the applicants contend that the Phumelela respondents operate totalisator sports betting unlawfully in contravention of their licences and/or the Lotteries Act. They thus seek a mandamus directing all the gaming Boards in South Africa to withdraw any permissions to the Phumelela respondents which purport to authorise the operation of totalisator sports betting operations.

[23] The applicants submits that at its heart therefore this application seeks to ensure that the Phumelela respondents do not continue to operate a totalisator sports betting operation on any sport other than horseracing in contravention of the Constitution as read with the Lotteries Act.

[25] They further contend that the respondents fundamentally undermine the scheme of the Lotteries Act by their conduct of continuing to operate sports pool betting unlawfully and in competition with the National Lottery which they submit, undermine the National Lottery and is not in the public interest.

[26] The applicants contend that properly interpreted the Lotteries Act prohibits the conducting of totes on any sport other than horseracing That sports tote contravenes s57(1) read with 51 of the Lotteries Act.

[61] In my considered view, soccer and rugby totes fall within the definition of sports pool in the Lotteries Act, however on the totalisator sports betting that the Phumelela respondents conducted prior 18 June 1997 set out above, I am of a considered view that falls within the second part of the exclusion in the definition of sports pool.

[62] To sum up, looking at the definition of 'sports pool' [in accordance with the Lotteries Act 57 of 1997], which I repeat herein:

'sports pool' means any scheme, excluding any scheme or competition in respect of horse racing which is authorised by the board, or which is conducted in the same format or manner and under the same circumstances as a scheme or competition in respect of horse racing that existed prior to 18 June 1997 -

[63] According to applicants self, the the Phumelela respondents and the third respondent - Totalisator betting was the only form of betting (other than betting laid by bookmakers) which was legally permissible in South Africa prior to the legalisation of other forms of gambling in the country in 1996. This is prior June 1997. The Phumelela respondents have set out the various sports activities they conducted ' in the same format and manner and under the same circumstances as a scheme or competition in respect of horse racing that existed prior to 18 June 1997' .

[64] In my considered view the Phumelela respondents are covered by the exclusion-"...any scheme which is conducted in the same format and manner and under the same circumstances as a scheme or competition in respect of horse racing that existed prior to 18 June 1997

The second part of the exclusion cannot include horseracing. The... 'under the same circumstances as [like] .. .in respect of horseracing indicates that the next part after the second 'which is' relates to something other than horseracing, i.e. any scheme or competition...which is conducted in the same format and manner and under the same circumstances as a [like] scheme or competition in respect of horseracing . Horseracing is catered for in the first part of the definition.

[65] The definition of sports pool in my considered view excludes horseracing and any other scheme which is conducted in the same format and manner and under the same circumstances as a scheme or competition in respect of horse racing that existed prior to 18 June 1997.

[66] Having interpreted the exclusion as such, the court now has to look at whether soccer and/ or rugby totes are schemes or competitions

conducted in the same format and manner and under the same circumstances as horse racing that existed prior to 18 June 1997.

[67]

Counsel for the Phumelela respondents submitted that during the 1993 Interim Constitution-Constitution of the Republic of South Africa Act 200 of 1993, Provinces had the competency to deal with lotteries and sports pools.

[68] It is useful to quote some of the remarks made by counsel for the applicants in their heads of argument:

"[22] Totalisator betting was the only form of betting (other than betting laid by bookmakers) which was legally permissible in South Africa prior to the legalisation of other forms of gambling in the country in 1996.

[35] It is apparent from both the definition of " sports pool" and the provisions of section 57(1) quoted above that a sports pool is permissible in defined circumstances." [Own emphasis].

[69] From the above it is apparent that the Phumelela respondents operated sports betting prior in the same format and manner and under the same circumstances as horse racing that existed prior to 18 June 1997. There is no evidence to the contrary.

[70] To sum up

In my considered view, the second ' which is' in the exclusion set out in s 1 of the Lotteries Act, relates to a scheme or competition other than horseracing , and not to horse racing as contended for by the applicants. To put it otherwise- the exclusion, properly interpreted means -any scheme or competition which is conducted in the same format and .manner and under the same circumstances as a scheme or competition in respect of horse racing that existed prior to 18 June 1997.

[71] The explanatory notes proffered by the 13th and 14th respondents do not assist the applicants in view of the interpretation proffered by this Court. In my considered view it cannot be the intention of the Legislature that both exclusions are linked horseracing.

[72] Pertaining to the third respondent's condonation application: Clearly the minute the applicants sought to attack KZN that had direct bearing on the 3rd respondents it has a legitimate right to protect its interest. The 3rd respondent's condonation application is granted.

[73] In their replying affidavit, the applicants stated the following at para 136:

" It is clear from what is said in the founding affidavit and would be clear from a judgement in accordance with the applicants' argument that the totalisator respondents are unlawfully operating a totalisator sports betting operation in contravention of their

totalisator licenses and/or Lotteries Act since they are offering totalisator betting on sports other than horseracing. To the extent necessary, the wording in italics can be included in prayer 1 of the Notice of Motion. That relief is sought in order to ensure compliance with a statutory prohibition contained in the Lotteries Act. "

[75] Counsel for the applicants submitted that if this court were to find in favour of the applicants, this court must issue a declaratory

order to the effect that the KZN Provincial Legislation is invalid for want of constitutional consistency. This has never been pleaded by the applicants, not in the founding affidavit nor in the replying affidavit. All that is stated in the replying affidavit is that the declaratory relief would be relevant to future amendments of the Act.

[76] Even if the applicants were successful, it would not be correct for this court to grant the declaratory order sought by the applicants in their oral submissions. The case has not been pleaded by the applicants. The authorities are clear. In *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa* 1999 (2) SA279 (T) Joffe J held as follows:

"The Law relating to affidavits generally

It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits. In *Hart v Pinetown Drive-Inn Cinema (Pty) Ltd* 1972 (1) SA 464 (DJ) it was stated at 469C- E that where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound. ' An applicant must accordingly raise the issues upon which it would seek to rely in founding affidavit. It must do so by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof As was held in *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 849B in regard to a constitutional issue:

'Dit is myns insiens vir die behoorlike ordening van die praktyk absoluut noodsaaklik dat konstitusionele punte nie deur advokate as laaste debatspunt uit die mou geskud word maar pertinent in die stukke as geskilpunt geopper word sodat dit volledig uitgepluis kan word deur die partye ten einde die Hof in staat te stel om dit behoorlik te bereg. '

The dictum is not only of application to constitutional issues - it applies to all issues. Nor is the dictum only of application in the context of a founding affidavit - it applies equally to answering affidavits and replying affidavits. The more complex the dispute between the parties, the greater precision that is required in the formulation of the issues. See in regard to actions Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A) at 106-

7. Although this dictum relates to pleadings in an action it is equally applicable to affidavits in motion proceedings." [Own emphasis].

[77] In their replying affidavits the applicants raise another new matter that the tote/Phumelela respondents were specifically invited in the applicants' replying affidavit to proffer evidence that they have been authorised if they had it- that they chose not to do so; i.e. that the Phumelela respondents did not avail themselves of an opportunity to deal with the applicants' averments in the replying affidavit and/or did not provide evidence to the applicants that they were authorised to conduct sports pools . The contend that Phumelela's failure to do so supports the applicant's version that, the Phumelela respondents are not in fact authorised to conduct soccer and rugby tote betting.

[78] It is trite that the applicant must make out its case in the founding affidavit; see Swissborough Diamond Mines supra

[79] The applicants cannot litigate by ambush. They cannot therefore put blame on the respondents for not responding/answering a new case now advanced in the replying affidavit by stating that "their failure to do so supports the applicant's version". The Phumelela respondents timeously filed their answering affidavit responding to allegations and/or averments made in the founding

affidavit. They can therefore not be expected to assist the applicants in floundering of the rules by answering a new case raised

in the replying affidavit.

[80] Clearly In so far as the 17th respondent is concerned-The Premier KZN also had a legitimate right to protect his Provincial Legislation, especially where the applicants sought an order declaring KZN Provincial Legislation unconstitutional.

[81] Clearly the third and seventeenth respondents disagree with the interpretation proffered by the applicants; and the contention of the seventeenth respondents that this is a matter of competition between the applicants and the Phumelela respondents hold water.

[82] On a conspectus of all the facts before the Court, the legal principles, the authorities and the arguments of both parties, I am not satisfied that on the facts before me and on a balance of probabilities, the applicants have established a case for the relief they seek. I am satisfied that the third respondent has made out a case for condonation.

The condonation of the third respondent is granted; and since it is an indulgence for the third respondent, the respondent ought to pay the costs occasioned by the condonation

[83] In the result, an order is made in the following terms:

1. Condonation for the late filing of the third respondent's notice of opposition and affidavits is granted with costs.
2. The application is dismissed with costs, such costs to include the costs consequent upon the employment of 2 counsel in respect of the first, second, and third respondents.

L M MOLOPA-SETHOSA

Judge of The High Court

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