

SOUTH AFRICA / JUDGMENT

Maxime Hotel (Pty) Limited and Another v Chairperson: National Gambling Board NO and Others (A94/2015) [2017] ZAGPPHC 648 (2 June 2017)

[2017] ZAGPPHC 648

COURT

North Gauteng High Court, Pretoria

BEFORE

Molopa-Sethosa, C P Rabie, P M Mabuse

CASE / FILE NUMBER

A94/2015

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A94/2015

Not reportable

Not of interest to other judges

Revised.

2/6/2017

In the matter between:

MAXIME HOTEL (PTY) LIMITED 1st Appellant

EGOLI GAME (PTY) LTD t/a

GOLD RUSH GAMING 2nd Appellant

And

THE CHAIRPERSON: NATIONAL

GAMBLING BOARD N.O. 1st Respondent

ADMINISTRATOR: GAUTENG GAMBLING

BOARD N.O. 2nd Respondent

THE MINISTER OF TRADE & INDUSTRY 3rd Respondent

JUDGMENT

MOLOPA-SETHOSA J

[1] The appellants launched an application against the respondents for a declaratory order in the following terms:

“1....

2. Declaring regulation 3(2) of the Regulations on Limited Pay-out Machines published under GN R1425 in GG 6977 of 21 December 2000, as amended by the National Gambling Act 7 of 2004,-

- a) ultra vires the powers, functions and duties of the National Board as outlined by the National Gambling Act 2004; and
- b) as infringing upon the exclusive licensing authority of the Gauteng Gambling Board as contemplated by the National Gambling Act. 2004 and the Gauteng Gambling Act.

3. Costs in the event of this application being opposed, against those respondents who oppose.

4. Further and/or alternative relief "

[1] The first and the third respondents ("the respondents") opposed the relief sought on the merits but in addition also raised various preliminary legal arguments [point in limine] in opposition in the court a quo, inter alia, contending:

[2.1] That the relief sought by the appellants is moot and, for academic due to the fact that it would have no consequence or benefit for the appellants in that the retention of regulation 3(1) effectively precludes the issue of any further operating license by the second respondent in respect of the site; and

[2.2] That appellants' application is procedurally flawed and in essence constitutes a simulated attempt to avoid the specific provisions of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

[3] In addition the respondents instituted a counter-application in which they sought an order declaring regulation 3(2) to be valid and of full force and effect. Alternatively, in the event that the Court making a finding that regulation 3(2) was invalid, they sought an order in terms of Section 172 (1)(b)(ii) of the Constitution suspending the declaration of invalidity for a period of two years in order for Parliament or the first or third respondent to remedy the defect.

[4] On 20 March 2014 Mr Justice Kollapen ("Kollapen J") sitting in the High Court Gauteng Division, Pretoria, delivered a judgment in which he upheld the respondents' point in limine, thus dismissing the appellants' application with costs. In that regard the court a quo held as follows:

"35. The nature of the relief the applicants seek must be established from the papers. The thread that consistently runs through the papers is the stance of the applicants that regulation 3(2) is ultra vires and they seek an order declaring it to be invalid. The notice of motion issued at the behest of the applicants is clear and unambiguous in seeking an order 'declaring regulation 3(2) ultra vires the powers, functions > and duties of the National Board.'

This is the case the applicants make out in their founding affidavit and it accordingly is not open to the applicants, having taken such a stance, to now contend that they do not seek the striking down of regulation 3(2).

36. However even if the applicants are correct in their assertions regarding the nature of the relief they seek, and the option of reading down which they contend for results in saving regulation 3(2) in some re-shaped form, what remains behind is regulation 3(1) which has not been the subject of this application. In this regard there may be two possible scenarios.

If regulation 3(2) is struck down in its entirety, what remains is regulation 3(1) which limits the power of a provincial licensing authority to issue a license for up to 5 LPMs.

37. If regulation 3(2) can be saved to the extent that it empowers the provincial licensing authority to issue a license for more than 5 but less than 40 LPMs, then a conflict would exist between regulation 3(2) and regulation 3(1).

In both scenarios the applicants would not be entitled to the issue of the license they seek, rendering the relief they seek moot and/or academic..

On this score the point in limine is sustainable and the application falls to be dismissed on this ground as well."

Kollapen J did not see it necessary to make any order in respect of the counter-application of the respondents. The respondents do not persist with its counter application launched in the initial proceedings at the court a quo. The second respondent did not partake in the proceedings in the court a quo and is therefore not a party to this appeal. It can safely be assumed that it will abide by the decision of the court; otherwise it would surely have entered the fray.

[5] The appellants now appeal to the Full Court of this Division, against the judgment and orders of Kollapen J. with leave to appeal to the Full Court having been granted by the court a quo on 20 August 2014.

[6] At the commencement of the proceedings the appellants made an application in terms of Rule 49 (7) of the Uniform Rules of court.

for reinstatement of the appellant's appeal and for condonation for the appellant's late filing of the appeal record . The respondents did not oppose this application for condonation; the application was thus granted.

Background

Facts

[7] The following is a summary background to the issues leading to this appeal :

[7.1] The first appellant is the holder of a licence issued by the second respondent, to operate five (5) limited pay-out machines (LPMs) at its premises at the corner of Bok and Banket Streets, Joubert Park, Johannesburg. The second appellant is a licenced route operator of limited pay-out machines within the contemplation of the Gauteng Gambling Act ["GGA"].

[7.2] On 8 June 2012, the first appellant applied to the second respondent for the grant to it of additional gaming licences in order to operate forty

(40) LPMs at its aforementioned premises.

[7.3] On 16 April 2012 the second respondent advised the second appellant (in its capacity as operations manager of the first appellant) that the second respondent had approved its application to operate forty (40) LPMs, subject to concurrence by the (NGB) and; that a licence would be issued to the appellants once the (NGB) had concurred.

[7.4] On 8 October 2012, the first respondent stated in a letter to the appellants' then attorneys that:

The NGB [National Gambling Board] retains and has the ultimate authority to approve or disprove any application for any licence to operate machines in excess of five. The NGB's role should not be viewed as a 'concurrence' or ratification of the PLA's decision as stipulated in your letter, but has to satisfy itself that the national guidelines or criteria for the evaluation of such applications has been met to its satisfaction. '

[7.5] In the same letter the first respondent advised that the application received from the GGB was yet to be considered (own emphasis) and that they had raised certain issues of concern with regard to the application and had sought clarity from the GGB in that regard. Further they stated that they had since received a response from the GGB and that the application would be considered by the Board's structures.

[7.6] In response thereto, the appellants' attorneys on 19 October 2012 raised concern about the delay in the processing and finalising of the application. They requested that the first respondent inform them of the date on which the NGB would take a decision on the application.

[7.7] The first respondent replied on the 8 November 2012, stating that it needed to apply its mind in the determination of the applications taking into consideration its decision making processes, and that the appellants would be advised once a determination had been made. It refuted that it was unnecessarily delaying processing the application.

[7.8] On the 6 December 2012, the appellants launched the proceedings in question herein. The basis of bringing the application, as appears from the appellants' papers, is that the delay [in taking a decision] has been causing financial prejudice to the appellants; i.e. the appellants contended that they were prejudiced financially by the failure to have a licence to operate 40 LPMs issued.

[8] It is common cause that at the time that the appellants launched the application in question herein the first respondent had not taken a decision relative to the application of the first appellant for a licence to operate 40 LPMs.

[9] The empowering provisions which form the basis of the application to operate 40 LPMs is regulation 3(2) of the regulations on Limited Payout Machines, published under GNR 1425 in Government Gazette No. 6977 of 21 December 2000. Regulation 3 reads as follows:

"3. Number of limited payout machines per site

(1) Subject to the provisions of sub-regulation (2), the maximum number of limited payout machines which may be allowed by a provincial

licensing authority to be operated on a single site must be five.

(2) The Board may, on good cause shown and upon application by a provincial licensing authority, approve the operation of limited payout machine in excess of five machines and not more than forty: Provided that such application must be made in respect of every site for which limited payout machines in excess of five is sought."

Reference to 'The Board' refers to the National Gambling Board [the first respondent]; whereas reference to a Provincial Licensing Authority in this case refers to the Provincial Gambling Board (in this case Gauteng Gambling Board/the second respondent.

[10] It was contended on behalf of the appellants that on the proper interpretation of the relevant legislation, the first respondent NGB does not have the right, power or competence in law to receive and consider applications from the second respondent GGB and that the second respondent could not and should not have made any application to the first respondent/NGB to concur in the granting of the licence to operate forty (40) LPM's at the first appellant's premises. It is worth noting that the second respondent does not seem to have any qualms and/or problems whatsoever with having to defer to the first respondent for concurrence, where LPM's in excess of five (5) is concerned as required in terms of regulation 3(2).

- [11] It was further contended on behalf of the appellants that the ground on which the two gambling boards, first and second respondents, rely for the second respondent's application to the first respondent viz. the relevant regulation 3(2) is bad in law and the appellants essentially seek an order declaring the regulation to be void for lack of legality.
- [12] It was thus submitted on behalf of the appellants that the court a quo erred in both the procedural findings and that the appellants should have succeeded on the merits. It was submitted furthermore on behalf of the appellants that therefore the appeal should be upheld and the judgment and orders of the court a quo should be set aside.
- [13] As stated above the respondents contended that the appellants' application was procedurally flawed and in essence constituted a simulated attempt to avoid the specific provisions of The Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). Further that the relief sought by the appellants was moot academic due to the fact that it would have no consequence or benefit for the appellants in that the retention of regulation 3(1) effectively precludes the issue of any further operating licence by the second respondent in respect of the site [first appellant's premises].
- [14] In argument counsel for the appellants submitted that from the beginning the appellant made an application in terms of the GGA and not the National Gambling Act or the regulations [I may just state that the application, referred to as annexure M4 to the founding affidavit, is not even annexed to the papers i.e. does not form part of the record, and in fact, when one has regard to par 24 of Kollapen J's judgment, this application for a licence, which was at the heart of the litigation, was not before the court a quo]. Counsel for the appellants submitted that the second respondent should not even have sought concurrence of the first respondent pertaining to the granting of the licence for 40 LPM's, thus deferring to "regulation that is ultra vires and that has not been properly promulgated ..." Contrary to the argument above and from the correspondence exchanged between the appellants and the first respondent, more specifically the letter of 19 October 2012 from the appellants' attorneys, wherein the appellants {through their attorney}, amongst others, enquire about the processing and the finalisation of their application and requested that the first respondent inform them of the date on which it/NGB would take a decision on their application (own emphasis); it clearly indicates that the appellants recognised the first respondent as the final decision maker in so far as LPM's in excess of five (5) are concerned. The argument advanced above on behalf of the appellant clearly flies in their face.
- [15] The court a quo correctly found that the second respondent has no power to give final approval of the appellants' application for an operating licence in excess of five (5) LPM's; and that such power is vested exclusively in the first respondent in accordance with the provisions of regulation 3(2).
- [16] Surely the appellants submitted their application for LPM's in excess of five (5), knowing very well the architecture of the act and the regulations aforesaid; more specifically that the power to grant such an operating licence is vested with the first respondent. Hence the

correspondence alluded to hereinabove between the appellants' attorneys and the first respondent. In a letter dated 8 November 2012 the first respondent advised the appellants that their application was still under consideration (on emphasis). Without any recourse whatsoever to the first respondent, the appellants instituted the proceedings forming the basis of this appeal while their application for forty (40) LPM"s was still pending before the first respondent.

- [17] As already stated above, it is common cause that at the time the appellants launched the application in question herein, the first respondent had not taken a decision relative to the application of the first appellant for a licence to operate 40 LPM.
- [18] From the correspondence alluded to above, it is clear that the appellants were of the view that the first respondent was delaying in taking a decision pertaining to their application. The appellants therefore, and as correctly found by the court a quo, had options.
- [19] The appellants could have placed the first respondent on terms and insisted that a decision be taken within such given time frame, failing which they would regard this as failure to take a decision therefore a refusal of their application, and would avail themselves of the remedies provided for in PAJA.
- [20] In *Intertrade Two (PIJ Ltd v MEC For Roads And Public Works. Eastern Cape And Another* 2007
- (6) SA 442 (CkCH) Plaskett J stated the following at 453F:
- "It is common cause that no final decision has been taken in respect of the tenders despite the effluxion of more than reasonable time for a decision to be taken. This means that there can be no dispute that Intertrade is entitled to relief s 6(2)(g) together with s (6)(3)(a) of PAJA, provide that failure to take a decision within a reasonable time 'is ground of review and hence an infringement of the fundamental right to just administrative action. "*
- [21] The appellants had not launched a review application in respect of the first respondent's failure to approve its application, but instead opted to seek an order declaring the empowering provision (regulation 3(2)) invalid, thus subverting the need to review the first respondent's failure to make a decision. In our considered view the court a quo correctly found that the point in limine taken by the respondents had merit, and thus correctly dismissed the application of the appellants on this point.
- [22] The core challenge of the appellants pertains to regulation 3(2). In so far as the striking down of regulation 3(2) is concerned, Kollapen J correctly found that the effect of striking down regulation 3(2) would entail that regulation 3(1) still remains and this will not assist the appellants in anyway.
- [23] The appellants in their application at the court a quo sought an order declaring regulation 3(2) invalid as they contend it is ultra vires the powers, functions, and duties of the first respondent, NGB. The problem they faced was that even if they were to be successful in the

relief they sought, as argued by the respondents at the court a quo. and as correctly found by the court a quo, regulation 3(1) which was not the subject of the application at the court a quo, would remain behind. Regulation 3(1) limits the power of a provincial licensing authority to issue a licence for up to five (5) LPM's. The appellants would thus, not be entitled to the issue of the licence they sought, i.e. a licence to operate forty (40) LPM's at the first appellant's

premises. Thus the relief sought by the appellants would be moot academic.

[24] From the reading of the judgment of Kollapen J, it is apparent that the appellants, mooted for the reading down of regulation 3(2) and not the entire striking out of regulation 3(2). The court a quo correctly found that even if this were to be one, this would create conflict between regulation 3(1) and regulation 3(2).

[25] In its heads of arguments and in its submissions before the appeal court the respondents submitted that, seeing the conundrum it is in on the nature of the relief they seek which they unsuccessfully attempted to 'read down' at the court a quo, the appellants now raise new points on appeal.

[26] It is so that in their notice of appeal, the appellants for the first time, raise the following issues on appeal:

"6. It is inconceivable that the National Gambling Board and the Gauteng Gambling Board and, indeed, the Minister, would seek to uphold regulation 3(1) if regulation 3(2) is struck down because of it being unconstitutional. The grounds on which regulation 3(2) are illegitimate and fall foul of the principle of legality apply with equal force to regulation 3(1). A finding on the legality of regulation 3(2) would at the same time inform the legality of regulation 3(1). It is submitted that there are reasonable prospects that another court may have come to a different conclusion on this issue from the conclusion reached by his Lordship.

...

9. His Lordship could and should have found that regulation 3(2) was not authorised in terms of the old National Gambling Act in terms of which it was purportedly promulgated and that it was also not authorized under the new Gambling Act of 2004. It was thus ultra vires.
10. Apart from this his Lordship could and should have found that regulation 3(2) is in conflict with the provisions of the Provincial Gambling Act of 2005 and that unless the Minister of Trade and Industry (the third respondent) could prove that the regulation was considered by the National Council of Provinces, the regulation did not trump the provisions of the Gauteng Gambling Act and is therefore pro non scripto...

[27] It is generally accepted that a question of law may be advanced for the first time on appeal if its consideration then involves no unfairness to the party against whom it is directed, refer *Cole v Government of the Union of SA* 1910 AD 263 at 272-273.

[28] In general, a point not arising on the original pleadings in a case may not be raised on appeal. unless the court granted leave to amend the pleadings. Hence, it has been held that it was not open to an appellant, in the absence of an amendment to his notice of motion, to claim on appeal something which he did not claim in the court a quo. Refer Electrical Contractors ' Association (SA) v Bolding Industries Federation 1980

(2) SASI 6 (T) at 519G-H.

[29] In Donnelly v Barclays National Bank Ltd 1990 (1) SA 375 (W) at 380H-38 IB Kdegler J (Weyers J concurring) gave the following concise summary of the principles applicable in respect of a point taken for the first time on appeal:

"Generally Speaking, a Court of Appeal will not entertain a point not raised in the court below and especially one not raised on the pleadings in the court below. In principle, a Court of Appeal is disinclined to allow a point to be raised for the first time before it. It will generally decline to do so unless

(i) the point is covered by the pleadings ; (i) there would be no unfairness to the other party; (iii) the facts are common cause or well-nigh incontrovertible; and (iv) there is no ground. for thinking that other or further evidence would have been produced that could have affected the point. "

[30] The respondents contend that they were never called upon to produce any evidence on these points in the court a quo, which evidence, they submit, would surely have affected these points.

[31] The appellants dispute that the grounds of appeal listed in paragraphs 6, 9 and 10 of the appellants' notice of appeal constitute new points raised for the first time on appeal. However from the reading of the papers filed by the appellants at the court a quo it is clear that the aforesaid points were not covered. Also, the judgment of the court a quo does not refer to or mention any arguments in respect of the new points raised on appeal. This. in our view and as contended by the respondents, confirms that the points were neither covered in the appellants papers nor raised in argument. The judgment of the court a quo in fact confirms, as already stated above, that the appellants contended during argument at the

1

court a quo that they did not seek the striking down of regulation 3(2), but only sought the 'reading down' of regulation 3(2). This is not consistent with the argument now proffered in support of paragraph 6 of the appellants' notice of appeal. From the reading of Kollapen J's judgment neither was these points canvassed at the court a quo.

- [32] The effect of this is that the appellants in this appeal now attempt to introduce a whole new case which was not argued in the court a quo nor canvassed in the appellants' papers. The new point raised by the appellants in paragraph 6 of their notice of appeal clearly finds no support in the relief claimed by the appellants. In fairness this was never their case and they have not sought an amendment of their notice of motion in this regard.
- [33] The respondents contend that the new point made by the appellants in paragraph 9 of their notice of appeal was neither alleged nor argued by the appellants in the court a quo. i.e. that the LPM Regulations were neither authorized in terms of the 1996 Gambling Act nor the NGA, and that it was therefore ultra vires. It was submitted on behalf of the respondents that had the appellants raised this issue in their papers, the respondents would have responded thereto.
- [34] In paragraph 10 of their notice of appeal and in their heads of argument the appellants contend that because the Minister of Trade and Industry ("MTI") (the third respondent) failed to prove that the LPM Regulations were considered by the National

Council of Provinces and that the latter approved it, it must be regarded as *pro non scripto*. From the contents of the appellants' papers it is clear that the third respondent was never called upon to prove this issue in the initial court proceedings at the court a quo. The raising of this new issue on appeal by the appellants is therefore also extremely prejudicial and unfair towards the respondents and cannot be allowed.

- [35] The appellants for the first time, contended in their heads and submitted in argument that there was conflict between section 49(1A) of the Gauteng Gambling Act and regulation 3(2), and that section 146(6) of the Constitution Act of the Republic of South Africa Act no. 108 of 1996 ("The Constitution Act") process had to be utilized for it to trump the GGA. In this regard it is pertinent to note that the appellants in their founding affidavit clearly indicates that their application for an additional licence to operate 40 (forty) LPM's was made to the second respondent in terms of section 19 read with sections 48 and 46 of the GGA.
- [36] As a result, and on 16 April 2012, the second respondent informed the appellants that their application has been approved by it subject to concurrence by the first respondent, and that a licence will be issued once the first respondent has concurred (own emphasis).
- [37] In our view, the aforesaid undoubtedly demonstrates that the second respondent, notwithstanding the provisions of section 49(1A) of the GGA, fully subscribed to the peremptory requirements of regulation 3(2). Accordingly, the only inescapable inference to be drawn from this is conduct by the second respondent is that it accepts the concurring authority of the first respondent and is most certainly not of the view that section 49(1A) of the GOA trumps regulation 3(2). As already indicated above, the second respondent is not party to these proceedings; as it basically chose not to enter the fray. We thus do not have the benefit of the second respondent's view on this issue, which is fatal to this new point raised on appeal, which was not raised at the court a quo and more so in the papers served on the second respondent, amongst others.

[38] The respondents correctly submitted that the argument raised by the appellants in paragraph 10 of their notice of appeal presupposed that the "section 146(6) process" has not been followed, without having provided the respondents an opportunity to present evidence in respect of this issue.

[39] The issue of determining whether legislation was indeed promulgated in accordance with the approved processes involves the "tagging"

of legislation; refer *Democratic Alliance v President of South Africa and Others* 2014

(4) SA 402 (WCC) at para f.5]-f.13]. It was submitted on behalf of the respondents that that was never required nor requested from the respondents during the proceedings at the court a quo. The appellants did not dispute this.

[40] Clearly the respondents are bound to be prejudiced by the new arguments raised by the appellants for the first time in this

appeal. As stated above, these arguments do not appear in the appellants' founding affidavit or replying affidavit dealing with the factual and legal bases for their application. It cannot be termed as either fair or reasonable to attempt to hold the third respondent accountable when he was never called upon to disprove the evidence in the first place.

[41] On a conspectus of all the facts the appellants failed to properly set out their case in their founding affidavit and this failure is fatal to their appeal as well. The appellants ought to have stated their cause of action to such an extent that the respondents knew what case they have to meet. In *Sex Worker Education and Advocacy Task Force v Minister of Safety and Security and Others* 2009 (6) SA 513 (WCC) at 524 par [32]; Fourie J refers to the dicta of Diemont JA, quoting Krause J when he stated the following:

"... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts slated herein, because those are the facts which the respondent is called upon either to affirm or deny."

[42] The dictates of fairness which characterize civil proceedings do not justify introduction of these new points, especially where the respondents were not provided with an opportunity to adduce any evidence in this regard in the court a quo.

[43] The appellants in this appeal seek to declare regulation 3(2) constitutionally untenable. It is trite that where a case can be decided without traversing a constitutional issue, the course immune of the constitutional determination is the course to be chartered. Refer *S v Mhlungu and others* 1995 (3) SA 292 (CC). Chaskalson CJ, quoting an 1885 American judgment by Matthew J, said the following:

"Never ... anticipate a question of constitutional law in advance of the necessity of deciding it, ... never formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. 11 See: *Lantsi v Council of State Ciskei and others* [1995] ZACC 9; 1995

(4) SA 615 (CC) at par [2]"

[44] Having regard to all the factors herein, the appellants have thus not made out a case that would justify this Court to interfere with the decision by the Court a quo. Under the circumstances, the appeal cannot succeed.

[45] In the premises, I propose the following order:

1. The appeal is dismissed;
2. The appellants are ordered to pay the costs of the appeal , such costs to include the costs of two (2) counsel

L M MOLOPA SETHOSA

JUDGE OF THE HIGH COURT

I agree

C P RABIE

JUDGE OF THE HIGH COURT

P M MABUSE

For the Appellant : Adv: P Louw SC

Ad v: N Jagga

Instructed by : Shestone & Wylie

For the Respondent :Adv: I Ellis SC

Adv: M Majoji

Instructed by : Ramushu Mashile Twala Inc

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2017/648.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/maxime-hotel-pty-limited-and-another-v-chairperson-unknown-topic-agpphc-2017--6a3ea5133b1caa912980a690>

Prepared on 13 October 2026 · Esheria