

SOUTH AFRICA / JUDGMENT

## Royal Entertainment Internet Entre/Cafe v Vakani Gaming North West (Pty) Ltd (M544/2017) [2019] ZANWHC 5 (21 February 2019) [2019] ZANWHC 5

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

M544/2017

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IN

THE NORTH WEST HIGH COURT, MAFIKENG

CASE

NO: M 544/2017

In

the matter between:

ROYAL

ENTERTAINMENT INTERNET ENTRE/CAFÉ

Applicant

And

VAKANI

GAMING NORTH WEST (PTY) LTD

Respondent

In

re: VAKANI  
GAMING NORTH WEST (PTY) LTD  
Applicant  
URVASHU  
PROPERTIES (PTY) LTD  
1st  
Respondent  
(Registration  
number: 2011/109208/07)  
ROYAL  
ENTERTAINMENT INTERNET ENTRE/CAFÉ  
2nd  
Respondent  
THE  
NORHT WEST GAMBLING BOARD  
3rd  
Respondent  
DATE  
OF HEARING  
:  
31 JANUARY 2019  
DATE  
OF JUDGMENT  
:  
21 FEBRUARY 2019  
FOR  
THE APPLICANT  
:  
ADV. JAGGA  
FOR  
THE RESPONDENT  
:  
ADV. ELLIS

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## JUDGMENT

HENDRICKS J

### Introduction

- [1] Vukani Gaming North West (Pty) Ltd filed an application for an interdict against Royal Entertainment Internet Café to prevent it from conducting unlawful gambling activities as prohibited by the National Gambling Act 7 of 2004 and the North West Gambling Act 2 of 2001. This is the main application. Royal Entertainment Internet Café (applicant) filed a notice in terms of Rule 35 (12) of the Uniform Rules of Court (the Rules) for discovery of certain documentation. Vukani Gaming North West (Pty) Ltd (respondent) complied with the request. Dissatisfied, and based on fact that the respondent allegedly did not fully comply with the request, the applicant launched the present application in terms of Rule 30

A to compel compliance. It is alleged that items 3 and 6-9 of the respondent's reply to the Rule 35 (12) application were not fully complied with.

- [2] As far as item 3 is concerned, the request was for proof of certification alternatively approval by the North West Gambling Board (3rd respondent) of the limited pay-out machines (LPM). In response, the respondent attached a letter from the 3rd respondent with the following content:

*"The above-mentioned matter and your three (3) applications before the High Court of South Africa, North West Division, Mahikeng, refers.*

Kindly be advised that the Board hereby confirms that the Limited Payout Machines ("LPMs") as depicted in Annexure E on the Founding Affidavit under case number m543/2017 is that of a type that the Board has approved for Vukani Gaming North West (Pty) Ltd.

Kindly see attached Route Operator License issued to Vukani Gaming NW (Pty) Ltd by the Board for your information."

Items 6 – 9 of the respondent's reply relates to the contracts of employment of Mr. Hennop and Mr. Lowings in which the respondent states that no reference is made to employment contracts and that there is no obligation on it to furnish these documents. It is also not relevant and the request for copies of employment contracts is an abuse of the provisions of Rule 35 (12).

- [3] At the hearing of this Rule 30A application, the respondent raised certain points in limine. At first it was submitted that in terms of Rule 30 A, notice should have been given by the aggrieved party (applicant in this instance) that unless the other party (respondent) complies with the request made, an application will be made in terms of Rule 30 A. The applicant did not notify the respondent that it intends to proceed with an application in terms of Rule 30 A. This, so it was submitted, is fatal and renders the Rule 30A application defective. On this basis alone, so the contention goes further, must the Rule 30A application be dismissed on a punitive costs scale as between attorney and client.

- [4] In response to this submission, it was contended that the fact that no notice of the intended Rule 30A application was given to the respondent, is not fatal. Furthermore, an answering affidavit was filed and so too, heads of argument. The filing of the answering affidavit and heads of argument amounts to the taking of further steps. No application was made that an irregular step was taken by the applicant. In any event, so it was further submitted, will it be to place form over substance if this point in limine is upheld. It was contended that no prejudice at all has been suffered by the respondent.

- [5] Rule 30 A states:

*"(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.*

- (2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet.”

The use of the word “may” indicate that it is not peremptory that such notice be given. The failing to give such notice is in my view not fatally defective. It is correct, as submitted by Mr. Jagga on behalf of the applicant, that the respondent filed an answering affidavit in response to the Rule 30A application and therefore took a further step in the proceedings. I cannot think of any possible prejudice that the respondent suffered as a result of the failure of the applicant to notify the respondent of the intended Rule 30A application. Form should not triumph over substance. This point in limine cannot be upheld.

- [6] As a second point in limine was raised the issue that the respondent complied with the request and furnished the requisite documentation, colour copies of still photos and the video material. The applicant fail to inform this Court that there was compliance and it is submitted that this is a blatant abuse of the processes of this Court. It was further submitted that the applicant’s failure to inform this Court that there was compliance amounts to misleading the Court and it warrants a punitive costs order de bonis propriis against the applicant’s attorney.
- [7] During oral submissions Mr. Jagga did not place much emphasis on the fact that there was a failure to provide these items. Much emphasis was laid on the employment contracts of Mr. Hennop and Mr. Lowings, the certification of the LMP’s by the Board and the issue of relevance. The fact that it was not denied that the documentation, still photos and video material were indeed supplied simply means that there was compliance on the part of the respondent insofar as it relates to these items in terms of the Rule 35 (12) request.
- [8] As a third point in limine it was argued on behalf of the respondent that no reference is made by the deponent to employment agreements (contracts) between the applicant and Mr. Hennop and Mr. Lowings. There is therefore no basis that these employment agreements are relevant. Rule 35
- (12) is available to a party to any proceeding, at any time before the hearing thereof, to deliver a notice as near as maybe in accordance with Form 15 in the First Schedule, to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription

thereof.

See: Protea Assurance Co Ltd v Waverley Agencies CC 1994 (3) SA 247 (C).

- [9] In *Penta Communication Services (Pty) Ltd v King and Another* 2007 (3) SA 471 (C) the court dealt with the question where, upon analysis of a statement made by a deponent, it can reasonably be inferred that a document must exist relating to that fact or allegation, and whether the opposing side would be entitled to request production of such document. The court held:

*“In my view this does not fit within the purpose or scope of Rule 35(12). The Rule provides a mechanism for a party to obtain production and inspection of documents prior to making out his case where these documents have been referred to by another litigant but not annexed. To give the Rule the wide meaning contended for by Mr Vetten would be to sanction immediate and full discovery as provided for by Rule 35(1). This is not the purpose of Rule 35(12).”*

- [10] Mr. Jagga on behalf of the applicant contended that Mr. Hennop and Mr. Lowings states in their affidavits that they are in the employment and/or a consultant of Vakani Gaming (respondent). To this extend, so he submitted, is there a legal relationship between them and the respondent. There is at least an indirect reference to those agreements. This is not a case where inferential reasoning is required to conclude that those agreements exist, it is simply a matter of indirect reference to it. Because of the reference made, the applicant is entitled to those agreements.
- [11] In its response to the request, the respondent stated that no reference is made to the employment contract or mandate between Mr. Hennop or Mr. Lowings and the respondent and that it is under no obligation to furnish such documentation. Furthermore, an employment contract between the respondent and either Mr. Hennop and/or Mr. Lowings has no relevance to the main application.
- [12] Relevance is indeed a factor to be taken into account in an application of this nature.

See: *Universal City Studios v Movie Time* 1983 (4) SA 736 (D).

In *Centre for Child Law v Hoërskool Fochville and Another* 2016 (2) SA 121 (SCA), the following is stated on page 133 D-E:

*“In my view, the court has a general discretion in terms of which it is required to try to strike a balance between the conflicting interests of the parties to the case. Implicit in that is that it should not fetter its own discretion in any manner and particularly not by adopting a predisposition either in favour of or against granting production. And, in the exercise of that discretion, it is obvious, I think, that a court will not make an order against a party to produce a document that cannot be produced or is privileged or irrelevant.”*

- [13] Mr. Jagga submitted that it is relevant to have sight of these employment agreements in order to determine whether or not Mr. Hennop and Mr. Lowings are bias and what their mandates entailed. The notion ‘he who pays the piper calls the tune’ find application, so it was submitted. Mr. Ellis on behalf of the respondent (Vakani Gaming) submitted that none of these documents has any relevance to the issues at hand. Mr. Hennop and Mr. Lowings capacity in relation to the respondent (Vakani Gaming) has been stated. This does not in way

change their factual observations of their visit to the applicant's business. They also do not profess to be experts. The court hearing the main application must decide, based on the evidence presented, whether the applicant is permitted and does make gambling available to members of the public.

[14] I am full agreement with this contention by Mr. Ellis. Mr. Hennop and Mr. Lowings tender evidence of their factual observation when they visited the applicant's premises. Their evidence is akin to the evidence of a patron. There is no difference between their evidence and a punter or patron who visit the applicant's business. It is in any event the task of the court hearing the application (trial court) to determine what reliance, if any, can be placed on their evidence.

[15] Both counsel referred me to similar matters in the Free State High Court, Bloemfontein and the Northern Cape High Court, Kimberley respectively. I was also furnished with copies of these judgments.

In the matter of Purple Dot Investments 34 (Pty) Ltd v Vukani Gaming Free State (Pty) Ltd, case no 1064/2018, a similar application for exactly the same relief was made. Jordaan J states:

*"For argument's sake I would accept that such documents are in existence and sufficiently referred to. However, the evidence of Hennop and Lowings pertain to their factual observations during their inspection. Whether they were employed by Vukani or not is totally irrelevant as to that."*

Whether the terms and scope of their brief made provision for what they did remains equally irrelevant to the facts they attest to. If they were unrelated to Vukani or not briefed at all it would not detract from their factual evidence at all.

What are in issue are their factual evidence as to what transpired during their visit. That forms the basis for the main application by Vukani.

That is what the 2nd respondent is called to answer to and their employment or not and brief of not remains irrelevant to the issues as to whether the 2nd respondent conducted illegal gambling activities."

Jordaan J dismissed the application with costs on a punitive scale as between attorney and client. There lies no appeal pending in respect to this matter, so I am told. I am in full agreement with Jordaan J.

[16] In the matter of Star Internet Café v Vukani Gaming Northern Cape (Pty) Ltd, Case no 254/2018, Sieberhagen A.J dealt with exactly the same issues. The following is stated:

*"[24] I do not consider the words "employed" and "brief" as set out in the supporting affidavits in the current matter as an indirect reference to the employment contracts and mandates of Hennop and Lowings. I agree with the approach as set out in paragraph 17 of the PENTA matter."*

*“[17] This was in effect the argument adopted by the second respondent in the compelling application. The approach was developed by Mr Vetten in argument, his submission being that where, upon analysis of a statement made by a deponent it can reasonably be inferred that a document/s must exist relating to that fact or allegation, then the opposing party is entitled to call for the production of such documents. In my view this extends the provisions of rule 35(12) too far in that it gives the concept of a "reference" to a document so broad a meaning as to make it almost superfluous. In my view this does not fit within the purpose or scope of rule 35(12). The subrule provides a mechanism for a party to obtain production and inspection of documents prior to making out his case where these documents have been referred to by another litigant but not annexed. To give the subrule the wide meaning contended for by Mr Vetten would be to sanction immediate and full discovery as provided for by rule 35(1). This is not the purpose of the subrule 35(12).”*

[25] In respect of the "relevance" of the documents sought, I agree with Jordaan J, that they are irrelevant. What is relevant, however, in relation to the investigation of Hennop and Lowings, is their factual evidence as to what had transpired during their visit. Star Internet Café has already been provided with a DVD with the full video material and photographs recorded by Hennop and Lowings in respect of their investigation. As a result thereof I am of the view that there is balance between the conflicting interests of the parties to the case and that Star Internet Café will be able to file opposing papers in the main application in which they can attack the factual findings and objectivity of Hennop and Lowings”

[17] Sieberhagen A.J found that the applicant in that case was not entitled to those documents and therefore dismissed the application with costs. She did however grant leave to appeal in respect of this judgement. However, I am of the view that the required documents are not relevant.

## Conclusion

[18] I am satisfied that the respondent (Vukani Gaming) has satisfactorily complied with the Rule 35 (12) notice as it was obliged to do and this application should therefore fail. Costs should also follow the result. I am of the view that a punitive cost order is warranted. The insistence with the Rule 30A application despite the fact that the documentation, colour photo's and video material have been supplied and the applicant kept quiet about it, is an abuse of the process of court. Likewise, in two similar matters in two different divisions of the High Court (Bloemfontein and Kimberley) were similar issues argued by the same counsel. Counsel should have realised what the outcome was and should have advised his client accordingly. It was not necessary to bring the present application in this Court on exactly the same facts and issues raised in the other High Courts.

## Order

[19] Consequently the following order is made:

- (i) The Rule 30A application is dismissed.

(ii) The applicant in the Rule 30A application, (Royal Entertainment Internet Café) is ordered to pay the costs of this application.

(iii) Such costs should be on the scale as between attorney and client.

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R D HENDRICKS

JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG.

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