THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1330/2021

In the matter between:

THE WESTERN CAPE GAMBLING AND RACING BOARD — **FIRST APPELLANT**

THE PROVINCIAL MINISTER OF FINANCE, WESTERN CAPE — **SECOND APPELLANT**

and

SUNWEST INTERNATIONAL (PTY) LTD t/a GRANDWEST CASINO & ENTERTAINMENT WORLD — **FIRST RESPONDENT**

WORCESTER CASINO (PTY)LTD t/a GOLDEN VALLEY CASINO & LODGE — **SECOND RESPONDENT**

EASTERN CAPE GAMBLING BOARD — **AMICUS CURIAE**

Neutral citation: *The Western Cape Gambling and Racing Board and Another v Sunwest International t/a Grandwest Casino & Entertainment World and Another (Eastern Cape Gambling Board as Amicus Curiae)* (Case no 1330/2021) [2023] ZASCA 118 (04 September 2023)

Coram: DAMBUZA ADP, MOCUMIE and PLASKET JJA and GOOSEN and MALI AJJA

Heard: 22 November 2022

Delivered: 4 September 2023

Summary: Tax Law – Gambling – gambling tax – s 64 of the Western Cape Gambling Tax Act 4 of 1996 and Schedules thereto – whether freeplay credits awarded by casino operator licence holders to its customers attract gambling tax under s 64 read with the Schedules of the Act – under s 64 of the Act gambling tax is assessed on gambling activity of customers – freeplay credits form part of the 'drop' which is a component of 'adjusted gross revenue' on which taxable revenue is determined – gambling tax is payable in respect of freeplay credits.

ORDER

On appeal from: The Full Court of the Western Cape Division of the High Court, Cape Town (Erasmus, Mabindla-Boqwana and Papier JJ sitting as court of first instance):

1 The application to introduce further evidence on appeal is dismissed.

2 The *amicus curiae* is ordered to pay the respondents' costs for the application for introduction of further evidence, such costs to include the costs of two counsel where so employed.

3 The appeal is upheld.

4 The order of the Full Court is set aside and replaced with the following order:

'The application is dismissed.'

JUDGMENT

Dambuza ADP (Mocumie and Plasket JJA and Goosen and Mali AJJA)

Introduction

[1] The issue for determination in this appeal is whether 'freeplay credits' (freeplay) used to bet in slot machines at the first and second respondents' casinos attract gambling taxes and levies payable to the first appellant, the Western Cape Gambling and Racing Board (the WC Board). The Full Court of the Western Cape Division of the High Court (the high

court) held that freeplay does not form part of taxable revenue under the Western Cape Gambling and Racing Act 4 of 1996 (the Act). The WC Board together with the second appellant, the Provincial Minister of Finance, Western Cape (MEC) appeal against the judgment of the high court, leave having been granted by that court.

[2] The Eastern Cape Gambling Board (the EC Board) was admitted as *amicus curiae* in the high court proceedings. It had also been confronted with similar issues relating to freeplay in the Eastern Cape High Court. In those court proceedings the applicants were Emfuleni Resorts t/a Boardwalk Casino and Entertainment World and Transkei Sun International t/a Wild Coast Sun, which are subsidiaries of Sun International (South Africa) (EC casinos). Having been admitted as amicus *curiae* in this appeal, apart from aligning itself with the contentions made by the WC Board, the EC Board also brought an application for the introduction of further evidence in the appeal.

The facts

[3] The first and second respondents, Sunwest International, trading as Grandwest Casino & Entertainment World (Grandwest) and Worcester Casino, trading as Golden Valley Casino and Lodge (Golden Valley) are also subsidiaries of Sun International. They are holders of casino operator licences granted in terms of s 27*(a)* of the Act. In the high court they obtained an order declaring that freeplay credits does not constitute part of the 'drop' which is a component in the formula used for computation of adjusted gross revenue when determining taxable revenue under s 64, read with Schedule III of the Act. That section regulates payment of gambling and betting taxes and levies

to the WC Board by holders of casino operator licenses in the Western Cape Province. The respondents were granted consequential relief requiring the MEC to set-off the amounts already paid by them against their future liability for gambling tax.

[4] In gambling parlance, freeplay refers to special non-cashable credits loaded by the respondents as casino operators onto card accounts that a group of gamblers known as the 'most valued customers' use when playing at the casino slot machines.[1] These customers do not pay for freeplay. It is a gift or reward given by the casinos to their most frequent customers.

[5] Freeplay is a cash equivalent denominated in rand value, and the amount given to a customer is based on the extent of his or her past gambling activities and conduct. The customer downloads the credits onto a slot machine within a specified time, at a specified casino, and then places bets. As the customer plays, the credits are deducted from his or her slot account. The casino does not receive any revenue from a game played with freeplay. But the winnings accrue to the player. Freeplay cannot be redeemed for cash.

[6] A dispute arose between the WC Board and the casinos as to whether freeplay is part of the casinos' taxable revenue for purposes of assessing gambling tax payable by casino licence holders. The context is this: under s 64(1) of the Act casino licence holders are liable for gambling and betting taxes and levies which are computed as provided in Schedule III and IV of the

[1] In March 2017 freeplay was renamed Xtra Play. However, for convenience, the term will still be used in this judgment.

Act. In terms of s 64(5) of the Act, the provisions of Schedules III and IV, which include the assessment of gambling tax payable by licence holders, are administered by the Chief Executive Officer on behalf of the WC Board.

[7] The dispute arose after the Sun International management arm, Sun International Management Limited (SIML) introduced a software system known as BALLY to its subsidiaries nationally. BALLY is able to distinguish between freeplay and credits paid for in cash by a player. This allowed for SIML to exclude the value of freeplay when calculating gambling taxes in provinces where Sun International operates casinos. SIML sought approval from the WC Board for the exclusion of non-cashable bets funded by the casinos.

[8] The exchange between the parties culminated in a letter dated 9 March 2017 wherein the WC Board expressed the view that freeplay is part of the casinos' 'adjusted gross revenue' and is therefore part of their taxable revenue. The casinos considered this view to be a decision of the Board on the issue and launched an appeal against it as provided in s 13(4) of the Act.[2] The Board protested that it had merely conveyed its view on the dispute rather than making a decision or determination on the treatment of freeplay. The parties then agreed to approach the high court for a declaratory order on the interpretation of the relevant taxation provisions of the Act.

[2] Section 13(4) provides: 'Any person aggrieved by a decision taken in terms of a delegated power or function shall have a right of appeal to the Board against such decision in the manner and within the time prescribed.'

[9] In the high court the casinos contended that on a proper interpretation of s 64, freeplay is excluded from the definition of the 'drop' for purposes of computation of gambling tax. They contended that the purpose for imposition of gambling tax is to raise public funds from revenue received by licence holders in proportion to the financial benefit enjoyed by them. They posited that the tax is levied on the premise that the licence holder has acquired revenue from gambling, and is therefore 'better off' financially. However, they do not derive any revenue or *quid pro quo* from a game played with free play. Instead, whilst their financial position remains the same if a customer loses a freeplay game, a win on a freeplay game results in financial loss to the casino. Consequently, including freeplay in the taxable revenue constituted arbitrary deprivation of property in breach of s 25 (1) of the Constitution of the Republic of South Africa (the Constitution), because it requires a licence holder to pay an increased gambling tax in circumstances where its financial position has not improved. Constitutional imperatives therefore militate against taxation of freeplay, so it was argued.

[10] The argument went further: freeplay results in increased gross gaming revenue (GGR) over time because it attracts more players to casinos, and once freeplay credits are used up the players use their own resources to continue playing. Consequently, the use of freeplay results in increased gambling tax liability for gambling licence holders.

[11] The WC Board's argument centred on the text of s 64 read with the Schedules, and the purpose of the section as stated in the Act. It highlighted the existence of distinction in the language of s 64 and the definitions of the

terms contained therein, between credits that are paid for and those that are free. It maintained that this is because the intention was to advance administrative simplicity and to protect tax revenue. Furthermore, unlike with assessment of income tax, where freeplay is deductible as an expense incurred in the production of income, it is not deductible for gambling tax assessment.

[12] The high court agreed with the respondents' interpretation of the Act. In addition to declaring that freeplay does not form part of taxable revenue for purposes of gambling tax computation, it ordered the WC Board to set off against the respondents' future liability to pay gambling tax, the amounts agreed or proved by them to have been derived from freeplay in their past tax assessments. The court was of the view that it was irrational to levy gambling taxes on a 'neutral position', especially when it had been demonstrated that over time freeplay results in growth in gambling revenue which, in turn, results in increased gambling tax liability.

[13] In this appeal the parties maintain the same arguments they made before the high court. The EC Board, as the *amicus*, asserted that there is no evidence that the freeplay goals of customer loyalty and increased gambling activity over time have ever been attained. It is in this regard, in part, that it seeks to introduce the evidence of Professor Anthony Lucas (Prof Lucas), a professor in casino management in Nevada, United States of America (US). In sum, Prof Lucas asserts that freeplay does not increase gross gaming revenue (GGR) in casinos. He refers to a number of academic writings from the US to illustrate that imposition of gambling tax varies in different jurisdictions and is a matter of legislative election rather than uniform application. In relation

to the constitutional protection of property rights, Prof Lucas states that the inclusion of freeplay for the purposes of computing tax liability has not been successfully challenged in the US. The argument is that given the similarities in the US and South African contexts, the courts in this country should also use the same approach as in that country.

Discussion

Text, context and purpose

[14] The principles applicable to interpretation of legal documents in this country are trite. The language used in the legal text sought to be interpreted remains central to the interpretative exercise; 'for without the written text there would be no interpretative exercise'.[3] But the words in a document must be considered sensibly, and due regard must be had to the context in which they are used. In the relevant part s 64 reads as follows:

'Imposition of taxes and levies on gambling and betting

64. (1) From time to time and in the manner prescribed, there shall be paid to the Board gambling and betting taxes and levies by the holders of licences as provided for in Schedules III and IV.

(2) Unless otherwise prescribed, the taxes and levies contemplated in subsection (1) shall be –

(a) on the bases, at the rates or percentages or in the amounts, and

(b) payable in the manner and at the times

provided for in Schedules III and IV.'

[15] Item 1*(a)* in Part B of Schedule III, sets out the rate at which gambling tax is to be computed. In relation to a casino operator licence, gambling tax is

[3] *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2018] ZASCA 176 at para 63.

payable on taxable revenue. Under Item 1 in Part A of Schedule III taxable revenue is defined as 'adjusted gross revenue less admissible deductions as determined under this Act' (taxable revenue – adjusted gross revenue (AGR) – admissible deductions). It is common cause in these proceedings that freeplay is not an admissible deduction.

[16] AGR is defined in Item 1of Part A of Schedule III. Only subparagraphs *(d)* and *(e)* of that definition are relevant in this instance. In terms thereof AGR means:

'*(d)* in relation to slot machines, other than those contemplated in subparagraph *(e)* and *(f)* below operated by a licence holder in the Province, the drop, less fills to the machine and winnings paid out; provided that the initial hopper load shall not constitute a fill and shall not affect the calculation of gross adjusted income;

(e) in relation to slot machines operated by a licence holder in the Province which are linked via a wide-area progressive system, the drop, less fills to the machine, less any contributions made by the licence holder which are payable in consequence of such wide-area progressive system in respect of such slot machines during the tax period, and less any winnings paid out which are not recoverable from the central fund in terms of the wide-area progressive system; provided that the initial hopper load shall not constitute a fill and shall not affect the calculation of adjusted gross revenue; provided further that where any surplus amount is distributed from the central fund to a licence holder or where any licence holder withdraws from a wide-area progressive system and in consequence of such distribution or withdrawal recovers or recoups during any tax period any contribution previously deducted under this subparagraph, such contribution so recovered or recouped shall be included in the licence holder's adjusted gross revenue in the tax period in which the contribution is recovered or recouped'.(emphasis supplied)

[17] The 'drop', in the context of gaming on slot machines, is defined in Part A of Schedule III as: 'the amount deducted from players' slot accounts as a

result of slot machine play'.[4] The 'fills to the machines' represents the winnings of players which require that the machines be refilled. In sum therefore, the AGR is the amount deducted from players' slot accounts as a result of slot machine play, less the fills to the machines together with winnings paid out. Significantly, the starting point in the determination of taxable revenue is the drop. Contrary to the respondents' contention, there is no distinction, in the language used in the definition of the 'drop', between own resource credits and freeplay credits deducted from a player's account. The 'drop' is 'the amount deducted from players' slot account as a result of slot machine play'. There is no ambiguity in the language used in the text.

[18] In addition, this interpretation of the definition of the 'drop' is consistent with the definition of the drop in relation to cashless slot machines as: 'the total amount of money and tokens removed from the drop box'. It is similarly consistent with the definition of the drop in relation to table games, which is: 'the total amount of money, chips and tokens contained in the drop boxes'.

[19] The interpretation of the 'drop' advanced by the WC Board is not only grounded in the language used in s 64(1) and the definitions in Schedule III and IV, it also accounts for the purpose of s 64 as conveyed in the heading

[4] In the relevant part Item 1 of Part A of Schedule III reads as follows:

'"drop" means—

... (b) in relation to slot machines, the total amount of money and tokens removed from the drop box, or for cash-less slot machines, the amount deducted from players' slot accounts as a result of slot machine play'.

thereto: the imposition of tax on gambling and betting activities.[5] What is sought to be taxed is the gambling and betting activity. Gambling activity is defined in s 1(2) of the Act as follows:

'(2) An activity is a gambling activity if it involves—

(a) placing or accepting a bet or wager in terms of subsection (3);

(b) placing or accepting a totalisator bet, in terms of subsection (4); or

(c) making available for play, or playing bingo or another gambling game as contemplated in subsection (5)'

[20] Subsection1(5) provides that:

'An activity is a gambling game if—

(a) it meets the following criteria:

(i) it is played upon payment of any consideration, with the chance that the person playing the game might become entitled to, or receive a pay-out; and

(ii) the result might be determined by the skill of the player, the element of chance, or both; or

(b) it is a bet or wager in terms of subsection (3), that is placed in a casino in relation to an activity that meets the criteria in paragraph *(a).*

Simply put, gambling tax is payable on a gambling game played upon payment of any consideration. Such consideration may be 'money, merchandise, token . . . or any other thing, undertaking promise, agreement or assurance, regardless of its apparent or intrinsic value . . .'[6]

Clearly, the fact that a licence holder makes no gain or derives no benefit from a game of play is irrelevant in the assessment of liability for gambling tax.[7]

---

[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13;2012 (4) SA 593 (SCA) para 18.

[6] See definition of 'consideration' in s 1(1) of the Act.

[7] The definition of 'consideration' in s 1(1) of the Act is the following:

'Consideration' means:

[21] The respondents' approach in interpreting s 64 inverts the established interpretative process by first devising a purpose for s 64, and then imposing the devised purpose on the wording of the section. Their starting point is that gambling tax is aimed at raising public funds in proportion to the financial benefit derived by the licence holder. Apart from the fact that this approach is incorrect, the devised purpose finds no support in the language of s 64.

[22] The high-watermark of the respondents' argument with regard to the language used in s 64 is that the word 'amount' in 'the amount deducted from payers' slot accounts…'the definition of the 'drop' refers to 'revenue', in keeping with 'taxable revenue'. To support this interpretation they introduce the dictionary meaning of revenue to reach the conclusion that 'amount' must mean 'amount of money', and therefore the customer's own funds (as opposed to freeplay). However, as shown above, 'taxable revenue' is specifically defined in the Act. And the use of the defined term 'consideration', for in relation to gambling activity rather than money, is deliberate. On the respondents' interpretation, the word 'revenue' would have to be read into the definition of the 'drop.' That would be improper when s 64 is capable of clear and sensible interpretation.

(a) money, merchandise, property, a cheque, a token, a ticket, electronic credit, debit or an electronic chip, or similar object; or

(b) any other thing, undertaking, promise, agreement or assurance, regardless of its apparent or intrinsic value, or whether it is transferred directly or indirectly'.

[23] Generally the word 'amount' indicates a quantity of something.[8] It derives its full meaning from other words with which it is used, and its wider context. In this case the word is used as 'amount deducted from players' stock accounts as a result of slot machine play'.[9] Its meaning in this context is clear. Where the amount deducted from a player's slot account consists of different forms of considerations there is no basis for confining 'the drop' to only a portion of the deduction.

Constitutional considerations

[24] The imposition of gambling and betting tax is a deliberate policy adopted by the Western Cape Provincial Government. The policy entails the charging of tax on holders of gambling licences for the act of conducting gambling businesses. Nothing is irrational about such policy. And the argument that the imposition of the tax in the absence of revenue or benefit amounts to unlawful deprivation of property is misguided.

Application to introduce new evidence

[25] The answer to the issue whether the respondents should pay gambling tax on freeplay lies in the interpretation of s 64 of the Act. Prof Lucas' evidence is not only unnecessary for the interpretative exercise, it is also irrelevant. The *amicus curiae* must pay the respondents' costs for the application to introduce new evidence.

---

[8] See *Oxford Concise English Dictionary*. See also *Merrian Webster Dictionary*: the total number or quantity; the quantity at hand or under consideration.

[9] See also footnote 4.

[26] As to the costs of the appeal, the approach to the courts was, in effect, a joint venture by the parties to achieve clarity on an issue of importance to all of them. As a result, there should be no order as to costs.

[27] Consequently the following order shall issue:

1 The application to introduce further evidence is dismissed.

2 The *amicus curiae* is ordered to pay the respondents' costs of the application for introduction of further evidence, such costs to include costs of two counsel where so employed.

3 The appeal is upheld.

4 The order of the Full Court is set aside and replaced with the following order:

'The application is dismissed'.

N DAMBUZA

JUDGE OF APPEAL

Appearances:

Counsel for the first appellant:	J A Newdigate SC
Instructed by:	Marais Muller Hendricks Inc, Cape Town Phatshoane Henney, Bloemfontein
Counsel for the second appellant:	R T Williams SC and H Cassim
Instructed by:	State Attorney, Cape Town State Attorney, Bloemfontein
Counsel for the amicus curiae:	J de Waal and N de Jager
Instructed by:	Tshangane Le Roux Inc, Gqeberha Honey Attorneys, Bloemfontein
Counsel for respondents:	A Cockrell SC and N Ferreira
Instructed by:	Cliffe Dekker Hofmeyer Inc, Sandton Webbers Attorneys Bloemfontein