

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

CASE NUMBER: 68993/09

DATE: 23 FEBRUARY 2010

In the matter between:

COLIN JOSEPH DE JAGER

First Applicant

SOUTH ROCK TRADING 20 CC

Second Applicant

And

THE MINISTER OF SAFETY AND SECURITY N.O.

First Respondent

**THE NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE N.O.**

Second Respondent

**THE PROVINCIAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE FOR
THE GAUTENG PROVINCE N.O.**

Third Respondent

**THE CHAIRPERSON:
GAUTENG GAMBLING BOARD N.O.**

Fourth Respondent

CASINO ASSOCIATION OF SOUTH AFRICA

Intervening Party

JUDGMENT

LOUW J

The parties

The first and second applicants are owners of businesses in Carletonville and Fochville within the local municipality of Merafong. It is in dispute whether “*gaming*”, as defined, is taking place at these premises.

The first respondent is the Minister of Safety and Security, the second is the National Commissioner of the SAPS and the third is the Provincial Commissioner. I shall refer to the first to third respondents jointly as “the Police”.

The fourth respondent is the Gauteng Gambling Board which exists in terms of the Gauteng Gambling Act.

The last party to this application is the intervening party, the Casino Association of South Africa which I shall herein refer to as “CASA”.

Urgency and the intervention of CASA

Firstly, I find the application to be urgent. An interim interdict was issued in the urgent court on 24 November 2009 which order allowed the applicants to carry on there businesses until 8 December 2009. On 8 December 2009 the matter was heard by me and I reserved judgment.

As on 8 December 2009 I am of the view that the matter was urgent. I reserved judgment and extended the interdict until the date of my judgment. If the activities carried on by the applicants are *prima facie* unlawful, then that should not be allowed to continue. On the other hand, if the businesses are *prima facie* lawful, then that should be so decided and an interim interdict granted until the main application, in terms of which the applicants seeks various decelerators, have been decided.

Secondly, CASA relied as authority for their intervention on the proposition that a trader who sustains damage through the illegal trading of another, which is expressly prohibited by statute, suffers an infringement of his rights which entitles him to an order interdicting the continuance of such illegal trading.¹

I therefore find that CASA has a material and substantial interest in the outcome of these proceedings. Accordingly the leave to intervene is granted.

Issues in dispute

Apart from the application of the *Criminal Procedure Act*, 51 of 1977, (the CPA) with which I shall deal hereunder, the two main issues in dispute are the following:

- Whether the applicants' machines are "gaming machines" as contemplated in the *Gauteng Gambling Act*, 4 of 1995 and - or the *National Gambling Act*, 7 of 2004.
- Even if the machines are found to be such, the factual question is whether they were in fact used for gambling.

The CPA

The relevant parts of the *Criminal Procedure Act* provides as follows:

"20 State may seize certain articles

The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)-

- (a) *which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;*
- (b) *which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or*

¹ *Modern Appliances Ltd v African Auctions and Estates (Pty) Ltd* 1961(3) SA 240 (W) at 241 F – 242 G
Bophuthatswana Transport Holdings v Matthysen Bus Vervoer 1996(2) SA 166 (A) at 173 – 4.

- (c) *which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.*

21 Article to be seized under search warrant

(1) *Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued—*

- (a) *by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction; or*
- (b) *by a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such article in the possession or under the control of any person or upon or at any premises is required in evidence at such proceedings.”*

“22 Circumstances in which article may be seized without search warrant

A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20—

- (a) *if the person concerned consents to such search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or*
- (b) *if he on reasonable grounds believes—*
 - (i) *that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and*
 - (ii) *that the delay in obtaining such warrant would defeat the object of the search.”*

The essence of the applicants' case is that the Police acted from an improper or ulterior motive. This is best set out in the applicants' heads of argument:

- “4. *Accordingly, it is apparent from the Respondents' own evidence that it was not necessary for them to seize more than two machines in issue as evidence. The seizure of all of the Applicants' machines on the premises on which the searches were conducted was conducted for an improper purpose – to effectively close down the Applicants' business without having to go through the prior formality of a criminal trial.*”

This contention is further elaborated in the applicants' replying heads of argument from which I quote paragraphs 6, 7 and 8:

- “6. *First, it was conceded by counsel for the Fourth Respondent (“the Gauteng Gambling Board”) that it was not the **nature** of the machines found on the Applicants' premises that would determine the outcome of a criminal trial, but **the purpose for which the machines were used**. If the machines were being used in circumstances where the customers paid money with a prospect of obtaining a **financial gain**, then the Applicants might be engaged in “gambling activity”. On the other hand, if this was not the purpose for which the machines were being utilised, a criminal trial would not succeed.*²

7. *In this respect, the Applicants state (FA p23, para 52.2) that:*

“52.2 *[M]y and the second applicants' businesses are conducted in such a way that it does not fall foul of that legislation as –*

² The Court is referred to the relevant sections of the National Gambling Act 7 of 2004 (“the NGA”) and the Gauteng Gambling Act 4 of 1995 (“the GGA”), which are recited in the Applicants' Founding Affidavit at **p14-19, para 33-38**.

- (i) *the equipment is operated for entertainment purposes;*
- (ii) ***does not allow any outcome other than the opportunity to play a further game; and***
- (iii) ***an opportunity to play a further game is limited to that which the National Act contemplates.***³

[emphasis added].

8. *In this context the nature of the machines will be of only peripheral relevance and minimal evidentiary value in the pending criminal trial. The real issue will be whether the Applicants are affording their customers an opportunity to obtain a financial gain over and above the cost of playing the game. That will depend upon the **testimony of witnesses**, not the nature of the seized equipment.”*

The applicants rely strongly on the *Highstead* decision⁴.

The *Highstead* decision was distinguished in *AK Entertainment cc v Minister of Safety and Security*⁵ as follows:

“The Highstead Entertainment case supra was decided on the assumption that the purpose of the search warrant is to obtain articles which it is believed may be of use in proving a criminal case; and it was held, on the facts of that case, that the State was already in possession of all the evidence it needed (at 393C-E). In the present matter no criminal proceedings are pending. More importantly the

³ These allegations by the First Applicant are confirmed by a member of the Second Applicant. (FA p36, para 4).

⁴ *Highstead Entertainment (Pty) Ltd t/a “The Club” v The Minister of Law and Order and Others* 1994(1)SA 387 (C)

⁵ 1995(1)SA 783 (E)

applicant has not established, or even alleged, why the respondents cannot use the powers of seizure for the purposes mentioned in s 20, ie if the articles are concerned in or are intended for use in the commission of an offence. The applicant's case, on the affidavits, proceeded on the basis that the articles are not required as evidence because the State had all the evidence it needed. The respondents denied that the police were precluded from seizing the applicant's equipment in order to procure evidence for a prosecution. I do not consider it necessary to decide whether the respondents are correct. For as there was no allegation by the applicant that the police could not seize the articles for either of the other purposes referred to in s 20, the respondents were not called upon to deal therewith. The result is, quite simply, that the applicant has not established that the seizure of its gambling equipment will be impermissible for all of the purposes of s 20. It only remains to add in this regard that in the Highstead Entertainment case supra the applicant believed, and alleged, that its activities were lawful and it claimed a temporary interdict pending the outcome of a criminal case that would have determined whether or not it was trading legally. In this matter the applicant concedes that it is carrying on business in contravention of the Gambling Act and it seeks an order pending a decision of the Board on an application for a licence, alternatively pending a decision of the Constitutional Court on the co-existence of the three statutes to which I have earlier referred."

(my emphasis)

The facts and the nature of the machines

The first and second applicants are carrying on business in Fochville and Carletonville under trading names such as Las Vegas Entertainment and Pink Panther Entertainment. According to applicants they offer amusement which do not amount to "gambling" as defined. I shall briefly deal with the relevant legislation hereunder. It is further common cause that the first and second applicants have the same kind of machines at there respective premises.

On 23 September 2009 police officials from the Randfontein Police Station accompanied by members of the fourth respondent, without warrant, seized 144 of the first applicants machines. It is common cause that all the machines, at both applicants premises, are the same as to the nature thereof and what these machines are capable of.

The police had two of these machines examined by an expert Mr Marimuthu and he concluded that both machines are “gaming machines”. The Gauteng Gambling Act, 4 of 1995, defines a “gaming machine”. The essence of this definition is that after a person has paid money to play that machine, such a person may receive cash or anything of value after having successfully operated the machine. In s 1 of the National Gambling Act, 7 of 2004, the term “gambling machine” is defined as:

“Any mechanical, electrical, video, electronic, electro-mechanical or other device, contrivance, machine or software, other than an amusement machine, that-

- (a) is available to be played or operated upon payment of a consideration; and*
- (b) may, as a result of playing or operating it, entitle the player or operator to a pay-out, or deliver a pay-out to the player or operator;”*

The Gauteng Gambling Act defines “gambling” as follows:

“the wagering of a stake or money or anything of value on the unknown result of a future event at the risk of losing all or a portion thereof for the sake of a return, irrespective of whether any measure skill is involved or not and encompasses all forms of gaming and betting, but excludes the operation of a machine contemplated in sub-section (3) or (4), provided that the responsible member may, on the recommendation of the Board declare certain games of skill not to be gambling.”

The applicants also had some of their machines tested by an expert, Mr O'Neill. He came to the conclusion that the machines are not gaming machines or gambling machines as defined in the relevant National and Provincial Legislation. He however points out in par 7 of his opinion that what is determinative, apart from the ability of a machine to perform

a function such as gambling, it also has to be shown that the machine was utilised in a specific manner.

Having regard to these conflicting opinions, it is of crucial importance to, on the facts of this case, determine whether these machines at the applicants premises were used for gambling or gaming.

During argument on behalf of the applicants this was also advanced. Mr Levenberg SC argued that the test is not what the machines are, i.e. what they are capable of, but how they are used. It seemed that none of the other parties to this application had any problem with this proposition.

It then becomes crucial to look at any evidence of how these machines were used. The first to third respondent produced an affidavit by Mr Gomez stating that he has for at least two years frequented one of the applicants' establishments i.e. Las Vegas/Mermaid. He clearly states that he starts operating the machine by paying which payment is then loaded as a credit on a magnetic stick. He further states in his affidavit at par 6:

“Win or lose after I finished playing I take the stick to the counter and they will then pay out what an amount is credited on it.”

Mr Gomez further states that he personally saw a person winning R 15 000 in this way.

The applicants put up no evidence by any customer to gainsay the version of Mr Gomez. If innocent activities were going on at these premises the applicant could surely have produced the affidavits of many of their customers to state exactly that. One must take into account that over the number of years that this activity was going on, thousands of people must have been playing at these premises. It is astounding that the applicants could not put up the affidavit of any customer who took part in these “innocent” activities.

I therefore find on an overwhelming balance of probabilities that gaming and gambling were taking place at these premises in contravention of the relevant legislation.

The Highstead case

As stated before the applicants rely very strongly on this decision. In that case machines were seized at the applicants premises in Sea Point, Cape Town. The applicant sought a temporary interdict to prohibit further search and seizure pending the outcome of a criminal trial. That criminal trial had already been set down for hearing by the High Court within a relevantly short period from the date of the application.

The court found that the purpose of a search warrant is the procurement of articles which is reasonably necessarily to prove a criminal case. The court referred in general terms to s 20 and 21 of the CPA without referring specifically to s 20 (a) and (c), which I have quoted above. The essence of the judge's reasoning is captured in the following paragraph⁶:

“The purpose of a search warrant is the procurement of articles which it is reasonably believed may be of use in proving a criminal case – Cine Films (Pty) Ltd and Others v Commissioner of Police and Others [1971 \(4\) SA 574 \(W\)](#). As far as the pending criminal case is concerned there can be no need to procure any further articles for such use as, according to third respondent, the State was ready as at 4 May 1992 to proceed with its case, the postponement to 10 August being granted at the instance of applicant. Insofar as may be necessary applicant has indicated its willingness to make any admissions necessary so as to ensure that all that will be in issue at the criminal trial is whether the two games are or are not games of chance in terms of the Gambling Act. It cannot be said that any further search or seizure is necessary in respect of the pending prosecution or, for that matter, any future prosecutions which could possibly eventuate in respect of applicant's continued activities. The issue of a warrant for this purpose would be unnecessary for the achievement of the purposes set out in ss 20 and 21 and the issuing official would not be acting bona fide, but with an ulterior, improper motive.”

⁶ at 393 B - E

If the learned judge found that the procurement of evidence is the only purpose of the search and seizure, I respectfully differ from that conclusion. The wording of s 20(a) and (c) of the CPA are clear.

The *Highstead* case can also be distinguished from the present facts as follows:

1. The attorneys for the applicant in that case commenced correspondence with the police even prior to the commencement of its business, so as to ascertain the view of the police in regard thereto.
2. It was found that the applicant in that case conducted the business in a genuine belief, based on legal advice, that it was operating within the law.
3. In regard to the criminal prosecution the it was found that the applicants would co - operate fully and make the necessary admissions in order to, obviously, shorten the proceedings.
4. The trial in the High Court was set down for a date approximately three months from the date of the hearing of that application.
5. In that case there was no evidence of anyone who had received money in the process of playing the machines.

To my mind these are substantial differences. I find that the conduct of the Police in this case did not take place as a result of an ulterior or improper reason or motive. In the present case the evidence was that the case was set down for hearing in the magistrate's court during January 2010. What is of crucial importance is the evidence of Mr Gomez. Therefore, in essence what the applicants ask this court to do is to give them permission to continue to conduct their illegal activities pending the outcome of an action for declaratory relief to be instituted and finalised.

I am not prepared to do that especially in the light of my finding that the applicants did not make out a *prima facie* case that legal activities were conducted at these premises. Quite clearly the applicant has no *prima facie* right to trade illegally. In the light of this finding the other requirements of an interim interdict fade into insignificance.

I however also fully agree with what was stated in the *Sema* case.⁷ In that case an order similar to the one sought by the applicants in this matter was refused. The court held that what the applicants wished to achieve by way of an interim interdict was for the court to issue an order in terms of which they will be able to operate their illegal gambling business in contravention of the law, without any interference from relevant authorities.

It was further said in that case:

*“Inhabitants of the Republic who wish to establish new gaming institutions or who wish to continue with unlawful gambling activities in contravention of the Gambling Act have only themselves to blame if they are closed down and suffer financial loss in the process.”*⁸

Although the requirement of irreparable harm favours the Applicants, the balance of convenience does not. There is a strong public interest to protect people from illegal gambling. The police have to do their work, which is, amongst others, to enforce the law. The legitimate business interest of the members of CASA will also be damaged.

Another remedy, taking into account that the applicants have so traded for a number of years, is that they could have followed the legal route and could have applied for a license.

Seizure without a search warrant

I further have to be satisfied that the search and seizure without a search warrant was justified by s 22(b)(i) and(ii).

In this regard the deponent of the Police states as follows:

“26. In order to police illegal gambling activities effectively, the members of the SAPS are required to act swiftly and without giving notice, because as soon as any information of a planned raid of illegal activities is reported, operational experiences in the past indicated and proved that where such

⁷ *Sema and Another v Minister of Safety and Security and Others* 1995(2) SA 401 (OPD)

⁸ At 405

raid is planned, information is leaked to the persons and/or entities who conduct illegal gambling activities and/or who are in possession of illegal gambling machines and/or devices, and when members of the SAPS and/or inspectors of the Gambling Board are about to visit and/or inspect any premises, such notice allows them an opportunity to close their business and/or to remove any gambling devices and/or portions thereof and to chase the members of the public away, in a very short period of time, and long before the police and/or the inspectors of the Gambling Board can arrive at the premises.”

“28. I further confirm that reliable information was received by the SAPS on the morning of 23 September 2009, whereafter a team of SAPS members was quickly assembled together with two Gambling Board Inspectors to attend and inspect the premises known as 777 Las Vegas Entertainment (No. 3 Pretorius Street, Fochville, being one of the illegal gambling businesses of the First Applicant), Lucky 7, and Fochville Hotel in Fochville. It was further established that as soon as the members of the SAPS and the inspectors of the Gambling Board arrived at the premises of 777 Las Vegas Entertainment at 3 Pretorius Street, Fochville, all the other entities referred to, managed to close their premises and remove their illegal gambling machines and devices before the police could inspect their respective premises.”

This evidence was not seriously disputed by the applicants in their replying affidavit. On the basis of this evidence I find that this requirement has also being satisfied.

In the circumstances the application stands to be dismissed.

I therefore order as follows:

1. The application is dismissed with costs

2. The costs will include the costs of two counsel, where two counsel were employed.

AA LOUW
JUDGE OF THE HIGH COURT

ADV FOR APPLICANT: Adv P Levenberg SC

Adv N Jagga

ATTORNEYS FOR APPLICANT: David Kotzen Attorneys

ADV FOR FIRST TO THIRD RESPONDENT: Adv DJ Joubert

ATTORNEYS FOR RESPONDENT: State Attorneys

ADV FOR THE FOURTH RESPONDENT: Adv FJ Nalane

ATTORNEYS FOR THE FOURTH RESP: Manamela Marobela & Associates Inc

ADV FOR THE INTERVENING PARTY: Adv DA Preis SC

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