

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

CASE NO: 28704/04

In the matter between:

CASINO ENTERPRISES (PTY) LIMITED (SWAZILAND)

Plaintiff

and

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE. YES/NO	
(2) OF INTEREST TO OTHER JUDGES: YES/NO	
(3) REVISED	
16/09/10 DATE	<i>[Signature]</i> SIGNATURE

GAUTENG GAMBLING BOARD

First Defendant

NATIONAL GAMBLING BOARD

Second Defendant

MINISTER OF TRADE AND INDUSTRY

Third Defendant

JUDGMENT

Introduction

- 1 The plaintiff owns and operates a land based casino in Swaziland. It also operates an online¹ casino from Swaziland. It is licensed under Swazi law to do so. This case concerns its online casino operation.
- 2 The plaintiff advertised its online casino through radio stations broadcasting in the province of Gauteng. The first defendant ("the GGB") warned the broadcasters to stop broadcasting the plaintiff's advertisements. The GGB asserted that the plaintiff was not licensed to conduct a casino in Gauteng and that its internet casino operation was thus conducted in contravention of s 77(1) of the Gauteng Gambling Act 4 of 1995 ("the Provincial Act") and the National Gambling Act 7 of 2004 ("the National Act"). Section 77(1) reads, to the extent relevant:

No person shall gamble at any place other than the licensed premises.

- 3 Representatives of the plaintiff and the GGB met and it became clear that the GGB took the view that gambling through the plaintiff's online

¹ In many instances in the documents placed before me, this word is written as "on-line". For uniformity, I omit the hyphen when quoting from these documents.

casino takes place where the player and his computer are situated. The plaintiff took a contrary view, maintaining that the gambling takes place solely in Swaziland because that is where its computer equipment² is situated and where its online casino is licensed.

- 4 By notice of motion dated 29 October 2004, the plaintiff launched an application for orders declaring that to the extent that gamblers in Gauteng gamble on the plaintiff's online casinos in accordance with the procedures specified by its expert Mr Verardi, such gambling takes place legally in Swaziland and not in Gauteng in any manner that contravenes the Provincial Act and that any advertising occurring in Gauteng in respect of the plaintiff's "casino in Swaziland" is not unlawful and does not constitute a contravention of the provisions of s 71(1) of the Provincial Act. Mr Verardi, a lawyer practising in the Isle of Man, explained in one of the founding affidavits put up by the plaintiff how the online casino worked. The application was opposed by the GGB and the NGB.
- 5 The plaintiff does not hold any license under the Provincial or the National Act.

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Called "servers" in the evidence.

- 6 The application was set down for hearing on 3 March 2006. At the plaintiff's request it was referred to trial. This is the contemplated trial. Mr Ginsburg SC, Mr Dunne SC and Mr Miltz SC appear for the plaintiff. Mr Semanya SC, Mr Maleka SC and Ms Nhamuravate appear for the GGB and the NGB. The Minister abides the decision of the court.

The pleadings

- 7 The plaintiff's case as made in its declaration is that the gambling which takes place "at the plaintiff's online casino" does not take place in Gauteng and is thus not required to be licensed under the Provincial Act. Accordingly, so runs the declaration, the provisions of the Provincial Act prohibit neither any activities in Gauteng "at and on the plaintiff's online casino" nor the advertising of those activities within Gauteng.
- 8 The plaintiff claims further in its declaration that gambling "at the plaintiff's online casino" is not an interactive game as contemplated by the National Act, does not take place within the Republic of South Africa and is not unlawful under either the Provincial or the National Act. In the alternative, if any of these propositions is decided against

the plaintiff, the plaintiff contends that such interactive gaming is only made available in Swaziland and not in Gauteng or anywhere else in the Republic in any manner that contravenes either the Provincial or the National Act.

- 9 Only the GGB has delivered a plea. However, I was informed by counsel that the NGB has made common cause with the GGB.
- 10 In the plea, the GGB admits that it advised three named radio stations to desist from advertising or distributing any information concerning the "plaintiff's online casino in ... Gauteng" The GGB further denies that the plaintiff's online operation is such that gambling does not take place within Gauteng. The GGB pleads that such gambling can only take place lawfully if the plaintiff holds a license under the Provincial Act. The GGB places in issue the questions whether the gambling activities which take place pursuant to the plaintiff's online casino operation constitute interactive games and whether the plaintiff's online casino operation is made available to or engaged in by persons in Gauteng.
- 11 No replication was delivered.

Issues for determination

- 12 The main issue is whether and to what extent that which takes place when a player in Gauteng interacts through the Internet with the plaintiff's servers in Swaziland constitutes gambling for the purposes of the Provincial Act or the National Act. In what follows, I shall postulate, as counsel did, that the player is in Gauteng. Of course, because the Internet is involved, the player could be anywhere at all. Internet access is available, from right next to the plaintiff's servers in Swaziland to the other ends of the earth.
- 13 Within that enquiry, the question arises whether, to the extent that such gambling does take place, such gambling takes place in both Swaziland and South Africa or only in Swaziland.
- 14 A further issue which arises is whether, at a discretionary level, the declarators, or any of them, should issue.

The evidence

- 15 Two witnesses gave evidence before me: Professor Hazelhurst for the plaintiff and Professor von Solms for the defendants. Both men gave evidence as experts. Both are highly qualified in the field of information technology. In regard to all relevant matters except one, with which I shall deal separately, they are in agreement on the evidential material that I need to decide this case. They sometimes used different terminology and emphasised different aspects but not to the extent that I need to resolve any disputes between them.
- 16 In a room in Swaziland, the plaintiff maintains and operates several servers which are connected to the Internet. The plaintiff makes available to an aspirant player, on application, a suite of software³ which the aspirant loads on to his own electronic device⁴ which, for the purposes of this enquiry, is physically located at the aspirant's home in Gauteng.

³ Either by delivering to him or her a storage device from which the software may be extracted or by transmitting the software over the Internet.

⁴ Usually a desktop or a laptop computer but may be any electronic device capable of connecting to the Internet and loading the plaintiff's software.

- 17 After loading the plaintiff's software, the aspirant connects over the Internet to the plaintiff's servers in Swaziland. The aspirant can read the following messages on the plaintiff's webpages:

"Getting started

Register an account today and begin your journey of gaming pleasure. In just a few easy steps you can start playing all your favourite casino games from the comfort of your own home."

and

"How to play online slots

Imagine being able to enjoy all your favorite [sic] slot machine games in your own personal cozy abode where you can just relax and be at home."

- 18 The aspirant then registers an account with the plaintiff. For this purpose he or she obtains a unique username and password and a "wallet". This wallet is an electronic account with the plaintiff, into which the aspirant transfers money in the form of SA rands.⁶ At this stage the aspirant is in a position to become a player, if the aspirant chooses not to wager any money but merely to play the online games accessible through the plaintiff's servers, or a gambler. This trial

⁶ Because Swaziland and South Africa are members of the Common Monetary area, no exchange control issues arise.

concerns the gambler so I shall use that term to refer to the person in Gauteng who has chosen to gamble through the facilities made available by the plaintiff.

- 19 The gambler chooses the online casino option and the software on the gambler's device displays a screen where the gambler makes certain choices, using a mouse or other pointing device. The first of these choices is the game to be played.
- 20 When the game has been selected, a screen appears with graphics approximating the visual appearance of the game as it would appear in the real (as opposed to virtual) world. In the example shown by Prof Hazelhurst in court, the game was a slot machine but the principle applies to any casino game made available by the plaintiff, including roulette.
- 21 The gambler then selects the stake to be wagered per payline and the number of paylines selected. So, if the gambler wagers R3 and chooses three paylines, the total bet will be R9.

- 22 The gambler then positions his mouse on the simulation of a button on the screen marked "SPIN" and "presses" the button, usually by leftclicking the mouse.⁶ The gambler's computer begins to display spinning wheels or whatever is best suited to simulate the operation of the gambling device in the real life situation. This simulation continues, provided there is no system or connection failure, until the result is reported to the gambler as I shall describe below.
- 23 Upon the activation of the spin button, a packet of data is transmitted over the Internet to the plaintiff's servers in Swaziland where the data are validated to establish, amongst other things, that they have been sent from the specific gambler in question and that the gambler has sufficient funds in his wallet to fund the bet. What follows describes what happens when there are sufficient funds.
- 24 The game is then further played according to the rules of the game on one of the plaintiff's servers called the game server. Via a connection with an electronic device in Swaziland called a pseudo-random number generator, which introduces the factor of chance into the game, a set of numbers applicable to the wager is identified. The result of the wager is then recorded in the database server, the

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This moment was described by Prof Hazelhurst as the point of no return because from then on, the gambler has no control over the game.

balance in the gambler's wallet is updated to reflect the result of the wager and the updated balance is retrieved.

- 25 The confirmed game result and the updated balance are then, again provided there is no system or connection failure, sent over the Internet to the player's computer where the simulated wheels or other gambling device stop moving and the results are displayed. That is the end of the game.

The dispute between the experts

- 26 I have mentioned above that there is one matter upon which the experts are not in agreement. This is about whether the game as a whole could properly within their academic discipline be described as an atomic unit of work, ie one in which either the entire transaction takes place or, in electronic terms, no transaction takes place at all.
- 27 Prof Van Solms thinks that the game as a whole, from the moment that the gambler begins making his or her choices to the moment the reported result becomes visible on the gambler's video device, is an atomic unit of work.

28 Prof Hazelhurst says that on an academically rigorous analysis, what takes place in Gauteng both before and after the plaintiff's servers in Swaziland are engaged, is not part of an atomic unit of work because none of this has any effect on what happens in Swaziland. Prof Hazelhurst points out that the result would be the same whether or not the result is reported to the gambler. It therefore follows, Prof Hazelhurst reasons, that the electronic actions in Swaziland are an integral atomic unit of work discrete from what preceded and what followed these actions in Gauteng.

29 The evidence hardly qualifies me to take sides in this dispute. I point out only that it seems from an extract from a reputable work handed up by counsel for the defendants⁷ that the notion of an atomic unit of work can for academic purposes legitimately be used both as Prof von Solms and as Prof Hazelhurst did. I suppose that it should be made clear in each case whether the term is being used in the narrow technical sense or in the wider sense, described by counsel for the plaintiff, somewhat pejoratively, as the philosophical sense.

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Bernstein and Newcomer, *Principles of Transaction Processing for the Systems Professional*, 1997 ed at pp2-3.

30 So I think that the dispute between the experts is not one of substance in the context of this case. Whatever labels the experts give to the electronic transactions involved:

30.1 the game starts when the gambler in Gauteng communicates his selections to the plaintiff's servers and ends when the results of the game are reported to the gambler in Gauteng; and

30.2 the operation of the electronic equivalent of the gambling device⁸ on which the outcome of the wager is decided (analogous to the roulette wheel) takes place solely in Swaziland.

31 The question I must determine is whether any of what happens in Gauteng is hit by the legislation in question.

⁸ Under the Provincial Act, a "gambling device" means any equipment or thing used in connection with gambling... Under the National Act, a "gambling device" means equipment or any other thing that is used ... in determining the result of a gambling activity.

Evaluation

32 The following actions take place In Gauteng:

32.1 The software, which is to be loaded onto the gambler's device to enable access to the plaintiff's servers, is made available;

32.2 The gambler takes and implements the decisions to load the software, put funds into the wallet, select the game and stake and press the spin button;

32.3 The gambler receives the results of the game.

33 Counsel for the plaintiffs submitted that the Provincial Act does not deal at all with electronic gambling. I agree. Under the provincial statute, gambling within the province may only take place at licensed premises.

34 Gambling is defined in s 1, the definition section of the Provincial Act, to mean:

The wagering of a stake of 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 of skill is involved or not and encompasses all forms of gaming⁹ and betting, but excludes [two types of machine not relevant to this enquiry].

- 36 "Licensed premises" means the place or premises specified on a license. As I have mentioned, no person may gamble except at licensed premises.¹⁰ Furthermore, only gambling on the result of an event or contingency in a casino game, bingo game or gambling machine is permitted and no person may gamble on the result of such an event or contingency with any unlicensed person.¹¹ The Provincial Act thus envisages only gambling which takes place at a real world location, between the gambler and the holder of a license¹² and within a casino or bingo game or through a gambling machine. As the Provincial Act stands, therefore, any gambling, as defined, within the province which takes place at a location which is not licensed premises as defined, or takes place between the gambler and a person other than the holder of a license, is unlawful.

⁹ Gaming is defined in the same section to mean the playing of a casino game. A casino game is also defined. A casino game is "any game" [my emphasis].

¹⁰ Section 77(1).

¹¹ Section 76(1) and (2)

¹² A "license" is one contemplated under the Provincial Act.

- 36 It therefore follows that if what I have identified as taking place in Gauteng constitutes gambling as defined, such actions are unlawful.
- 37 Gambling as defined "encompasses all forms of gaming". Gaming means "the playing of a casino game". A casino game means any game played with any device used to determine win or loss in the outcome of a wager for money.
- 38 Neither "game" in its noun or verb sense nor the verb "to play" is defined. I shall identify their ordinary meanings by reference to dictionary definitions.¹³ In its present day meaning, counsel for the plaintiffs accepted, a "game" for present purposes is a diversion in the nature of a contest, played according to rules and displaying in the result the superiority either in skill, strength, or good fortune of the winner or winners. The most appropriate meaning of the verb "to play" in the present context is in my view to employ oneself or engage in a game. It is interesting to note that the verb "to gamble" derives from words in ancient languages carrying the meaning of playing or gambolling or taking part in a diversion.

¹³

I consulted the *Oxford English Dictionary*, 2nd ed, 1985.

39 So in my judgment, on the clear language of the Provincial Act, the gambler on the plaintiff's online casino is playing, in Gauteng, one of the games offered by the plaintiff. That, under the Provincial Act, the player may not do because the gambler is not at licensed premises when he or she does so and because the gambler is not gambling with a person who is the holder of a license.

40 Counsel for the plaintiff submit that this conclusion would be wrong. They point out that it was formally agreed before the trial that the Provincial and National Acts do not have extra-territorial application and contend that the legislature could not have intended the clear language I have mentioned to have the effect I have described because a finding that the Provincial Act (to limit the enquiry for the moment to that enactment) has such an effect would offend against the presumption, based on the principle of comity between nations, that statutes are presumed not to operate extra-territorially. The intention of the legislature in relation to the Provincial Act, it was argued, was to limit the reach of the statute only to gambling where all the participants in the game are playing it in Gauteng. The gambler's involvement, so runs the submission, is an "insignificant portion of the entire gambling process"¹⁴ which does not create a real and

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I quote from para 11 of the plaintiff's heads of argument

substantial link from a jurisdictional perspective as that concept is used in international law.

- 41 I do not agree. I am mindful, as counsel for the plaintiff said I should be, of the risks of an interpretative approach that pays too much attention to the ordinary language of the words in a statute and that I should employ a purposive approach to statutory interpretation.
- 42 The purposes of the Provincial Act and the National Act can be established from their respective preambles. The purposes are broadly similar.
- 43 The preamble to the Provincial Act reads:

WHEREAS gambling and betting have the potential to make a substantial and lasting contribution to the growth and development of tourism and the economy in the Province of Gauteng, and to the prosperity of its people;
AND WHEREAS it is recognised that gambling and betting are privileged activities which should stimulate the creation of employment opportunities and assist in the advancement of deprived communities, and thereby promote the improvement of the quality and standard of living of the people of the Province;

AND WHEREAS gambling and betting can be a significant source of public revenue for the Province, and so contribute to the well-being of all its people in the general interest;
AND WHEREAS the special risks and dangers entailed by opportunities for gambling and betting justify the imposition of appropriate restrictions, regulations and controls

44 The preamble to the National Act reads:

CONSIDERING that the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), establishes that casinos, racing, gambling and wagering are matters of concurrent national and provincial legislative competence;

It is desirable to co-ordinate activities relating to the exercise of that concurrent competence within the national and provincial spheres of government;

It is desirable to establish certain uniform norms and standards, which will safeguard people participating in gambling and their communities against the adverse effect of gambling, applying generally throughout the Republic with regard to casinos, racing, gambling and wagering, so that-

- * gambling activities are effectively regulated, licenced, controlled and policed;
- * members of the public who participate in any licenced gambling activity are protected;
- * society and the economy are protected against over-stimulation of the latent demand for gambling; and
- * the licensing of gambling activities is transparent, fair and equitable;

It is expedient to establish certain national institutions, and to recognise the establishment of provincial institutions, which together will determine and administer national gambling policy in a co-operative, coherent and efficient manner.

- 45 The statutes reflected a profound change in legislative policy. Before the enactment of the Interim Constitution of 1993, no industry of casino gambling and no lotteries existed in South Africa as then geographically constituted because these activities were prohibited under the Gambling Act, 51 of 1965. Only after the Interim Constitution and of course the final Constitution made provision for these activities from a fiscal perspective, were provincial and national statutes enacted which legitimised and regulated the gambling industry by way of licenses and otherwise.
- 46 The preambles recognise certain benefits and dangers which the legislatures regard as inherent in the gambling activity. The industry is held to have the potential to contribute to tourism and thus promote the economy. No doubt legislative policy holds that many tourists like to gamble when they are on holiday and that for many people, tourists and otherwise, gambling represents a pleasant and exciting recreational activity. In the policy view taken by the legislature, the establishment of regulated and strategically placed gambling

establishments can promote the advancement of deprived communities and thus improve the quality of life of members of such communities, the vast majority of whom were disadvantaged by the pre-Constitutional dispensation. And finally, on the positive side, the creation of a well regulated gambling industry can be a significant source of public revenue.

- 47 The legislatures also recognised certain negative aspects attendant upon the establishment of a gambling industry. One of these was manifestly the undesirability of allowing unlicensed, and thus unregulated, industry operators to compete, probably at a cost advantage in regard to infrastructure and taxation, with industry operators which had spent large sums of money to get the necessary licenses to enter the market.
- 48 Another negative aspect, to my mind of the greatest importance, is the risk posed by gambling to vulnerable individuals and, by extension, their families. This risk is expressly recognised in the fourth paragraph of the preamble to the Provincial Act and in the third asterisk point in the third paragraph of the preamble to the National Act. For certain susceptible individuals, the gambling experience is addictive. Many losers do not know when to stop. Such individuals

and their families can face ruin through their propensity to gamble money they cannot afford to lose.

- 49 The South African gambling market is finite. It would be subversive of their own declared purposes for the legislatures to allow a foreign organisation to benefit from the local gambling market without fiscal compensation, whether in the form of licenses, infrastructure, job creation or otherwise.
- 50 In coming to this conclusion, I do not overlook the high value our Constitution places on personal privacy, which would include the right to engage in recreational activities. As was pointed out in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*¹⁵, the right to privacy lies upon a continuum. The more a person moves from his or her innermost core and interacts with other people, the more the right to privacy is attenuated. To restrict gambling to licensed premises or to regulate the conduct of persons who gamble from within their own homes on a basis broadly equivalent to the regulation of the conduct of persons who travel to licensed premises to enjoy the gambling

¹⁵ 2001 1 SA 545 CC paras 15 and 16, following *Bernstein and Others v Bester and Others* NNO 1996 2 SA 751 CC

experience seem to me legitimate legislative choices which, moreover, are entirely appropriate given the clear purposes of the Provincial and the National Acts.

- 51 The vulnerabilities of individuals and the risk of harm to their families are if anything greater where the gambling takes place in a private home rather than in a public place, where limitations on reckless gambling and access, eg by children and other vulnerable persons, can be prevented or regulated. The Provincial legislature has exercised a clear policy choice against the enjoyment of the casino experience from, to use the language on the plaintiff's webpages, the gambler's personal cozy abode where the gambler can just relax and be at home.
- 52 In my judgment, the legislatures did not seek to restrict the extent of their fiscal and regulatory net. They intended to cast it as widely as possible.
- 53 In *Otherchoice (Pty) Ltd v Independent Communications Authority of SA and Another*, TPD case no 19718/03, unreported, a judgment delivered on 21 April 2006, at pp8-9, the court approved the following

dictum in *Treacy v Director of Public Prosecutions* [1971] AC 537 HL
584E:

The rules of international comity ... do not call for more than that each sovereign state should refrain from punishing persons for their conduct within the territory of another sovereign state *where that conduct has no harmful consequences within the territory of the state which imposes the punishment.* [my emphasis] .

64 I respectfully agree. The harmful consequences in the present context include the unregulated access to gambling, the movement of money out of South Africa with no concomitant local benefit and the potential loss of revenue from taxation and from license fees. On the construction of the Provincial Act contended for by the defendant, the legislature is not seeking to legislate extra-territorially but to regulate the conduct of persons physically within Gauteng and the consequences of the plaintiff's actions within the province.

55 Counsel for the plaintiff referred me to the doctoral thesis of Dr Michelle Geissler titled *Bulk unsolicited electronic messages (spam) a South African Perspective*. The author concludes that the mere uploading of data onto the Internet ought not to confer jurisdiction on

a state merely because such data were downloadable in the state in question. The author observes:

This is absurd because it makes all of cyberspace subject to the law of the state. If every state adopted this approach, the result would be that every conceivable body of law would govern Internet-related activities.

56 At the level of principle, I do not agree. The question of jurisdiction is determined, in South Africa at any rate, by reference to South African law. If under our law our courts have jurisdiction, no absurdity arises, regardless of whether another state may also claim jurisdiction.

57 I also do not agree with the submission that the issue should be decided by reference to the significance of the actions which take place in the province. The Provincial Act proscribes those acts which it characterises as gambling. If those acts are committed, they are illegal. This is so whether or not they are part of a course of conduct in which other acts do not constitute gambling for the purposes of the Provincial Act, no matter how significant those other acts are in the context of the course of conduct as a whole.

- 58 In my view the conduct which takes place in Gauteng cannot be described as insignificant. The decision to play the game at all is made in Gauteng and the act of communicating that decision to the plaintiff is performed in Gauteng. Although the result of the game stands after it has been determined in Swaziland, whether or not it has been reported to the gambler, the rules of the game require that it be so reported. It is crucial to the gambling experience that the player knows the result.
- 59 Gambling of this type is not a game in which it matters not whether you won or lost but how you played the game.¹⁸ Winning is the predominant purpose of the game. A gambler who is losing and who continues playing does so in the hope that his or her luck will change. So the process by which the result of the game is reported to the gambler in Gauteng, far from being insignificant, is of the greatest importance. If the result were not, barring accidents, reported immediately, it would be most unlikely that gamblers would continue playing.

¹⁸ To perpetuate the common misquotation from the poem *Alumnus Football* by Henry Grantland Rice.

60 Counsel for the plaintiff placed reliance on *Bishop and Others v Conrath and Another* 1947 2 SA 800 T 803 and 804. In that case a syndicate had been formed in the Transvaal to send money from South Africa to Rhodesia with which to buy, in the name of one of the syndicate members, tickets in the Rhodesian State Lottery to be drawn on the Durban July Handicap. One of the tickets drew the winning horse. The syndicate member received the prize money into his bank account in Johannesburg. After his death, his executrix refused to pay out to the other members of the syndicate on the ground that under s 1(c) of Law 7 of 1890 of the Zuid-Afrikaanse Republiek¹⁷, participation in any lottery, wheresoever conducted, was unlawful. On exception, the court found that, on a proper construction of the section, what was prohibited was the taking or purchase of a ticket or the acquiring of a share in a ticket where the positive act of taking, buying or acquiring took place in the old Transvaal.

61 I do not think *Bishop's* case helps the plaintiff. The question is statute specific: what conduct does the statute in question proscribe? In my view, as I have said, the Provincial Act does indeed proscribe gambling in Gauteng other than at licensed premises.

¹⁷ "Any person who, whether personally or through a representative authorised by him, takes or buys any ticket in a lottery or has any share therein shall be guilty of a contravention of this Law." [my translation]

- 62 Counsel for the plaintiff also referred me to the dictum in *S v Basson* 2007 3 SA 582 para 237, that it would be against the comity owed to a foreign country for a South African court to punish a person for a conspiracy to commit acts which can lawfully be committed in that foreign country. I do not think that this dictum is in point: what is under attack is not the *decision to gamble* (analogous to the conspiracy to commit a certain act which would be criminal if committed in South Africa) but the *implementation* of that decision (analogous to the execution of that criminal act).
- 63 These conclusions are decisive because the context in which the present case arose is that the plaintiff objected to the stance taken by the GGB in relation to the plaintiff's advertising on radio stations broadcasting from Gauteng. The GGB told the radio stations that in its view the radio stations could not, lawfully, advertise or distribute any information concerning the plaintiff's online casino within the province of Gauteng. In my view the GGB got it right. The radio stations could not lawfully do so because persons in Gauteng interacting with the plaintiff's online casino are engaged in gambling in the Province¹⁸ in respect of which a license is not in force.

¹⁸ In the sense that phrase is used in *Casino Enterprises (Pty) Ltd (Swaziland) v The Gauteng Gambling Board* [2008] ZASCA 31 para 16.

64 I shall nevertheless give my views on the questions which the parties addressed in relation to s 11 read with ss 5(1)(a)(i) and (ii) of the National Act because these questions were fully argued. Section 11 reads:

A person must not engage in or make available an interactive game except as authorised in terms of this Act or any other national law.

Section 5(1)(a) reads:

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; ...

65 Counsel for the plaintiff submitted that s 11 of the National Act was not engaged because gambling at the plaintiff's online casino was not an interactive game as contemplated by the National Act. The argument is that an interactive game, as defined, is only one where both the gambler and the casino are physically situated with South Africa's territorial borders. Counsel point to the different elements of

the definition of "interactive game", particularly in relation to the elements of the game identified in s 5(1)(a)(i) and (ii) which I shall call the critical elements.¹⁹ If the critical elements are not to be found physically within South Africa, counsel submit, the game is not an interactive game as defined. I do not agree.

66 In my view the flaw in the argument is the following: the critical elements identify a game which is a gambling game. Once the critical elements exist, the game in question is a gambling game and thus, for present purposes, an interactive game. Section 11 does not merely prohibit engaging in or making available the critical elements. The section prohibits engaging in or making available *the game as a whole*. It matters not in my view whether the critical elements are to be found or are generated within the borders of South Africa or not. Section 11 proscribes in my view both engaging in the game, which happens each time a gambler presses the spin button, and making available the game, which takes place at least when the plaintiff's servers in Swaziland make it possible for the gambler in Gauteng to connect interactively with them though the Internet.²⁰

¹⁹ The argument accepted that the evidence showed that the other elements of the definition of "interactive game" were present.

²⁰ I do not find it necessary to decide whether the plaintiff makes the game available when it provides the aspirant gambler with the necessary software.

67 I agree with counsel for the defendants that in using the terms "engage in" and "make available" the legislature was using simple non-technical language. I am fortified in my conclusion by the statements of the plaintiff itself on its webpages to describe what it offers through its online casino.

Costs

68 Neither side asked for costs against the other.

Conclusion and order

69 It follows that the plaintiff's action cannot succeed. The plaintiff's claims are dismissed.



NB Tuchten
Judge of the High Court
16 August 2010

For plaintiff:

Mr P Ginsburg SC, Mr EW Dunne SC and Mr I Miltz SC
instructed by Hack, Stupel & Ross

For defendants:

Mr IAM Semanya SC, Mr IV Maleka SC and Ms N Nharmuravate
instructed by Mdlulwa Nkuhlu Inc