

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Reportable /Not Reportable

CASE NO: CA 32/2023

In the matter between:

VUKANI GAMING EASTERN CAPE (PTY) LTD

APPELLANT

And

NAILING WEN 518 (PTY) LTD

FIRST RESPONDENT

FLAMING CHERRIES INTERNET LOUNGE

SECOND RESPONDENT

**EASTERN CAPE GAMBLING &
BETTING BOARD**

THIRD RESPONDENT

And

CASE NO. 34/2023

In the matter between:

VUKANI GAMING EASTERN CAPE (PTY) LTD

APPELLANT

And

DEREK RAYMOND SEEBER N. O.

FIRST RESPONDENT

CHRISTOPHER EDWARD HESSIAN N.O.

SECOND RESPONDENT

KEITH GENTS N.O.

THIRD RESPONDENT

BERNICE MILLER N.O.

FOURTH RESPONDENT

PETER MILLER N. O.

FIFTH RESPONDENT

TRIPLE CHERRIES INTERNET LOUNGE

SIXTH RESPONDENT

**EASTERN CAPE GAMBLING &
BETTING BOARD**

SEVENTH RESPONDENT

JUDGMENT

Noncembu J

Introduction

[1] This is an appeal against the whole judgment and order of Pakati J, sitting as a court of first instance at Gqeberha High Court, Eastern Cape, and delivered on 10 August 2021. In the judgment, the court *a quo* dismissed with costs an application for an interdict instituted by the appellant against the respondents to prohibit them from operating a gambling business at their premises without a licence, i.e. illegally. The court *a quo* held that the appellant had an alternative remedy and had the option of utilising mechanisms provided for by the National Gambling Act and/ or bring the respondents' illegal gambling activities to the attention of the SAPS. As such, the court found that the appellant was not entitled to a final interdict as it did not meet one of the essential requirements for a final interdict.

[2] The aforesaid judgment concerned two applications brought by the appellant, which applications were argued simultaneously, as they pertained to similar facts and with arguments on both matters near identical.

[3] The first application (the subject matter under appeal case number CA 32/2021)¹ was opposed by the second respondent (Flaming Cherries Internet Lounge), and the second application (which forms the subject matter under appeal case number CA 34/2021)² was opposed by the sixth respondent (Triple Cherries Internet Lounge). Consequently, the two are the only respondents opposing the appeal.

¹ The Flaming Cherries matter.

² The Triple Cherries matter.

[4] For purposes of this judgment and for ease of reference the opposing respondents will be referred to as 'Flaming Cherries' and 'Triple Cherries' where the context so requires, otherwise they will collectively be referred to as 'the respondents'. Incidentally, no relief is sought against the other respondents in the appeal.

[5] The matter serves before this court with the leave of the court *a quo* where the court held that in view of conflicting judgments on the issue under consideration, there are compelling reasons why the appeal should be heard.³

The grounds of appeal

[6] It is the appellant's case that the court *a quo* erred in finding that the appellant has an appropriate alternative remedy and should, as a result thereof, be denied a final interdict. It contends that the remedies granted by the National and Provincial Gaming Boards are not remedies available to the appellant. They are granted to the National and Provincial Boards by legislation aimed at empowering the Boards to search premises, seize equipment with a view to enable criminal prosecution and not to stop the illegal activities.

[7] The appellant further contends that it has no control over any criminal prosecution, and that neither of the Acts provide any Board or Inspector powers to close down any illegal gambling operations, nor is criminal prosecution aimed at closure of such illegal operations other than punishment of those engaging therein. It asserts therefore, that the court *a quo* should have found that it had no suitable

³ Section 17 (1) (a) (ii) Superior Courts Act, (Act 10 of 2013).

alternative remedy and granted it the relief it sought in paragraphs 2 and 3 of the Notice of Motion.

[8] Specifically, the appellant seeks the following relief in the appeal, namely that:

8.1 The appeal be upheld with costs; and

8.2 The order of the court *a quo* dated 10 August 2021 be replaced with the following order:

(a) That the respondents, and all persons occupying the unlicensed premises by, through or on behalf of the respondents are interdicted and restrained from:

- (i) conducting any restricted gambling activity, unlawful gambling activity and engaging in any other conduct connected with unlawful gambling activity prohibited by the National Gambling Act 7 of 2004 and the Eastern Cape Gambling Act 5 of 1997;
- (ii) permitting or allowing gambling as defined in section 1 of the National Gambling Act 7 of 2004 and the Eastern Cape Gambling Act 5 of 1997, on and from the premises.

8.3 The respondents be directed to pay the costs of this application, jointly and severally, the one paying the others to be absolved, on the scale as between attorney and client.

Proceedings in the court *a quo*

[9] As a point of departure, it is necessary to set out the factual background to the matter in order to properly contextualise the proceedings in the court *a quo* culminating in the judgment and order sought to be appealed against.

[10] The appellant is a duly incorporated company with its principal place of business situated at 19 Richards Drive, Gallagher Estate, Gallagher House, Midrand, Gauteng. It is the holder of a route operator licence which authorises it to offer for play 1000 Limited Pay-Out Machines (LPMs)⁴ in the Eastern Cape at sites approved and licensed for this purpose by the Eastern Cape Gambling and Betting Board (the Provincial Board).

[11] As an incidence of its router licence holder status, it has service agreements with Pool City Action Bar, a licensed site operator situated at 24 Newton Street, Newton Park, Port Elizabeth,⁵ and Hotspot Sports Bar, Westering, a licensed site

⁴ Defined in s 1 of the Eastern Cape Gambling Act (Act 5 of 1997), (hereinafter referred to as the Eastern Cape Gambling Act) as a gambling machine outside of a casino in respect of the playing of which the stakes and prizes are limited as prescribed by regulations made in terms of the National Gambling Act (Act 7 of 2004), hereinafter referred to as the National Gambling Act).

⁵ Approximately 260 meters from Triple Cherries (sixth respondent's premises).

operator situated at 10 Townsend Avenue, Westering, Port Elizabeth,⁶ which both operate the appellant's LPMs in their premises.

[12] These agreements have been made in accordance with the provisions of s 18 of the National Gambling Act, which provides that a site operator may be linked to a particular route operator, which may keep limited pay-out machines owned by the route operator on the site, and make those machines available for play to members of the public.

[13] The appellant attached to its founding papers the Standard Premises Manager Agreements it entered into with the above-mentioned site operators.⁷ In terms of the aforesaid agreements the appellant is the owner of the LPMs situated at the site operators' premises and the site operators are liable for payment of 60% of the net profits and dividends to the appellant.

[14] The second respondent in the first matter is Flaming Cherries Internet Lounge, a partnership purporting to operate as an internet café at premises situated at 6 Boshoff Street, Westering, Port Elizabeth (Gqeberha), Eastern Cape (the alleged illegal premises).

[15] The sixth respondent in the second matter is Triple Cherries Internet Lounge, a partnership business situated at Shop 6, The Mall on 4th Avenue, Alma Street,

⁶ Approximately 980 meters from Flaming Cherries Internet Lounge (second respondent's premises)

⁷ Annexures "R" to the founding papers.

Newton Park, Port Elizabeth (Gqeberha), Eastern Cape. It purports to operate an internet café at the aforementioned premises (the alleged illegal premises).

[16] The applicant enlisted the assistance of two investigators, Hennop and Lowings, to investigate the legality of the businesses and the services rendered by the respondents as it suspected that illegal gambling activities were taking place at the said premises.

[17] The investigators visited the alleged illegal premises at different times on 12 September 2017. Their investigations established that:

17.1 The exteriors and the names of the premises depict that they are internet cafés;

17.2 A number of computers are available to patrons for use, and, although internet is accessible on the computers, no patrons were observed accessing the internet or emails on the computers, as all the patrons were participating in illegal gaming;

17.3 The investigators handed over cash to cashiers over a counter protected by a glass partition, and the cashiers loaded the desired credits onto the terminals chosen by the investigators, which credits corresponded with the amounts paid to the cashiers;

17.4 The investigators participated in the games at the chosen computer terminals which displayed on the screen credits equivalent to the cash value paid to the cashiers;

17.5 Inputs on the terminals could only be made via a touch screen;

17.6 The terminal displays a number of screens where one selects a game to play and one is required to select the number of credits one is willing to bet at a time;

17.7 The layout and style of the games are similar to games offered at legitimate gambling establishments and slot machines in licensed casinos;

17.8 Each game had a credit display which either increased or decreased as the player won or lost;

17.9 When one stops playing, they cash out from the cashier the number of credits displayed on their screen;

17.10 Videos and still pictures depicting the premises, the terminals and the modus operandi explained above were taken by the investigators; and

17.11 The investigators were convinced that illegal gaming was taking place at the premises.

[18] It is common cause that the respondents do not possess licences to offer LPMs for play to members of the public nor do they have licences to keep the said LPMs in their premises.

[19] The respondents denied operating illegal gaming activities in their premises, contending that their businesses were operating as internet cafés. They challenged the appellant's *locus standi*, alleging that it does not offer LPMs for play to the public as it was the site operators who offered this service in terms of the law, and the appellant was not authorised by the site operators to launch the current proceedings. They also contended that they have never been investigated by the SAPS or the

Gambling Board, and therefore the appellant had failed to establish that it has no alternative legal remedy.

[20] In addition to the above, they also alleged that there are disputes of fact in the matter, in that the veracity of the investigator's factual findings were never tested and that the matters should have been referred for oral evidence.

[21] After dealing with the cases for both the appellant and the respondents, as well as the requirements for a final interdict, the court *a quo* held that the appellant had failed to establish that it has no suitable alternative remedy. At paragraph 40 of its judgment, the court stated that the appellant had the option of utilising the mechanisms provided for by the National Gambling Act and/or bring the respondents' illegal gambling activities to the attention of the SAPS.

[22] Having found as above, the court *a quo* deemed it unnecessary to deal with the other issues raised in matter, more specifically, whether or not the respondents conducted illegal gaming activities in their premises. Also notably, the court made no finding with regards to the *locus standi* of the appellant, or the other requirements of a final interdict, namely; a clear right and injury actually committed or reasonably apprehended.

The legal framework

[23] Gambling activity is defined in the National Gambling Act (NGA) as an activity which involves placing or accepting a bet or wager in terms of s 4(1) or making available for play or playing Bingo or other gambling game in terms of s 5.⁸

[24] Section 4(1)(c) and (d) of the NGA stipulates that a person places or accepts a bet or wager when that person stakes or accepts a stake of money or anything of value with one or more persons on any contingency, or expressly or implicitly undertakes, promises or agrees to do so.

[25] Section 5 defines an activity as a gambling game if 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 the result might be determined by the skill of the player, the element of chance, or both.

[26] In terms of s 8 of the NGA, the conduct of making available gambling, unless it is licensed, or it is social gambling which is licensed or, social gambling permitted in terms of the provincial Act, or an informal bet, is prohibited.

[27] Similar provisions and definitions of gambling are also contained in the Eastern Cape Gambling Act.

Submissions

[28] It is the appellant's argument that the nature of the machines and games offered by the respondents is defined as a limited pay-out machine (LPM) as it is a

⁸ Section 3 of the Act.

gambling machine with a restricted prize,⁹ where games are played by the staking of a bet and then pushing a button, which runs the game, and the computer produces a result. Games played electronically on LPMs involve no skill on the part of the player, and the outcome is solely dependent on the determination by the computer at random. It contends therefore, that the respondents are operating illegal gaming activities as their premises are not licensed to offer LPMs for play to the public, nor are the touch screen computers they use authorised by the Gambling Board.

[29] The respondents on the other hand, contend that their businesses offer airtime to clients for use on computers to perform internet related activities. They submitted that their businesses comprise of equipment required to provide internet services to the public. Such include personal computers and facsimile facilities. They also have ADSL lines through Mweb to provide internet services to all clients which include the facility to access internet games played through the internet. On their version, these are typical games that may be accessed on a cell phone with internet access.

[30] As indicated earlier, the court *a quo* did not deem it necessary to determine this issue in its judgment, for the reasons stated therein, perhaps also having to do with the fact that it placed much reliance on *Vukani Gaming (Free State) (Pty) Ltd v Purple Dot Investments 34 (Pty) Ltd and Others*,¹⁰ (*Purple Dot*) where a similar approach was adopted.

⁹ Section 1 read with section 26 of the NGA.

¹⁰ Case no. 1064/18 Free State Division (delivered on 20 September 2018).

[31] I am of the view, however, that this issue is germane to the various other issues which were raised in the matter, including the *locus standi* of the appellant, and therefore a determination in the regard is apposite. I therefor deal with it below.

Whether the respondents operated illegal gambling activities in their premises.

[32] The averments made by the appellant's investigators pertaining to the lay-out of the premises, the activities and the nature of the games accessible at the respondents' premises, coupled with the fact that credits increased and decreased as one won or lost the bet on the touch screen terminals, lends one to the irresistible conclusion that the respondents operate illegal gambling at their premises. Notably, these averments were not disputed by the respondents.

[33] The sweeping and generalised statements to the effect that the investigators were not objective, the credibility of their evidence was not tested, or that there were disputes of facts, without any substantiation or evidence, cannot avail the respondents. They did not dispute that the investigators attended to their premises on the afore-mentioned date, nor did they challenge their factual observations except to contend that they do not provide illegal gambling activities at their premises.

[34] It seems to me though, that the respondents are approbating and reprobating, blowing hot and cold in this regard, because on the one hand they maintain that they do not conduct illegal gambling in their premises, whilst on the other hand they contend that the appellant's investigators acted clandestinely in that they participated

in the illegal gambling, retained the money paid out to them in winnings and as such their evidence should not be admissible. This is impermissible in law.

[35] Without more, the fact that the investigators stand in a close relationship with the appellant does not mean that their evidence was not independent. The respondents presented no evidence to suggest any bias on their part and as mentioned above, presented no evidence to gainsay their evidence pertaining to their factual observations, photos and video evidence.

[36] In *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*¹¹ the court held that a dispute of fact may arise when a respondent denies all the material allegations made by the various deponents on the Appellant's behalf, and produces or will produce positive evidence by deponents or witnesses to the contrary. This, the respondents have not done in the present matter.

[37] With the material aspects of the aforesaid evidence by the investigators remaining uncontested, and the common cause evidence that the respondents do not have the requisite licences to offer LPMs for play in their premises, the ineluctable conclusion, in my view, is that the respondents conducted illegal gambling activities in their premises.

Locus Standi

¹¹ 1949 (3) SA 1155 (T) at 1163.

[38] Although the court *a quo* made no finding with regards to the *locus standi* of the appellant, it referred with approval to the dictum of Hefer AJ in *Purple Dot*¹² where he stated:

“The allegations relied upon by the applicant in regards to establishing *locus standi* in the present application, on its own, in view of the authorities referred to above; do not establish *locus standi* for purposes of present application. I am namely not convinced that the National as well as the Provincial legislation pertaining to controlling gambling activities were enacted to protect existing gambling enterprises. On those submissions alone the applicant would not have *locus standi* in the present application. However, although the applicant deals with it under the heading of the second requisite in regards to an interdict, namely injury committed or reasonably apprehended, the impact of the illegal operations such as those of the second respondent diminishes the revenue generated by legal sites. This fact, coupled with the applicant’s submissions regarding the *locus standi* of the applicant, if it be found that the second respondent indeed is operating an illegal gambling operation at the premises concerned, will indeed establish *locus standi* for purposes of the present application.”

[39] It must be pointed out, however, that this was in respect of the interdict requirement of injury actually committed or reasonably apprehended.

¹² *Vukani Gaming Free State v Purple Dot Investments* (Case no. 1064/18) Free State Division (delivered on 20 September 2018) at para 20.

[40] The court in *Purple Dot*, a matter which dealt with similar facts to the matter *in casu*, found that the applicant had *locus standi* only on the limited grounds as stated above.

[41] As a starting point in this regard, it is perhaps convenient to consider the basis upon which this point was raised by the respondents.

[42] In their answering affidavits, they contend as follows with regards to the appellant's *locus standi*¹³:

“10 The applicant attaches licenses of site operators to its application which evidence that it allows the license holder to keep and expose for play LPM's.

11. I point out that this is due to the fact that the agreements would confirm what the exposition of the regulatory framework alludes to, namely that the site operators are the actual operators of LPM's and the ones who offer gambling. The route operator by itself does not and cannot offer gambling to the public.

12. *Under these circumstances can the Applicant not lay claim that it has locus standi purely as a supplier of LPM's to site operators.* (Own emphasis)

13. If any, the site operators would have had to complain before Court about the alleged unlawful activities of the 2nd/ 6th Respondent.

14. Where this is not its case, it had to disclose to this Court in full material facts to show that it has *locus standi* as a route operator to enter into the present type of litigation.

17. For the above stated reasons do I point out that the Applicant simply does not have the requisite *locus standi* in this matter and that the application be dismissed for this reason alone.”

¹³ Paragraphs 10, 11, 12, 13, 14 and 17 in respect of both applications.

[43] It seems to me that the above contention loses sight of one very important factor, which is that the regulatory framework referred to provides that site operators can only operate LPMs through licensed route operators and not on their own, as its only independent site operators that can operate LPMs on their own.

[44] As evidenced from its founding papers, with that insight in mind, the case for the appellant in this regard was not that it operates or offers LPMs for play on its own, but that it has entered into service agreements with the site operators which have, through the appellant, obtained site operator licenses in the regard, to operate the LPMs on its behalf.

[45] To that end, it attached the aforesaid agreements to its founding papers, indicating, *inter alia*, that it had a larger stake in the operation of the LPMs because the site operators only receive 40% of the net profits, and that it remains the owner of the LPMs.

[46] The contention therefore, that the appellant needed the authority of its site operators to lodge the current application is untenable.

[47] In *Vukani Gaming Gauteng (Pty) Ltd v Parelio Foods* and two similar matters,¹⁴ a matter dealing with facts and issues almost identical to the matter *in casu*, the court per Teffo J, found that the applicant had the requisite *locus standi*.

¹⁴ Gauteng case no. 45388/2017; 59406/2017 and 67429/2017, delivered on 4 March 2020.

[48] In *Vukani Gaming Gauteng (Pty) Ltd and Others v KKK Properties and Others*¹⁵ the court held:

“The applicants have a right to the protection of gambling revenue which is affected by the illegal gambling activities of the second respondent. Any other operator, especially an operator without a licence issued by the third respondent competes unfairly with the applicants for revenue derived from gambling activities. The applicants have thereby been harmed by the first and second respondent in their business. There is no any other remedy available to the applicants other than to interdict the conduct of the first and second respondents. This is more so that the unlawful activities are ongoing.”

[49] The appellant alleged that it went through lengthy legitimate applications and probity at significant expense. It pays licenses and gambling fees, as well as other taxes, as required by legislation. The respondents followed no such processes and pay no license and gambling fees to the gambling authorities for the amounts they earn as a result of their operations. The submission is that the ongoing unlawful conduct, which has been criminalised, is injurious by its nature and constitutes continuing harm, not only to the appellant’s rights and interests, but also the public interest which gambling legislation seeks to protect.

[50] The submission goes further to state that, given that people attend on the respondents’ premises solely in order to gamble, it is reasonable to assume that, but for the other opportunities offered for illegal gambling by the respondents, persons

¹⁵ (87975/2015) [2016] ZAGPPHC 482 (21 June 2016), at paras 29-30.

wishing to gamble would do so at legal outlets such as the appellant's. This is more so given the fact that the illegal premises are situated within the catchment areas of the appellant's legal sites. The impact of illegal operations do not merely diminish the revenue generated by legal sites, but have the potential to cause the loss of capital investments made in legal gaming.

[51] I agree with these submissions. Given what has been stated above, I am persuaded that the conduct of the respondents in operating the illegal gambling activities at their premises, have caused special damage to the appellant as a licensed route operator, as such the appellant has met the requirements for *locus standi* as set out in *Patz v Greene and Company*,¹⁶ as there can be no question in my view, that their conduct amounts to unlawful competition.

[52] Dealing with this issue in *Sigalo Foods (Pty) Ltd v Clover SA (Pty)Ltd*¹⁷, the Supreme Court of Appeal made the following remarks:

“It does not appear to be in dispute that *if the appellant trades in contravention of a statutory prohibition, such trade would also constitute an actionable wrong under the common law, namely unlawful competition*¹⁸ (which is

¹⁶ 1907 TS 427.

¹⁷ (425/2022) [2023] ZASCA 82 (31 May 2023).

¹⁸ *Patz v Greene & Co* 1907 TS 427; *Pexmart CC and Others v H Mocke Construction (Pty) Ltd and Another* [2018] ZASCA 175; [2019] 1 All SA 335 (SCA); 2019 (3) SA 117 (SCA) paras 62 and 63(a); *Schultz v Butt* [1986] 2 All SA 403 (A); 1986 (3) SA 667 (A) at 678F-H; *Long John International Ltd v Stellenbosch Wine Trust (Pty) Ltd* 1990 (4) SA 136 (D) at 143G-I; *Milestone Beverage CC and Others v The Scotch Whisky Association and Others* [2020] ZASCA 105; [2020] 4 All SA 335 (SCA); 2021 (2) SA 413 (SCA) para 16 (*Milestone*).

actionable even if the misrepresentation is innocent).¹⁹ On appeal, the appellant appears to have accepted that if it is found to trade in contravention of the statutory prohibitions, then the respondent has proven unlawful competition and that the court *a quo* was correct in so finding.” (own emphasis)

[53] On the strength of the above authorities therefore, I am of the view that the appellant is well suited to bring the application *in casu*.

Requirements for a final interdict

[54] With the above finding extant, and the reasons relied upon therefore, it follows in my view, that the appellant did establish the requirements of a clear right and an injury actually committed or reasonably apprehended in respect of the final relief it sought in the matter. The only remaining issue for determination is whether or not the court *a quo* was correct in finding that it has a suitable alternative legal remedy available to it.

[55] In this regard, the court *a quo* relied on *Purple Dot* and the authorities referred to therein which found in similar circumstances, that where an option of a criminal prosecution and sanction was available to an aggrieved party, it could not be said that the aggrieved party did not have an alternative legal remedy.

¹⁹ *Elida Gibbs (Pty) Ltd v Colgate-Palmolive (Pty) Ltd (1)* [1988] 4 All SA 68 (W); 1988 (2) SA 350 (W) at 358F-359A: ‘[w]here, however, a misstatement of fact relates to a fundamental or intrinsic quality of the wares to be sold, thereby providing the advertiser with a competitive advantage, a plaintiff should not be non-suited merely because the deception was innocent’.

[56] In the *KKK Properties* matter,²⁰ in dealing with a similar issue, the court found that the appellant did not have a suitable alternative remedy where the appellant had opted for an interdict instead of the mechanisms provided for in the NGA and provincial Gambling Acts. The appeal court accordingly confirmed the granting of an interdict by the court *a quo*. Referring to this matter, the court *a quo* in the matter *in casu*, held that *KKK Properties* was distinguishable in that the illegal conduct there had on previous occasions been reported to the Board, which took no steps to deal with the matter.

[57] Notably however, the submissions of the appellant in this regard in the present matter were that it had reported the matter to the Provincial Board, as well as the respondents themselves, requesting them to desist from the illegal conduct. No reaction was yielded by the letters sent to the two in this regard. It would seem to me from the judgment therefore, that the court *a quo* took issue with the fact that the said conduct was not reported to the National Board by the appellant.

[58] The main criticism levelled against the appellant, so it seems, laid on its failure to report the matter to the SAPS, where the legal framework in this regard provides mechanisms to deal with the problem, up to setting down severe criminal sanctions.

[59] The available legal authorities in this regard point to the view that the court *a quo* may have erred. The *Purple Dot* matter, which the court *a quo* followed in this regard, made the error of incorrectly distinguishing the *KKK Properties* matter solely

²⁰ *Supra*.

on the basis that previous reports had been made to the Board in the latter matter. It would appear that the court *a quo* fell into the similar trap.

[60] The aspect of the report to the Board was mentioned in *obiter* by the court in *KKK Properties*. At paragraph 33 the court made the following remarks:

“It has already been stated above that the third respondent has limited resources to enforce the Gauteng Act and monitor illegal gambling activities. This is evidenced by the non-responsiveness of the third respondent to the correspondence of the applicants as far back as 2011 to act on the activities of unlicensed players.”

[61] From the above passage it seems to me that what the court was highlighting here was that the Provincial Board had limited resources to monitor illegal gambling activities and to enforce the Provincial Act. The emphasis was not on the fact that because the conduct had previously been reported, it meant that the applicant had no alternative legal remedy. It is also relevant that in this same matter nowhere is it stated that the illegal activities were ever reported to the SAPS.

[62] Quite ironically, the argument that was raised in *KKK Properties* is the same argument raised by the appellant in the present matter, namely, that the respondents' conduct was reported to the Provincial Board which yielded no reaction because, *inter alia*, it does not have enough resources. Similar to the present matter, the illegal conduct in *KKK Properties* was never reported to the police.

[63] It appears that the court in *Purple Dot* took the *obiter* remarks of the court in *KKK Properties* as the *ratio* for its decision on the absence of an alternative legal remedy, when in actual fact, and as clearly demonstrated in the passage above, that was not the case. In this regard therefore, no doubt the *Purple Dot* matter was wrongly decided.

[64] Mr Ellis, on behalf of the appellant submitted the following on this issue:

64.1 The remedies granted by the National and Provincial Gambling Acts are not remedies available to the appellant.

64.2 The remedies granted to the National and Provincial Boards by legislation which are aimed at empowering the said Boards to search premises and seize equipment with a view to enable a criminal prosecution and not to stop such illegal activities.

64.3 The appellant has no control over any criminal prosecution.

64.4 Neither of the Acts provide that any Board or inspector may close down an illegal gambling operation and therefore no remedy similar to an interdict is available to the appellant under these Acts.

64.5 Criminal proceedings are not aimed at closure of illegal gambling operations, but the punishment of those engaging therein.

[65] In line with the *stare decisis* principle, Mr Ellis urged this court to follow the decisions in *Parelio Foods*²¹ and the Full Court in *Vukani Gaming Gauteng (Pty) Ltd v*

²¹ *Supra*.

Royal Internet Café,²² in dealing with available alternative remedies. The above decisions, in dealing with similar circumstances, found that the remedies available in terms of the Gambling legislation were not remedies that are equally or more effective to the one provided by an interdict, and the fact that the offending conduct might constitute a criminal offence did not accord to the applicant having similar protection to that sought by way of interdict proceedings. Accordingly, the courts in both these decisions held that the applicants did not have an alternative legal remedy.

[66] Further authority in this regard is found in *Sigalo Foods v Clover SA*²³ where the Supreme Court of Appeal stated the following:

“The appellant contends that the respondent had available to it an alternative remedy under the Act which, so the contention goes, should have been pursued instead of this application. On that score, s 3 of the Act, which states that the Minister may ‘prohibit the sale of a prescribed product’, has been invoked.²⁴ However, why it is thought that s 3, which does no more than empower the Minister to take steps to ensure compliance with the Act, would avail the respondent in the present circumstances is far from clear. ...

²² Unreported decision in Gauteng Case no. A511/2017.

²³ *Supra*.

²⁴ Section 3(1) provides that the Minister may prohibit the sale of a prescribed product unless that product is sold according to the prescribed class or grade; unless that product complies with the prescribed standards regarding the quality thereof, or a class or grade thereof; unless the prescribed requirements in connection with the management control system, packaging, marking and labelling of that product are complied with; if that product contains a prescribed prohibited substance or does not contain a prescribed substance; and unless that product is packed, marked and labelled in the prescribed manner or with the prescribed particulars.

In any event, s 3 of the Act falls far short of affording the respondent the remedy sought in this application, namely to interdict and restrain the appellant's continuing unlawful conduct. As observed in *Milestone Beverage CC and Others v The Scotch Whisky Association and Others*²⁵ (*Milestone*) (citing with approval the judgment of Trollip J in *Johannesburg City Council v Knoetze and Sons*²⁶):

‘ . . . [T]he purpose of an interdict is to restrain future or continuing breaches of a statute, whereas the statutory remedy of prosecuting and punishing an offender relates to past breaches. Different considerations must therefore inevitably apply. For, while the statutory remedies might be adequate to deal with past breaches, the civil remedy of an interdict might be the only effective means of coping with future or continuing breaches.’²⁷

The respondent's case is that the Act and the Regulations make no provision for any form of relief even remotely similar to an interdict to restrain continuing unlawful competition in the form of trade in contravention of a statutory prohibition. But, even if there was a statutory remedy that could be invoked to address the unlawful competition (and there appears to be none), then applying the dictum in *Milestone*, there is nothing that prevents the respondent from seeking an interdict in the high court. Nothing, therefore, precluded the respondent from seeking the remedy of an interdict for alleged trade in transgression of a statutory provision and, therefore, unlawful

²⁵ *Milestone* fn 21 above.

²⁶ *Johannesburg City Council v Knoetze and Sons* 1969 (2) SA 148 (W) at 150-155.

²⁷ *Milestone* fn 21 above para 53.

competition in the court *a quo*.”

[67] These authorities, in my view, settle the matter once and for all. The remedies provided in terms of the National and Provincial Gambling Acts are aimed at dealing with past transgressions as their object is the punishment of those who engage in illegal gaming activities. They do not avail the appellant in addressing the ongoing and future unlawful conduct of the respondents. The only remedy that can avail the appellant in this regard is an interdict. The court *a quo* therefore, erred in finding that the appellant had a suitable and better alternative remedy available to it.

[68] Under these circumstances therefore, the appeal must be upheld.

Costs

[69] I am not persuaded that an attorney and client scale of costs is warranted in the matter. In my view, the appellant as the successful party, is entitled to its costs, but such are to be on a party and party scale, including the costs of two counsel.

Order

[70] Accordingly, the following order is made:

70.1 The appeal is upheld with costs; and

70.2 The order of the court *a quo* dated 10 August 2021 is replaced with the following order:

(a) The respondents, and all persons occupying the unlicensed premises by, through or on behalf of the respondents are interdicted and restrained from:

- (i) conducting any restricted gambling activity, unlawful gambling activity and engaging in any other conduct connected with unlawful gambling activity prohibited by the National Gambling Act 7 of 2004 and the Eastern Cape Gambling Act 5 of 1997;
- (ii) permitting or allowing gambling as defined in section 1 of the National Gambling Act 7 of 2004 and the Eastern Cape Gambling Act 5 of 1997, on and from the premises.

70.3 The respondents are directed to pay the costs of this application, jointly and severally, the one paying the others to be absolved, on a party and party scale, including the costs of two counsel. The costs of Senior Counsel to be classed in accordance with scale C provided in Rule 69(7) of the Uniform Rules of Court, and those of junior counsel in accordance with scale A.

V P NONCEMBU

JUDGE OF THE HIGH COURT

I agree

J EKSTEEN

JUDGE OF THE HIGH COURT

I agree

R KRUGER

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the Appellant:

P Ellis SC (with A P Ellis)

Instructed by:

PDR Attorneys Inc

C/O McCallum Attornes

Makhanda

Counsel for the Respondents:

N Jagga

Instructed by:

Vardakos Attorneys

C/O Carinus Jagga Inc

Makhanda

Date of hearing

29 January 2024

Date judgment delivered

18 April 2024