



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No. : A265/2013

In the application between:-

VASILIOS VARDAKOS

1st Applicant

VALERIE VASSILEV VASSILEV

2nd Applicant

KYRIAKOS VARDAKOS

3rd Applicant

and

FREE STATE GAMBLING & LIQUOR AUTHORITY

1st Respondent

**THE CHIEF EXECUTIVE, FREE STATE
GAMBLING & LIQUOR AUTHORITY**

2nd Respondent

**CHAIRPERSON OF THE FREE STATE
GAMBLING & LIQUOR AUTHORITY**

3rd Respondent

HEARD ON: 13 JUNE 2016

JUDGMENT BY: VAN ZYL, J *et* MOTIMELE, AJ

DELIVERED ON: 30 JUNE 2016

[1] The Free State Gambling and Liquor Authority (“the Authority”) issued an advertisement in the Provincial Gazette dated 19 November 2010 and the Daily Sun newspaper of the same date, inviting applications from any persons who are interested to hold bookmaker licences in the Free State Province. The applicants applied pursuant to this notice.

[2] The notice read, inter alia, that:

- i) The application be made on a prescribed form;
- ii) All applicants are invited to tender payment of a lump sum for the acquisition of the licence; and
- iii) A non-refundable application fee of R5500.00 was payable upon submission of the application forms.

Furthermore, the Authority stated seven (7) areas, within which it has bookmaker licenses available, and advise that only two operators will be allocated per area.

[3] Applications were received and acknowledged on the 31 March 2011. Thereafter inspections were carried out at the proposed premises, and no objections were raised against any of the applications.

[4] On the 24 May 2013, the Authority wrote to the Applicants and advised them that the applications for a bookmaker’s licence, was considered by the board, but refused in terms of section 65(4)(a) of

the Free State Gambling and Liquor Act, 6 of 2010 (“the Act”) due to the following reason(s):

- i) That the Applicants did not tender a lump sum for the acquisition of a Bookmaker Licence in terms of the notice inviting the applications, read with section 78(1)(b) of the Act.
- ii) Additional reasons were given in respect of other Applicants. In respect of the Second Applicant, it was stated that the proposed premises are next to an already existing bookmaker. Third Applicant was advised that his application was not accompanied by the approval or representations of the Local Authority within whose area of jurisdiction premises, in respect of which the application is made, are situated.

The Board then concluded, that in light of the above it is its view, that the applications did not meet the legislative prescripts, and that non-compliance with the prescripts as outlined by the Act constitute a material defect, and the applications are therefore refused.

- [5] Applicants launched an application in terms of Rule 53 of the Uniform Rules of Court read with section 6 of the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”), to obtain an order reviewing and setting aside the decision of the Authority, not to grant the bookmaker’s licence to the Applicants.

In addition the court was requested to remit the matter back to the Authority for reconsideration.

- [6] In the main, the legal basis for the review application was that:
- i) The action by the Authority was procedurally unfair in that the Applicants did not receive notice of the intended decision;
 - ii) Applicants were not afforded the opportunity to make representation in respect of the proposed decision by the authority;
 - iii) The decision to refuse the application was influenced by an error in law;
 - iv) The action taken was arbitrarily with no regard for the import or the nature of the invitation to provide a lump sum;
 - v) The action was taken for a reason not authorised by the empowering statute.

In respect of the other grounds of disqualification, Applicants contended that they complied, alternatively, that it is not a legislative disqualification, and accordingly without merit and bad in law.

COUNTER REVIEW

- [7] The Authority instituted a counter-application seeking to review and set aside the decision, process and notices inviting applications for bookmaker licences (“the notices”), with an order directing that the process recommence *de novo*.

- [8] It is contended on behalf of the Authority that the notices are defective, in that they did not set out;
- i) The evaluation criteria referred to in section 78(1) of the Act; and
 - ii) A lump sum needed to be paid.

That the illegality consequently taints the administrative process which took place including the evaluation of the applications delivered in response to the notices and the decisions regarding the applications for bookmaker licences.

- [9] The Authority's review application is in terms of PAJA and the court's inherent right to review administration actions and decisions based on rationality and legality.

APPLICATION OUT OF TIME (CONDONATION)

- [10] The Applicants raised the issue of the counter-review being out of time, or launched after an inordinate delay which is unreasonable, without asking for condonation. This issue was raised for the first time in their heads of argument without being canvassed in their affidavits at all. The result is that the Respondents could not respond to that in their reply. In the event of a party raising an issue for the first time in its heads of argument, and without canvassing same in the affidavits filed, the issue is similar in status with any point raised by the court *mero motu*. In other words it is a point by the court and not the party, and this might have a bearing on a cost order in event that it is successfully raised.

[11] The Respondents contend that the counter-review is not out of time. The process was multi staged and it is both possible and desirable to treat it as such and view it holistically; alternatively that in any event, the Authority only received legal advice relating to the validity of the notice after the Applicants instituted the review application. In consequence, the argument goes, that the counter-review on legality at the very least, was instituted within a reasonable time.

[12] I find that, the counter-review based on legality and rationality was brought within a reasonable time as soon as the illegality was pointed out. I find solace in this view, in that the principle of legality is one of the foundational principles of our constitution. Failure to canvas this point in the papers precludes the Applicant from seeking to raise it, in ambush in their heads of argument. Had the point being raised earlier the Authority would have dealt with the facts relevant to the issue of delay and also sought an extension of time or condonation. At the beginning of the arguments, counsel informed us that they have agreed that the Respondents have the duty to begin.

THE NOTICE

[13] Respondents contend that the notice is invalid in that it did not comply with the provisions of section 78(1) of the Act and this vitiated the whole of the application process with the result that no valid licence could be issued pursuant to that process.

[14] The court also cannot issue a valid licence as claimed by the Applicants, inasmuch as the court can only exercise the powers

which the Authority enjoyed, and since the Authority did not have the power to issue the licence neither can the court.

[15] I proceed to look closely at the notice. Section 78(1) proves that:

“No person may apply for a bookmaker’s licence other than in response to a notice published in the *Provincial Gazette* and the media by the Authority, inviting applications and which notice may (underline for emphasis) state—

- (a) the number of licences to be issued and the areas to which the licences will relate;
- (b) an invitation to tender payment of a lump sum for the acquisition of a licence; and
- (c) the evaluation criteria to be applied.”

[16] The Applicants contends that section 78(1)(c) is couched not in peremptory terms, but directory. It does not create an obligation on the Applicants. In other words section 78(1)(c) created no more than an invitation (no obligation) to tender a non-specified amount as a lump sum for the acquisition of the licence. Nothing within the legislative scheme of things justify an argument that the failure to tender an amount would be a material omission on the part of the Applicants.

[17] It is further submitted on behalf of the Applicants that the Authority erred by not exercising its discretion in terms of section 68(3) by either holding a hearing with the applicants or informing the applicants to make submission on the lump sum.

[18] The Authority on the other hand contends that the Applicants' interpretation proceeds from a juridically unsound premise. The proper approach to the interpretation of the language used in an enactment is not to look at a single word and then apply what is seen as its ordinary meaning, instead the process of interpretation involves a proper consideration of the context in which the language has been used and by applying a purposive approach. To hold otherwise, one will be guilty of what Kenbridge AJ, (as he then was) pointed out any other approach is divination rather than interpretation. See **S v Zuma and Others** 1995 (2) SA 642 (CC) (1995 (1) SACR 568; 1995 (4) BCLR 401) paras [17] and [18]. This was recently affirmed by Wallace JA in **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) at [18]. He said:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in

regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

See also **Cool Ideas 1188 CC v Hubbard and Another** 2014 (4) SA 474 (CC) at [28].

[19] The court has held that the use of permissive language, such as "may" has to be interpreted to mean "must". See **Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)** 2002 (5) SA 246 (CC) at [180]. But this is not an issue about legal precedent, instead it is an issue of interpretation, and as has been said "context is everything" in attaching meaning to the language of an enactment. See **KPMG Chartered Accountants (SA) v Securefin Ltd and Another** 2009 (4) SA 399 (SCA) at [39]. Although this was said in the context of interpreting the language of a contract, it is my view that it is equally applicable to statutory provisions.

[20] The proper interpretation of section 78(1) requires the purpose and objectives of the section to be taken into account, so that the interpretation is given to the section achieves that purpose. Interested persons ought to be notified of the number of licences to be issued, the areas to which the licences will relate, the lump sum required and the evaluation criteria to be applied. The legislature

has prescribed these details as the minimum information that should be disclosed in the notice, to achieve the objects of the Act.

- [21] The construction placed by the Applicants on section 78(1) of the Act is wholly untenable. Such a construction will have the opposite effect to what the legislation was intended to achieve. In short the notice would be bereft of any meaningful information to assist an interested person to make an informed decision to apply for the licence. Such a notice would not pass the muster. The Legislature does not intend absurd results, but intends to advance the public interest. Words in a particular section ought to be interpreted purposively and not abstractly by divorcing the language from the context. It is trite that the question of validity of the notice must be determined as follows:

“In deciding whether there has been a compliance with the injunction the object sought to be achieved and the question of whether this object has been achieved are of importance.”

See **Maharaj and Others v Rampersad** 1964 (4) SA 638 (A) at 646C; **Coalcor (Cape) (Pty) Ltd V Boiler Efficiency Services CC** 1990 (4) SA 349 (C) at 356 C-D. Furthermore, this interpretation is supported by section 78(2) of the Act, which provides that the bookmaker's licence must only be granted to a person who meets the prescribed requirements. It would defeat the purpose of this provision if the notice did not inform the applicant of the prescribed requirements.

[22] In the result, I hold that section 78(1) of the Act, ought to be interpreted purposively to require the notice to include details referred to in the section.

ORDER

I, therefore make the following order:

1. The counter-review succeeds and the decision, the process and the notices issued by the Authority in terms of section 78(1) are hereby reviewed and set aside.
2. The Authority is directed to recommence the process de novo.
3. The review application is dismissed.
4. The Applicants to pay the costs of the applications, jointly and severally, such costs to include those consequent upon the employment of two counsel.

A.M.M. MOTIMELE, AJ

I agree.

C. VAN ZYL, J

On behalf of Applicants: Adv N Jagga
Instructed by:
Honey Attorneys
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On behalf of Respondents: Adv N Singh SC
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