

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 87975/2015

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
20/6/16 DATE	
 SIGNATURE	

21/6/2016

In the matter between

VUKANI GAMING GAUTENG (PTY) LTD
DIE WATERGAT KROEG CC
2 GREEKS AND A BOERTJIE INVESTMENTS CC

FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT

and

KKK PROPERTIES CC
ROYAL INTERNET CAFÉ
THE GAUTENG GAMING BOARD

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT

JUDGMENT

MADIMA, AJ

[1]. The applicants seek to interdict the first respondent from permitting the use of its premises by the second respondent for the purpose of unlawful gambling activities. Similarly an order interdicting the second respondent from conducting, permitting or allowing the unlawful gambling activities on the premises.

[2]. The premises, situated in the Northdale Shopping Centre in Akasia, Pretoria are owned by the first respondent, and occupied by the second respondent, as the tenant.

[3]. The first applicant is Vukani Gaming Gauteng (PTY) LTD ("Vukani"). It is the holder of a route operator licence for the province of Gauteng. The license allows Vukani to offer for play 1 000 Limited Payout Machines ("LPMs") in Gauteng province and at sites approved and licensed by the third respondent.

[4]. The second applicant is Die Watergat Kroeg CC ("Die Kroeg") and conducts the business of a pub from its premises situate at Eeufees Street in Pretoria North. Die Kroeg is licensed by Vukani for five LPMs in respect of the Eeufees Street premises.

[5]. The third applicant is 2 Greeks and a Boertjie Investments CC ("2 Greeks") and conducts business as The New Maroela Hotel in Pretoria North. 2 Greeks is also licensed by Vukani for five LPMs from its premises.

[6]. The first respondent is KKK Properties CC ("KKK Properties"), and the owner of the Northdale premises. KKK properties has not been licenced by the third respondent. The second respondent is Royal Internet Café ("the Royal"), and provides internet services from the Northdale premises. It also has not been licenced by the third respondent. The third respondent is the Gauteng Gambling Board ("the Board") established by section 3 of the Gauteng Act 4 of 1995. No relief is sought against the third respondent, however it is cited herein in so far as it may have an interest in the outcome of this application.

[7]. This matter was first brought out of this Court as an urgent application on 6 November 2015. The applicants sought *inter alia* a *rule nisi* against the first and second respondent pending finalization of the application on the return date. The first and second respondent filed their answering papers on 27 November 2015. On 1 December 2015 the application was struck off the roll for lack of urgency.

[8]. The matter came before me on 16 May 2016. In their heads of argument the first and second respondent raise in their submission certain preliminary objections that I find no longer relevant. These objections relate to condonation or lack thereof for the filing of heads of argument as well as the lack of a notice of withdrawal as attorneys of record by the applicant's erstwhile attorneys. I am more interested in the merits of the case as I have enough to work on to arrive at a decision in this application.

Background

[9]. The applicants are the holders of licences which permit them lawfully to offer gambling. They claim that the rights afforded them by their respective authority are affected by the conduct of the first and second respondents.

[10]. Vukani has in the past reported the existence of illegal outlets to the Board as far back as May 2011. Neither an acknowledgment of receipt of the complaint nor any action was taken by the Board. Vukani took matters in its hands and enlisted the assistance of private investigators, Mike Venter and Patrick Le Roux ("the investigators") who were also aware that illegal gambling was taking place at the Northdale premises. The investigators went to the premises and observed the illegal activities. They took the video and still images thereof.

[11]. In their affidavit the investigators describe at length the *modus operandi* of the second respondent and its customers. The activities included *inter alia* the following:

- 11.1. The exterior of the premises is intended to create the impression that the business is that of an internet café;
- 11.2. Despite the apparent innocent nature of the business, access to the premises is strictly controlled by security guards;
- 11.3. Upon gaining access to the premises, the person goes to a front desk and there pays over a sum which has to be in cash only in order to obtain a voucher and is then shown to a computer terminal by one of the employees;
- 11.4. The value of the voucher which can be loaded is not limited to R5.00;

- 11.5. The computer terminal has a touch screen which offers the patron no option of accessing the internet and browsing a site of his choosing at will;
- 11.6. instead, all that can be accessed are forms of gambling games;
- 11.7. These games can only be played after a patron has entered the voucher number or the front desk employee has loaded a credit to the value of the cash handed over;
- 11.8. A voucher is loaded by entering the voucher number which appears thereon using the touch screen computer. Once the voucher number is entered, the amount of available playing credit which is equivalent to the amount of cash the patron handed to the teller at the front desk appears in the right hand corner of the screen. This amount fluctuates during play depending on the result of the games but the credit available at any given time always appears on the screen;
- 11.9. The machines offer a multitude of games;
- 11.10. Many of the games on offer are similar to those offered on legal LPMs. For example, a game called Queen of the Nile is offered and this is one of the most popular LPM games offered in legal establishments;
- 11.11. The machines however also offer electronic card games such as poker but no card games have been licensed and authorised for play on LPMs;
- 11.12. Each time a player wishes to play, he is required first to place a bet;
- 11.13. The player then plays the game by pressing "buttons" on the computer touch screen;
- 11.14. The computer then displays the result of the game;
- 11.15. If the player won the game then the value of the credit which appears on the screen increases;
- 11.16. There is no apparent cap on the winnings, one punter won R12 000.00 in cash;
- 11.17. If the player lost the game the value of credit on the screen decreases by the amount which he places a bet;

- 11.18. If the player loses several games and the figure of credit available reduces in the result to zero, the player cannot continue to play on the terminal but has to approach the front desk again and in return for cash will be given another voucher or credit to the value of the cash will be loaded onto the machine by the front desk staff;
- 11.19. A player can cash in his winnings at any stage, if he does so, will be paid in rand an amount equal to the number of credits appearing on the screen;
- 11.20. In the event that a player wishes to stop playing and redeem the amount of credit due to him as it appears on the screen, he does so by again approaching the front desk, the staff of which check the amount reflecting on the computer terminal at which the patron has been playing and pays the amount to the patron, again in cash;
- 11.21. Liquor is not served on the premises but tea, coffee and cool drinks are provided free of charge;
- 11.22. All of the games are purely games of chance in the nature of games offered on an LPM where no skill is required of the player.

[12]. The above description of what takes place at the premises form the basis upon which the applicants seek their relief against the first and second respondent. The applicants further submitted that by their above conduct, the first and second respondents were in contravention of several of the laws governing gambling both national and provincial. Specifically Mike Venter stated that R200.00 of a customer's voucher was lost in 5 minutes. There is a sign behind the reception desk of the second respondent that states that internet access costs R60.00 for 1 hour, R30.00 for 30 minutes and R15.00 for 15 minutes. Le Roux's associate won R309.00 after paying R100.00. He cashed out and was paid.

[13]. The applicants claim further that the second respondent in particular was offering a gambling activity in the premises of the first respondent. The first respondent, by allowing such illegal activities on its premises. This activity may not be offered unless it

is licensed. By so doing the second respondent is in contravention both the provisions of the national and provincial Acts.

[14]. Section 5 of the National Gambling Act provides that an activity is 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 payment, and the result might be determined by the skill of the player, the element of chance or both.

[15]. Section 1 of the Gambling Act defines gambling as 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 of skill is involved or not and encompasses all forms of gaming and betting but excluded the operation of a machine contemplated in sub-section (3) or (4).

[16]. The first and second respondents challenge the evidence of the investigators on the basis that the investigators did not participate personally on the sting operations. There also are no affidavits deposed to by those claimed to be the participants in the gathering of the information.

[17] The first and second respondents also claim that the applicants seek a final interdict where the principles in *Plascon Evans Paints v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)* had not been met. Further that the applicants failed to file a replying affidavit.

[18] In its answering affidavit the second respondent asserts that the business it runs is a bona fide internet business with internet based facilities that customers make use of in order to access the internet for a fee which inter alia also "allows for gameplay." The second respondent further states that*games may obviously also be accessed on the computers, and that "this does not mean however that the playing thereof takes place on the basis that the second respondent is a party thereof or enters into any form of agreement with the customers in terms whereof the customer stands to win anything by playing any game"*.

[19]. The second respondent further asserts that *"Should a customer however visit a site on the internet that allows for gaming (and even gambling such as a bookmaker online site or an online casino) the second respondent has nothing to do with those activities"*.

[20] The second applicant submitted supporting affidavits by Hendrick Fourie, and Leon Krugell, customers who frequent the Northdale premises which both somewhat refer to as Northvale Shopping Centre. Both state that they have never utilized the internet at the premises for gambling purposes and have not seen anyone do that. They both state that the money that exchanges hand between the cashier and the customer relates to airtime that costs R15.00 and multiples thereof. Where he has not utilized all of his airtime, the customer is refunded the difference.

[21] The manageress also deposed to an affidavit stating that neither she nor her staff members have made any payouts in cash value as a consequence of gambling as no gambling takes place on the premises.

[22] The applicants attached to their papers stills from video recordings made by the investigators and confirm the accuracy thereof. The first and second respondents make much of the fact that the investigators confirm the accuracy of the stills but not the authenticity thereof.

[23] The first and second respondent state that the applicants have failed to file supporting affidavits by the patron who won. Importantly the second respondent claims that unless a client complains, there is no control over the sites a client chooses to visit on the internet.

[24] It seems the second respondent is not in a position to control and regulate the conduct of its customers who frequent his shop. The possibility exists that customers of the second respondent do in fact conduct gambling activities on the second respondent's machines. I have great sympathy for the second respondent if it is not in a position to control what its customers do on its machines at any given point. This does not mean that the second respondent is completely without a solution. It could for

example disable its machines of the gambling sites or monitor the activities of its customers. The former would be the best option to make the second respondent to not fall foul of the gambling laws.

[25] There is further no doubt that the conduct of the second respondent in allowing customers to gamble or its inability to prevent the customers from gambling on the premises is an affront to public policy and is unlawful. To compound matters for the second respondent the gaming activity that is allowed by the second respondent on the premises is not open to the scrutiny by independent testing authorities to verify the algorithms and mathematical processes used in the LPMs, so that players can be treated fairly.

[26] What purportedly occur on the premises is undoubtedly unlicensed gambling and a contravention of the gambling laws both at national and provincial level. For the second respondent to lawfully offer gambling activities, it must acquire a licence issued by the third respondent. The second respondent is not a holder of a route operator licence or an independent site operator license at sites that have been approved by the third respondent.

[27] The first respondent as the owner of the premises is also precluded by section 87(2) of the Gauteng Act from allowing gambling activities without a licence. LPMs may only be offered to play under licence. Section 8 of the National Act read with the definition of "licensed" in section 1 and section 48 of the Gauteng Act should be complied with by the first respondent. Section 48 of the Act provides that "*No person shall maintain premises where gaming machines or gambling devices are available to be played or be in possession of gaming machine or gambling devices without the necessary licence.*" The contravention of sections of the National and Gauteng Acts constitute criminal offences. The premises are zoned for commercial use and not for entertainment. This means that both the first and second respondents are acting in breach of the law

[28] I find it extraordinary that the applicants would go to the extent of appointing private investigators to monitor the first respondent's premises and the activities of the

second respondent's customers unless they had reasonable suspicion that illegal activities were taking place on the premises. I also find that the applicants would not have brought this application if there was any doubt regarding the findings of the investigators. The probability must therefore favour the applicants in this instance.

[29] 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.

[30] 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.

[31] Vukani for its part has to pay to the State an annual licence fee of R124 155.00 plus R1 255.00 per registered gaming machine. All LPMs have to be connected to a central electronic monitoring system in terms of section 27 of the National Act. This enables the authorities to monitor the machines remotely and ensure that the fiscus derives all the revenue to which it is entitled and the players are treated fairly.

[32] The illegal outlets such as the one operated by the second respondent do not pay gaming tax. This affects the bottom-line of the applicants. There is little doubt in that regard.

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

[34] The probabilities are overwhelming that gambling does take place at the premises.

[35] The second respondent's answer to the investigators' report is that it is not corroborated and is hearsay. It is in breach of the constitutional right to privacy. The further defence is that the applicants have failed to comply with section 252A of the CPA 1977.

[36] I find both points unhelpful. Undercover operations are permissible if they do not go beyond providing an opportunity to commit an offence. *Kotze v S* [2010] 1 All SA 220 (SCA), 2010 (1) SACR 100 (SCA). Investigations to uncover the commission of an offence are permissible. The applicants acted within the law when they employed the investigators to uncover the illegal activities taking place at the premises of the first respondent and committed by customers of the second respondent.

[37] I am satisfied that the applicants have satisfied and complied with all of the requirements for an interdict. There shall be no prejudice to the respondents at all in the grant of the relief sought by the applicants. On the contrary it is the applicants who will continue to suffer harm if the interdict is not granted.

[38] In the circumstances I make the following order

1. The first respondent is interdicted and restrained from permitting the use of its premises situated at The Northdale Shopping Centre, 204 Grafenheim Street, Nina Park, Akasia ("the premises") for the purpose of restricted gambling activities and unlawful gambling as prohibited by the National Gambling Act 7 of 2004 and the Gauteng Gambling Act 4 of 1995;
2. The second respondent, and all persons occupying the premises by, through or on behalf of the second respondent are interdicted and restrained from:
 - 2.1. 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 Gauteng Gambling Act 4 of 1995;

2.2. Permitting or allowing gambling as defined in section 1 of the National Gambling Act 7 of 2004 and the Gauteng Gambling Act 4 of 1995 on and from the premises.

3. The second respondent to pay the costs of the application.



TS MADIMA: AJ

ACTING JUDGE OF THE HIGH COURT

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Dates of Hearing:

16 May 2016

Date of Judgment:

21 June 2016