IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 9101/2023P

In the matter between:

GOLD CIRCLE PROPRIETARY LTD	**APPLICANT**

and

THE KWAZULU-NATAL GAMING AND BETTING BOARD	**FIRST RESPONDENT**
MEMBER OF THE EXECUTIVE COMMITTEE FOR ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS, KWAZULU-NATAL	**SECOND RESPONDENT**
MEMBER OF THE EXECUTIVE COMMITTEE FOR FINANCE, KWAZULU-NATAL	**THIRD RESPONDENT**
MBALI PEARL MYENI	**FOURTH RESPONDENT**
CHARLOTTE NKOSINATHI MHLONGO	**FIFTH RESPONDENT**
NALINI MAHARAJ	**SIXTH RESPONDENT**
BRUCE STAMFORD STOBIE	**SEVENTH RESPONDENT**
SHARON FIKILE MKHIZE	**EIGHTH RESPONDENT**

LUCKY SIFISO GABELA	**NINTH RESPONDENT**
MPUMELELO GIFT MAHLASE ZIKALALA	**TENTH RESPONDENT**
PORTIA BALOYI	**ELEVENTH RESPONDENT**

JUDGMENT

Delivered on:

POYO DLWATI JP

Introduction

[1] This application concerns the issue of whether the first respondent, the KwaZulu-Natal Gaming and Betting Board (the Board), is entitled to withhold a 3% tax deduction from the amount won by bettors in respect of fixed-odds bets on horse races placed with a bookmaker at racecourses operated by the applicant, Gold Circle (Pty) Ltd (Gold Circle), and in premises other than a racecourse, in respect of horse races staged by Gold Circle and whether doing so is contrary to the KwaZulu-Natal Gaming and Betting Act 8 of 2010 (the Gaming Act), read with the KwaZulu-Natal Gaming and Betting Tax Act 9 of 2010 (the Tax Act) and whether that constitutes self-help which is inimical to the rule of law.

[2] Gold Circle operates racecourses for thoroughbred horse races from its Greyville racecourse in Durban and from its Scottville racecourse in Pietermaritzburg. It also operates training centres for thoroughbred racehorses at training centres in Ashburton and Summerveld in KwaZulu-Natal. It also operates betting facilities for horse racing and other contingencies from various locations in KwaZulu-Natal. It averred in its founding affidavit that it is the only racecourse operator licensed in KwaZulu-Natal to run thoroughbred horse racing events,

including the world-renowned Hollywoodbets Durban July. It also broadcasts international horse racing events at its own cost.

[3] Gold Circle prides itself on being a non-profit company, established as such for the sustainability of the horse racing industry in KwaZulu-Natal, and, therefore, whatever profits are made are ploughed back into the maintenance, development and transformation of the horse racing industry. It is also a licensed totalisator operator in terms of s 110 of the Gaming Act. This enables it to operate a totalisator betting system in KwaZulu-Natal and to offer totalisator bets to punters from a number of physical locations in the province and by way of telephone and online betting offerings.

[4] Gold Circle launched an application on an urgent basis seeking an order directing the Board to effect distribution to it, alternatively to the KwaZulu-Natal Provincial Treasury, of the 3% tax deduction from the amount won by bettors in respect of fixed-odds bets on horse races placed with a bookmaker: (a) at racecourses operated by Gold Circle and (b) in premises other than a racecourse in respect of horse races staged by it, as contemplated in s 128 of the Gaming Act, read with part D.1 of the Schedule to the Tax Act for the months of March, April and May 2023. Gold Circle also sought a personal costs order against the members of the Board.

[5] The Board is the licensing authority for, and regulates, inter alia, certain aspects of horse racing and betting operated in this province. The second respondent, being the MEC for Economic Development, Tourism and Environmental Affairs, KwaZulu-Natal (the MEC) is the designated MEC responsible for gaming and betting in this province. The MEC for Finance (the Finance MEC), the third respondent, was cited as he is responsible for finance in this province and is also responsible for the Provincial Treasury Department

(Treasury), which is in charge of the KwaZulu-Natal Provincial Revenue Fund (the Revenue Fund) in terms of s 21(1) of the Public Finance Management Act 1 of 1999 (the PFMA). The Chief Executive Officer of the Board, Ms Portia Baloyi, as well as all the Board members, were cited in their personal capacities.

Gold Circle's case

[6] According to Gold Circle's understanding of the relevant legislation, a bookmaker must deduct a 6% tax from winning bets placed with it at a racecourse or at premises other than a racecourse. A bookmaker must pay the aforesaid 6% tax into the Revenue Fund. The Revenue Fund must in turn effect payment of 3% of the tax received by it from winning bets placed on horse races staged by Gold Circle (irrespective of whether these races were staged at racecourses at which Gold Circle is licensed to stage race meetings) to Gold Circle (in the form of the 3% distribution), within 20 days after the end of every calendar month. If any other racecourse operator stages horse races in KwaZulu-Natal, the Revenue Fund must effect payment of 3% of the tax received by it from winning bets placed on horse races staged by that racecourse operator, within 20 days after the end of every calendar month. The Board bears the legislative responsibility in terms of the Schedule to the Tax Act to effect the payment of the 3% distribution to the racecourse operator.

[7] According to Gold Circle, it has for decades been entitled to and did receive half of the 6% tax levied by the province on amounts won by punters. The reason for this arrangement was a quid pro quo to compensate the racecourse operator from the bets which are placed on its events by bookmakers. This arrangement, according to Gold Circle, was confirmed in 2010 with the enactment of the Gaming Act and the Tax Act, especially s 77(3) of the Gaming Act, read with part D.1 of the Schedule to the Tax Act.

[8] Gold Circle complained that it had not received the 3% distribution for the months of March and April 2023, which became due on 20 April and 20 May 2023, respectively. The amount owed was approximately R8.5 million, which was a calculation based on prior experience and reasonable assumptions made by Gold Circle. Gold Circle contended that it was reliant on the 3% distribution to continue its operations and sustain thoroughbred horse racing in KwaZulu-Natal.

[9] According to Gold Circle, the practice has been that each month the Board imposed and collected 6% of all winning bets from bookmakers (rather than the bookmakers paying directly into the Revenue Fund), as contemplated in s 77(1) of the Gaming Act. The Board then paid 3% (half of this 6%) into the Revenue Fund and the remaining 3% was redistributed to Gold Circle. This practice was also reflected in the Board's annual report of 31 March 2022.

[10] Gold Circle contended that regardless of who collects the 6% tax from the bookmakers, its rights as a racecourse operator were clear. It is entitled to be paid its 3% within the prescribed time frame of 20 days after each calendar month. If it does not receive the 3% distribution, it will run at large and unsustainable losses, which would result in it shutting down its operations. Gold Circle tabulated in detail and provided a summary of its income and expenditure for the past financial years since 2020. It demonstrated how it would have suffered financial losses had these amounts not been paid to it.

[11] Gold Circle further contended that despite engaging the Board in an attempt to secure payment, those attempts have not been fruitful. Instead, during March 2023, Gold Circle received a letter from the Board advising that 'the Board' had decided that all taxes received by it from bookmakers would, with effect from that month, and in the manner contemplated in s 77(1) read with ss

128(1) and 129(1) of the Gaming Act, as amended by the KwaZulu-Natal Gaming and Betting Amendment Act 4 of 2017, be paid into the Revenue Fund.

[12] According to Gold Circle, it was not too concerned by this letter as it believed that the Revenue Fund would pay it the 3% distribution it was obliged to be paid in terms of s 77(3) of the Gaming Act. This, according to Gold Circle, was subsequently confirmed in its meetings with representatives of the Finance MEC, where an undertaking was made that the February 2023 payment would be effected within four weeks from the date of those payments. Indeed, the 3% distribution for February 2023 was received but nothing thereafter.

[13] It turned out that the Board had failed to pay any amounts to the Revenue Fund and the Finance MEC would not, therefore, be in any position to pay any distribution to Gold Circle. Gold Circle then caused a letter to be addressed to the Board and enquired about the reasons for the failure to make payments. According to Gold Circle, the Board did not adequately respond to its concerns but instead raised issues about a second licensed operator which was also entitled to the 3% distribution.

[14] Gold Circle contended that the second licensed operator did not stage horse races in KwaZulu-Natal upon which bookmakers offered fixed-odds bets and would accordingly not be entitled to any distribution. It, therefore, warned the Board of litigation in order to find redress. According to Gold Circle, the Board's actions in withholding the taxes were in line with proposed amendments to the Tax Act which were vehemently opposed or objected to by the gambling industry. It therefore believed that the Board resorted to 'self-help' which was inimical to the rule of law, hence the launching of this application.

The Finance MEC's position

[15] The Finance MEC filed an explanatory affidavit and indicated that she would abide by the decision of the court. In her explanatory affidavit, deposed to by Ms Carol Coetzee, she reiterated the provisions of the Gaming Act and Tax Act in relation to the 6% tax distribution. She explained that in terms of s 77 of the Gaming Act, the licensees who would receive the distribution would be the racecourse operators licensed in terms of s 89 of the Gaming Act. She further explained that she recently learnt that the Board had taken the view that Gold Circle was not the only licensee entitled to the distribution in terms of the Tax Act, even though there was an issue with the licence of that other licensee. In this regard, Ms Coetzee submitted that Treasury was concerned that distributions should not be made to any racecourse operator who was not properly licensed. She raised this concern with the CEO of the Board.

[16] Ms Coetzee also stated that she reminded the CEO of the Board that funds received by the provincial government ought to be promptly paid into the Revenue Fund and that all fees and taxes payable under the Tax Act were to be paid timeously and correctly. She also reminded the CEO that there was no authority to withhold funds from the Revenue Fund and that urgent steps ought to be taken to rectify the situation. Ms Coetzee averred that the CEO of the Board disputed that the Board had not complied with the PFMA or any gambling legislation and proposed that the matter be referred to the respective MECs, in line with the Intergovernmental Relations Framework Act 13 of 2005 (the Intergovernmental Act). Ms Coetzee made it clear that Treasury would comply with any order granted by this court but can only do so if the funds in question have been paid into the Revenue Fund in terms of s 77(1) of Gaming Act.

The Board's opposition

[17] The Board, its CEO and its members, save for the 6th and 7th respondents, opposed the application. It filed two answering affidavits and later a counter-

application. I will not deal in much detail with the answering affidavits, save to mention the gist of what they entail. The Board contended that Gold Circle had no statutory right to seek payment of the 3% tax deductions from it, as that right statutorily exists against the Revenue Fund. The fact that the Board was collecting tax deductions and distributing them on behalf of Treasury was an incidence of intergovernmental arrangements.

[18] The gist of the Board's opposition was that Gold Circle was not entitled to the full 3% tax distribution as it was not the only racecourse operator in KwaZulu-Natal. It was for this reason that at a meeting held in March 2023, the Board resolved that a letter be sent to Treasury advising it that the Board would no longer distribute taxes to the racecourse operators but would transfer the funds to the Revenue Fund. Treasury would then be requested to transfer the taxes to the transformation fund, where Gold Circle could then apply for them.

[19] According to the Board, Treasury responded to their letter by stating that payment to Ithotho would be improper, as, in their view, it was not an operational racecourse operator. According to the Board, this should not have been Treasury's concern, as the Board is the regulator of the provincial gambling industry, and in its view, Ithotho was compliant and a licensed racecourse operator. The Board then decided to withhold payment of any distribution - even to Treasury and the Revenue Fund.

[20] The Board raised various points in *limine*. It contended that Ithotho ought to have been joined in these proceedings, as it had a direct and material interest in the outcome of the proceedings. Another point in *limine* included the fact that its decision not to pay over the funds had not been reviewed and set aside, as it was an administrative decision in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Flowing from the previous point was the further

point in *limine* that Gold Circle was entitled to appeal the decision of the Board and had therefore not exhausted the internal remedies available to it. It further stated that the provisions of the Intergovernmental Act were applicable, as there was a disagreement between the Board and Treasury on how distribution should be effected. That process ought to be finalised first, before Gold Circle can seek any relief in court. The Board also criticised Gold Circle for launching its application on an urgent basis, as it contended that the urgency was purely commercial.

Gold Circle's reply

[21] Gold Circle responded to the Board's opposition. Nothing new was canvassed in the replying affidavit, save that it reiterated the Board's unilateral act of unlawfulness by withholding taxes from Treasury. Gold Circle disputed that the Board's decision to withhold payment was tantamount to an administrative action. It also disputed the Board's contention that it was not using the distribution for transformation purposes. In any event, so went the contention, there was no legal provision requiring Gold Circle to use the tax distribution for transformation purposes. According to Gold Circle, the determination for the use of those funds was the prerogative of Treasury and not the Board. It disputed that the 2020 transformation fund for the gaming and betting industry document had any legal status. It contended that it has a clear statutory right to the 3% tax distribution on horse races it stages and that the Board had no legal right or basis for withholding those taxes.

[22] Whilst Gold Circle admitted that Ithotho is the holder of a racecourse operator licence for standardbred and harness racing horse races, it denied that Ithotho staged such horse races or that bookmakers in KwaZulu-Natal offer fixed-odds bets to punters in connection with standardbred and harness racing horse races. If it did, then it would be entitled to its own 3% distribution in accordance

with the relevant legislation but not to Gold Circle's distribution. Gold Circle also denied that Ithotho ought to have been joined in these proceedings as Gold Circle only sought payment to it of the deduction from bets on horse races placed with a bookmaker at a racecourse operated by it or horse races staged by it. However, out of caution, it had also served the application papers on Ithotho.

[23] Ithotho sent an email to Gold Circle after the papers were served on it. It advised that it would not be joining the proceedings but would abide by any order granted by the court. Gold Circle also contended that the Board's reliance on s 140[1] of the Gaming Act was misplaced. This was so as the decision being challenged was that of the Board and not the CEO as envisaged in the Gaming Act. In any event, so went the contention, any internal remedy under PAJA did not need to be exhausted prior to bringing an urgent interdict but needed to be exhausted prior to bringing a review of a decision. Gold Circle also disputed that it ought to respect the intergovernmental disputes resolution process, as the question was not whether the Board should withhold payments to Treasury but to it, which is not part of government. It stated that it would be unjust and not in the interests of any party for the funds to be held by the Board indefinitely.

The Board's counter-application

[24] After the filing of Gold Circle's replying affidavit, the Board launched a counter-application. It sought an order that

'3. In the event that this Court grants the applicant relief in the main application, then the first respondent seeks an order declaring as follows:

3.1 Gold Circle (the applicant) is entitled to payment of 3% of the distributable tax, provided for in Item D1 of the Schedule to the KwaZulu-Natal Gaming and Betting Tax Act 9 of 2000, deducted from the amount won by bettors in respect of fixed-odd bets which are:

[1] Section 140 deals with appeals.

(a) placed with a bookmaker at the racecourses which are specified in the racecourse operator licence, issued to Gold Circle, in terms of section 89(1) of the KwaZulu-Natal Gaming and Betting Act no.8 of 2010 ("Betting Act"); and/or

(b) placed with a bookmaker in premises other than a racecourse, in respect of horseraces specified in the racecourse operator licence, issued to Gold Circle in terms of section 89 of the Betting Act.'

The Board also sought a costs order against Gold Circle if it opposed the counter-application.

The Board's tender

[25] The Board sought to supplement its initial answer and set out its tender to Gold Circle in order to resolve the matter and stated that the counter-application would only be persisted with if the Board's tender was not acceptable. This was done after the Board received further advice to resolve the application. Its tender to resolve the matter was, however, rejected by Gold Circle. In the counter-application, the Board stated that it accepted that it must pay Gold Circle the distributions in respect of horse races at racecourses which it was licensed to operate. As a result, it resumed payments. For these payments, it relied on the provisions of s 7(2)*(l)* of the Gaming Act.

[26] What remained at issue, according to the Board, was how much Gold Circle was entitled to as a licensed racecourse operator, and whether it was entitled to any distribution in respect of horse races that it does not stage. That issue, according to the Board, was the subject of the intergovernmental dispute resolution process, which was still on the way. According to the Board, Gold Circle was claiming distributions in respect of taxes raised on horse races that it had not staged at its licensed racecourses, as well as those that arose from bets placed on horse races in other provinces and internationally.

[27] On this basis, the Board tendered a settlement to Gold Circle as follows:

‘(a) the Board will pay to Gold Circle 3% of the tax deduction amount won by betters in respect of fixed- odds bets on horse races, which are: -

(i) placed with a bookmaker at the racecourses which are specified in the racecourse operator license, issued to Gold Circle, in terms of s89 of the KwaZulu-Natal Gaming and Betting Act, No. 8 of 2010, as amended (“the Betting Act”); or

(ii) placed with a bookmaker in premises other than a racecourse, at the racecourses which are specified in the racecourse operator license, issued to Gold Circle in terms of s89 of the Betting Act.’

This tender, according to the Board, encapsulated the relief sought by Gold Circle in terms of para 2 of its notice of motion and is consistent with the racecourse operator’s licence granted to Gold Circle by the Board. The Board also proposed that each party pays its own costs.

Gold Circle’s response to the tender and the counter-application

[28] Gold Circle did not accept the tender but there were interactions between the legal representatives, hence the delay in filing the counter-application. In response to the counter-application, Gold Circle stated that the Board was attempting to have the court declare that it (Gold Circle) was not entitled to certain taxes which the Board intended to retain unlawfully for itself, being the 3% on winning bets, which related to races other than those at one of Gold Circle’s two racecourses and this, according to Gold Circle, the Board had been attempting even though the proposed statutory amendments were not persisted with by the provincial legislature. It reiterated its entitlement to the 3% distribution and stated that this was in accordance with the provisions of the Tax Act and that the Board and Treasury had always, for more than 10 years, adhered to the legislation until March 2023.

[29] Gold Circle did not oppose the granting of the relief sought by the Board in paragraphs 1 and 2 of its counter-application, save that it sought a punitive costs order against the members of the Board personally. It, however, opposed the granting of the declaratory relief sought in paragraph 3. It contended that the granting of such relief would allow the Board, without any statutory basis, to unlawfully retain those taxes for itself. This is so as the 3% tax payable to racecourse operators under the Tax Act is a quid pro quo for the costs of putting on the show, namely, making available to the bookmakers the horse races on which bets may be placed, thereby facilitating the maintenance, development and sustainability of horse racing in the province.

[30] According to Gold Circle, 'the show' on which a fixed-odds bet is placed does not only take place at one of its licensed racecourses. It takes place either through Gold Circle organising and hosting a race meeting at one of its licensed racecourses or by it broadcasting and making available the data in KwaZulu-Natal for races that occur internationally or throughout South Africa in terms of agreements with other racecourse operators, through Gallop TV, and the National Racing Bureau database. Therefore, as the only operational racecourse operator in KwaZulu-Natal that stages these shows, it becomes entitled to the 3% when the show it delivers, and on which the bet is placed, is by a KwaZulu-Natal bookmaker or punter and takes place at a venue other than its licensed racecourses.

[31] Furthermore, Gold Circle believed that the declaratory relief sought by the Board had no basis in the Tax Act, as same does not distinguish between bets placed on horseracing events at its venues and non-venues nor does it distinguish between races happening in South Africa or internationally. It stated that the Board had changed tact, as it initially, in its opposition, relied on Gold Circle not being the only racecourse operator in KwaZulu-Natal and therefore not being

entitled to the full 3%, to now, in its counter-application, focussing on where those races were staged. For all these reasons, Gold Circle urged the court to grant a just and equitable order as envisaged in s 172(1)*(b)* of the Constitution, in that the order need not follow the prayers sought in the notice of motion. It also persisted with a punitive costs order against the Board members, as it believed that the Board's conduct was egregious and unconstitutional and that its defence and counter-application were meritless and an abuse of the court processes.

[32] It emerged in the papers in the counter-application that prior to the launching of the counter-application, the Board also paid the taxes it withheld and had not been distributed from March to December 2023 to the Revenue Fund. As a consequence, the relief for payment was amended by Gold Circle so that Treasury and the Finance MEC would effect payment, as they were in possession of the funds.

[33] In reply to Gold Circle's answering affidavit in the counter-application, the Board sought an order that various sections of Gold Circle's answering affidavit be struck out, as it believed that they were frivolous, vexations and scandalous to it.

[34] It became evident in the Board's replying affidavit in the counter-application that the bone of contention remained the interpretation of s 128 of the Gaming Act, with relation to the distribution of the 6% tax. The Board contended that Gold Circle knew as far back as 2013 that the Board disputed its claim to the distribution of these taxes, particularly as they relate to horse races staged outside the province and internationally. The Board reiterated that Gold Circle was only entitled to the 3% distribution in respect of horse races held at the two racecourses at which it is licensed to hold races. This stance is quite contrary to the Board's answering affidavit filed in the main application. It persisted with its views that

Gold Circle ought not to use the taxes to support its private commercial business operations. It contended that it fell upon the provincial government and the provincial legislature to decide how best to allocate taxes raised in the provincial fiscus and that the court ought not to lightly interfere with the principle of separation of powers.

Issues for determination

[35] The issues to be determined are:

(a) Whether Gold Circle is entitled to recover the full 3% tax distribution from winnings at horse races staged at racecourses that it is not licensed to operate, in particular those that are held outside KwaZulu-Natal and internationally.

(b) Whether certain allegations and averments should be struck out from Gold Circle's answering affidavit.

(c) Whether the members of the Board should be held personally liable for the costs of the main application.

Gold Circle's entitlement to the full 3% tax distribution

[36] Whilst the Board initially vigorously opposed Gold Circle's application at the commencement of the proceedings, it changed its stance after Gold Circle filed its replying affidavit. It, instead, launched a counter-application seeking different relief and, in the process, made various concessions in respect of the main application. It is for this reason that I do not believe that it is necessary for me to deal extensively with the issues raised in the main application. I will do so to the extent that it is relevant to the counter-application. I also opine that it became evident from a reading of the papers and during argument that the following issues were not in serious dispute:

(a) Gold Circle is a licensed racecourse operator as provided for in s 89(1) of the Gaming Act; and is licensed to stage thoroughbred horseracing events at the two racecourses that it operates, namely Greyville (Durban) and Scottsville (Pietermaritzburg).

(b) A 6% tax is collected by bookmakers from winning bets placed by bettors on fixed-odds bets on horse races, staged by different racecourse operators throughout South Africa and worldwide, including those staged by the Gold Circle at its racecourses.

(c) 3% of the tax collected by bookmakers is to be distributed to the racecourse operator, whilst the other 3% is kept by the Revenue Fund.

(d) For approximately three decades, Gold Circle has been receiving the entire 3% of the taxes collected from winnings on bets placed on horse races, which include those staged by other racecourse operators throughout South Africa and internationally.

(e) On 29 May 2023, the Board took a resolution to withhold payment of the entire 3% of the taxes to Gold Circle, pending the outcome of the intergovernmental dispute about how much of the distribution Gold Circle is entitled to receive.

(f) In November 2023, during the course of litigation, the Board tendered an interim payment constituting 50% of the taxes collected from bets placed on horse races staged in South Africa to Gold Circle. Gold Circle accepted the tender and an amount of R9.2 million was paid to it.

(g) A final tender was made to Gold Circle consisting of 3% of taxes collected from bets placed with bookmakers on races staged by it at its two licensed racecourses (regardless of whether the bets are placed with bookmakers at the racecourses or at other premises). This tender was rejected by Gold Circle.

[37] I propose to deal with the issues in two parts, the first being the events prior to May 2023 and the second being the events after the launching of the counter-application. It is evident from the papers that for some time, the Board had been contemplating implementing transformation measures and development

initiatives within the gaming and betting industry. This, it wanted to enforce when it took a resolution in May 2023 that the amount distributable to racecourse operators, which had never been recorded as revenue by the Revenue Fund, would not be transferred, either to the Revenue Fund or the racecourse operator, until a decision pertaining to the continued unequitable distribution of taxes to Gold Circle was made by the relevant MECs. It, therefore, decided that the portion of punters' taxes that were currently in dispute, would not be transferred with the monthly taxes.

[38] Whilst the Board initially took a stance, in opposing the main application, that Gold Circle was not the only racecourse operator in the province, this, however, changed in the counter-application. I will revert to this later in the judgment. The opposition to the main application was without merit and this is evident from the Board's founding affidavit in the counter-application. The Board had always paid Gold Circle the whole 3% of tax distributions for more than ten years prior to May 2023. It could not, without any due notice, unilaterally decide to withhold these payments from Gold Circle. It also had no right or basis in law to withhold payments to the Revenue Fund either. It acted contrary to the internal arrangements it had with Treasury over the payment of these taxes.

[39] Section 128 of the Gaming Act provides that

'A bookmaking business must deduct from the amount won by a bettor, exclusive of the amount staked by the bettor, the taxes and deductions determined in terms of the KwaZulu-Natal Gaming and Betting Tax Act, 2010, and must pay such monies into the Provincial Revenue Fund in accordance with the provisions of section 77.'

However, because there is no provision in the PFMA for the Revenue Fund to interact with the individual accounts, Treasury determined that the licensees would deposit taxes in an account determined by the Board. The Board would then make monthly deposits of these taxes into the relevant department's pay master general account and thereafter to the Revenue Fund.

[40] It was further agreed that instead of Treasury making distributions, this would be done by the Board after submitting a verified schedule relating to the distribution for approval by Treasury within 10 days of submitting same. The distribution would thereafter be made no later than 20 days after the end of every tax period, as provided for under s 77(3) of the Gaming Act. The Finance MEC, in the explanatory affidavit filed by Ms Coetzee, stated that she reminded the CEO of the Board, the eleventh respondent, that she ought to ensure that funds received by the provincial government are promptly paid into the Revenue Fund and that all fees and taxes payable under the Tax Act are paid timeously and correctly. Obviously, this was after the Board had decided to withhold the payment of the funds - both from the Revenue Fund and Gold Circle.

[41] Therefore, even if the Board believed that Gold Circle was not entitled to the whole 3% distribution, at the very least, it should have paid Gold Circle what it believed was due to it. The total withholding of any payments was unlawful and totally unacceptable. Even if there was some disagreement between the Board and Treasury about how those taxes ought to be distributed, Gold Circle could not be expected to wait until the finalisation of any intergovernmental dispute resolution, as it is not part of government. It should further be noted that this process has not been finalised for almost two years since it started and that is despite this application.

[42] It is evident from the papers filed in this matter that the Board attempted to have the gambling legislation amended so that the 3% tax deduction can be distributed in the manner preferred by it, but it has failed to achieve this due to the objections raised by the various stakeholders. It then resolved to act

unilaterally and withhold payments to Gold Circle, which I believe was impermissible. It had no authority to do this as it, in any event, was merely performing an act on behalf of Treasury. Gold Circle therefore had a legitimate expectation of these payments. Even if Gold Circle was not using the funds for what the Board believed it ought to have used them for, then a proper process ought to have been followed, which includes a right of hearing and due notice of whatever steps the Board intended to take. In any event, neither the Gaming Act nor the Tax Act sets out or prescribes a purpose for which Gold Circle or a racecourse operator ought to use the funds.

[43] It must follow, therefore, that Gold Circle has succeeded in establishing its clear right to the payment of the 3% deduction of the distributable tax provided for in part D.1 of the Schedule to the Tax Act, which tax has been deducted from the amounts won by bettors in respect of fixed-odds bets, which are placed with a bookmaker at racecourses Gold Circle operates. This is so because Gold Circle is entitled to same in terms of the legislation and this has been the practice for more than ten years. The irreparable harm, which is the financial loss throughout this period, has also been established in my view. There was no other remedy available to Gold Circle as it tried to engage the Board and Treasury prior to launching this application but to no avail. The Board had no legal basis to withhold the payments. This order would be applicable from the period before the launching of the main application up to and including the date of this judgment.

[44] This leads me to the counter-application. Perhaps it suffices to mention here that the issues raised by the Board as points in *limine* no longer feature due to its stance in the counter-application. The Board, in its counter-application, asserted that it did not dispute Gold Circle's entitlement to a portion of the distributable taxes at issue in this application. It also stated that it accepted that it

must pay Gold Circle the distributions in respect of horse races at racecourses which it was licensed to operate. To this extent, it resumed interim payment arrangements, which were accepted by Gold Circle. What remained at issue, according to the Board, was how much Gold Circle was entitled to as a licensed racecourse operator and whether it was entitled to any amount in respect of races that it did not stage. The Board's assertion, therefore, is obviously a concession to a large extent of the main application. This then narrows the issue to whether Gold Circle is entitled to the full 3% distribution, especially in races it did not stage and those that happen outside the province and internationally.

[45] This leads me to the applicable relevant legislation. Section 77(1) of the Gaming Act is clear:

'All persons licensed in terms of this Act must pay the taxes imposed in terms of the [Tax Act], into the Provincial Revenue Fund, in the manner prescribed and at the same time, must lodge a tax return with both the Board and the Provincial Treasury, in the manner prescribed.'

Section 77(3) of the Gaming Act provides that

'The Treasury must effect any required distribution of a portion of the taxes received, as prescribed by the [Tax Act], no later than 20 days after the end of every tax period.'

Section 89(1) of the Gaming Act reads as follows:

'The Board may, on application in the manner prescribed by the Board and subject to the provisions of subsection (3), approve the issue of a racecourse operators' licence to any corporate body, or bodies, to hold race meetings on one or more racecourses specified in the licence, which approval may be conditional or unconditional: Provided that, when considering such application, the Board must consider the economic, social development and competition issues contemplated in sections 53 and 54 of the National Gambling Act.'

[46] Section 128(1) of the Gaming Act provides that

'A bookmaking business must deduct from the amount won by a bettor, exclusive of the amount staked by the bettor, the taxes and deductions determined in terms of the KwaZulu-Natal Gaming and Betting Tax Act, 2010, and must pay such monies into the Provincial Revenue Fund in accordance with the provisions of section 77.'

Part D.1 of the Schedule to the Tax Act reads as follows:

'The tax deduction and their distribution referred to in section 128 of the KwaZulu-Natal Gaming and Betting Act, 2010, in respect of fixed-odds bets on horse races placed with a bookmaker at a racecourse, or in premises other than a racecourse, are as prescribed in the table hereunder:

Beneficiaries to which the Board must effect distribution	Deductions from the amount won by a bettor, exclusive of the amount staked by the bettor, when a bettor wins a bet taken with a bookmaker
Provincial Revenue Fund	3 per cent
Racecourse Operator	3 per cent
TOTAL	6 per cent'

[47] All the above-mentioned provisions must be read together and in the context of regulating gaming and gambling activities in KwaZulu-Natal. Statutes dealing with the same subject matter, or which are in *pari materia*, should be construed together and harmoniously.[2] This was recently confirmed by the Constitutional Court in *Ruta v Minister of Home Affairs*,[3] when it held that statutes must be read 'alongside each other, so as to make sense of their provisions together'. How much Gold Circle is entitled to and under what circumstances lies in the interpretation of all these provisions.

[48] It is trite that

'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.'[4]

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[2] *Commander v Collector of Customs* 1920 AD 510 at 513.
[3] *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (2) SA 329 (CC) para 42.
[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA).

A contextual and purposive approach must be applied to statutory interpretation.[5] A consideration of the purpose of the relevant statutes in this matter is thus necessary. The purpose of the Tax Act is

'To provide for the payment of tax by persons licensed in terms of the KwaZulu-Natal Gaming and Betting Act, 2010; and to provide for matters connected therewith.'[6]

On the other hand, the purpose of the Betting Act is:[7]

'To provide for the regulation of gaming, horse racing and betting in the Province of KwaZulu-Natal; restrictions on gaming and betting; the establishment of a provincial Gaming and Betting Board; the licensing of persons conducting casinos and bingo games; the licensing of gaming machine operators, racecourse operators, totalisators and bookmakers; the registration of certain persons; the imposition of fees, taxes, levies and penalties on the various gambling activities; the appointment and authorisation of inspectors and their powers and duties; the establishment of a Horse Racing and Betting Transformation Fund; and to provide for matters connected therewith.'

[49] Section 89(1) of the Gaming Act makes it plain that the licence must specify where the race meeting must be held. Gold Circle's licensed racecourses are Scottsville and Greyville racecourses. There is therefore no doubt in my mind that Gold Circle is entitled to 3% of the tax distribution in respect of the races it stages at these two racecourses. This is in line with the context and purpose of the licence for which it was issued. The Gaming Act and part D.1 of the Schedule to the Tax Act must be read together with the provisions of the licence. This must have been the reason why there is a need to specify the racecourses in the licence, and this is in line with regulating the activities of the racecourse operators. As alluded to above, context includes, amongst others, the mischief which the legislation aims to address, the social and historical background of the

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[5] *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* [2019] ZACC 12; 2019 (5) SA 29 (CC) para 29.
[6] The long title of the Tax Act.
[7] The long title of the Betting Act.

legislation,[8] and most pertinently for the purpose of this case, other legislation (thus the external context), including the transformation purpose, as mentioned in the long title of the Gaming Act.

[50] Furthermore, it can only be in line with the purpose of the legislation that a racecourse operator must benefit from its operations, as provided for in its licence. It is sensible and business-like to believe that the benefit arises from the operations in respect of fixed-odds bets on horse races placed with a bookmaker at a racecourse, or in premises other than a racecourse. The racecourse or premises other than a racecourse must surely be those that are specified in the operator's licence. The Gaming Act is clear about the formulation of these payments, as illustrated above. There is no basis in law for Gold Circle to benefit from any tax distribution from an operation not staged from any of its racecourses. It is significant in this context not to lose sight of the grammatical meaning of the words 'racecourse operator' and 'racecourse operator's licence'.[9]

[51] What is envisaged in the Gaming Act is that a licensed operator of a racecourse must be compensated for hosting such an operation. The Gaming Act is clear and unambiguous in this regard. It is also important to note that the Gaming Act is titled 'KwaZulu-Natal Gaming and Betting Act' which must mean that it is meant to regulate gaming and betting in the province of KwaZulu-Natal. It is only sensible then to limit its operations to this province. This will also be in line with s 104(1)*(b)*(i) of the Constitution which sets out the legislative authority of provinces and it allows for the legislative authority 'to pass legislation for *its province*'(my emphasis) for matters listed in Schedule 4, which include

[8] *Department of Land Affairs and others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC) para 53.
[9] Section 1 of the Gaming Act defines 'racecourse operator' as: 'corporate body, or bodies, licensed in terms of section 89 to hold race meetings at one or more racecourses', while 'racecourse operator's licence' is defined as: 'a licence issued, in terms of section 89, to a corporate body and which authorizes the licence holder to hold race meetings at one or more racecourse'.

'[c]asinos, racing, gambling and wagering, excluding lotteries and sports pools'. The fact that the provisions of the Gaming Act were previously not complied with cannot be left to continue unabated, even when the Board has sought the assistance of this court through its counter-application to correct its misfortunes. An irregularity cannot be perpetuated with the assistance of the court. Through this counter-application, the Board has given reasonable notice to Gold Circle of the proposed change in the manner in which it was conducting itself. The time that the matter has taken to be heard, and eventually for this judgment to be handed down, has given Gold Circle sufficient notice to rearrange its affairs.

[52] As was held in *Khumalo and another v MEC for Education, KwaZulu-Natal*,[10] '[i]t is the duty of the courts to insist that the State, in all its dealings, operate within the confines of the law and, in so doing, remain accountable to those on whose behalf it exercises power'. That Gold Circle, the Board, and Treasury have operated in an unlawful manner does not mean that this is the law and must be condoned. It is for this reason that the order sought in the counter-application ought to be granted.

Strike out application

[53] This brings me to the issue of the striking out of various averments in Gold Circle's answering affidavit to the Board's counter-application. The Board contended that the answering affidavit itself was attacking the integrity of the Board and was prepared in an intemperate manner. It was further stated that the contents of the affidavit were prejudicial, defamatory and would injure the reputation of the Board if they were not removed from the proceedings. Various words and phrases, including but not limited to 'egregiously unlawful', 'rapacious', 'perverse argument', 'robber-baron fashion', 'argument suffer

[10] *Khumalo and another v MEC for Education, KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC) para 29.

fundamental lapses in logic', 'argument opportunistically made', 'feather its own nest', 'funds being pocketed and mislaid or misused by the Board', 'absurd outcome', 'tiptoeing around absurdity', 'retentionist habits of the Board' and 'unlawfully snaffle for itself monies', were deemed by the Board to be scandalous and vexatious.

[54] Gold Circle opposed the application to strike out on the basis that it was excessively and unreasonably late, and without an apology, or explanation or application for condonation from the Board. It contended that the Board failed to make out a case for the relief it sought, as it failed to identify why those words or phrases met the applicable test required for striking out. It was further argued that the words and phrases ought to be read in the context of the pleadings as a whole, and if that is done, neither those words nor phrases were scandalous, vexations or irrelevant nor would the Board be prejudiced.

[55] According to Gold Circle, those words and phrases complained of by the Board served to highlight the Board's gross disregard for their professional responsibilities, as they acted inappropriately and egregiously. They were therefore relevant to the issue of personal costs orders being sought against the members of the Board. Furthermore, so went the contention, the words were not scandalous or vexatious, as some are used even by the highest court of our country, the Constitutional Court. Gold Circle was therefore justifiably strident in its criticism of the Board. There was also no explanation as to how the Board would be prejudiced if the words and/or phrases remained.

[56] Rule 6(15) of the Uniform Rules provides that

'The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.'

As was held in *Beinash v Wixley*,[11]

'What is clear from this Rule is that two requirements must be satisfied before an application to strike out matter from any affidavit can succeed. First, the matter sought to be struck out must indeed be scandalous, vexatious or irrelevant. In the second place the Court must be satisfied that if such matter was not struck out the parties seeking such relief would be prejudiced.'

[57] I have considered all the papers in this application at least more than twice. Indeed, I align myself with what Olsen J said in *MEC for Transport, Community Safety and Liaison and another v Transport Appeal Tribunal and another*:[12]

'Concerning the role of the lawyers who represented the applicants in these proceedings, they drafted or allowed the presentation on affidavit of statements of that kind without any factual basis to support them. (Where the language is merely insulting, its use is forbidden and can never be justified.) A re-reading of the judgment in *Findlay v Knight* 1935 AD 58 illustrates that, to all intents and purposes, since time immemorial it has been so that the privilege granted to lawyers in the presentation of the cases of their clients may not be misused . . . The following appears at page 71 of the judgment.

> "The other principle of public policy which underlies qualified privilege is that the process of the court shall not be wantonly used for the purpose of defaming either litigants or third parties. The courts cannot allow advocates or attorneys to use the process of the courts for an illegitimate purpose; for manifestly the law cannot countenance an abuse of the privilege."

[58] Whilst I understand the frustration that this litigation brought upon Gold Circle, the use of abusive language cannot be condoned. Words insinuating deceit or untruthfulness without a basis for that accusation should have no place in our courts. In particular, words like 'veiled attempt' (meaning not expressed directly

[11] *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 733A-B.
[12] *MEC for Transport, Community Safety and Liaison and another v Transport Appeal Tribunal and another* [2016] ZAKZPHC 90 para 52.

or clearly); 'egregious' (extremely bad in a way that is very noticeable); 'perverse argument' (deliberate and determined to behave in a way that most people think is wrong, unacceptable or unreasonable); 'robber-baron fashion' (being rich through illegal means and without having regard for others); 'fundamental lapse in logic' and a few others should be struck out of the affidavits. There must be a tenable factual basis before using them and that has not been established by Gold Circle.

[59] These terms and phrases are vexatious and, in my view, not relevant in deciding any of the issues before me. One need not be scandalous or use emotive, unacceptable terms to prove a costs order against another. The dignity of the members of the Board must be protected until proven otherwise. I am, therefore, satisfied that if these words are not struck out, the members of the Board will be prejudiced, as the words are damaging to their reputation. The issue about the delay in bringing the application to strike out has not effect on whether the words are scandalous, vexatious and irrelevant as the rule does not provide any time limits for the launching of such application. I do not believe that the Board's application to strike out is without merit or that it is done to increase costs.[13]

[60] The words, in my view, are intended to annoy the Board and are abusive and defamatory, if considered as a whole and in their context.[14] Emotive language cannot be a consideration for a cost award, such an award it to be based on the facts of the matter. Some of the words, in my view, for instance, 'kept for itself' or 'snuffle funds' are meant to convey criminality, which is defamatory and prejudicial. It follows that the application to strike out must succeed.

Costs

[13] *Anderson and another v Port Elizabeth Municipality* 1954 (2) SA 299 (E) at 309.
[14] *Tshabalala-Msimang and another v Makhanya and others* 2008 (6) SA 102 (W).

[61] This brings me to the last issue and that is whether a personal costs order against the members of the Board is warranted. The basis for seeking this order was that the Board had acted in bad faith in keeping the tax distribution that Gold Circle is entitled to receive. It was argued that whilst the Board had disclosed that it acted on advice, it had failed to disclose fully and properly the advice it received and when it had received that advice. It was also submitted that the Board had been dilatory in this litigation and that its counter-application was intended to better their opposition to the award of a personal cost order, whilst its opposition to the main application was an abuse and waste of public resources, which was also prejudicial to Gold Circle.

[62] As was held by Mogoeng CJ in *Public Protector v South African Reserve Bank*,[15]

'[c]osts on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process. As correctly stated by the Labour Appeal Court –

> "[t]he scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible [manner]. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium."' (Footnote omitted.)

[63] I agree that up until the time that an offer was made to Gold Circle, the Board ought to pay punitive costs, as there was no basis whatsoever for keeping the whole amount of the distribution instead of paying what it thought Gold Circle was entitled to and thereafter withholding the amount that was in dispute. It had no legal basis for withholding the whole amount and for that, costs on an attorney and client scale are warranted. Furthermore, the Board's opposition amounted to

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[15] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC) para 8. Although this was a minority judgment from Mogoeng CJ, it appears as if the majority judgment did not differ on this aspect – see *Tjiroze v Appeal Board of the Financial Services Board and others* [2020] ZACC 18; 2021 (1) BCLR 59 (CC) para 23.

an abuse of the court process. For all of these reasons, costs on the attorney and client scale are warranted for the main application. Such costs will address the delays and prejudice suffered by Gold Circle throughout this litigation. However, I do not believe that a case has been made out for a personal costs order against the members of the Board.

[64] Whilst the Board has succeeded in its application to strike out and the counter-application, as a sign of displeasure in how it has conducted this litigation, I will not award it any costs. It has been dilatory, provided meritless defences to the main application, and belatedly launched its counter-application and the application to strike out. None of its papers were filed timeously and this is not the way that a government department should conduct itself. Accordingly, an order that each party shall pay its own costs for those applications will be appropriate in the circumstances.

Order

[65] Accordingly, I make the following order:

1. In relation to the main application and up to the date of this order:

1.1 The first respondent is directed to effect distribution to the applicant, alternatively the KwaZulu-Natal Provincial Treasury, of the 3% deduction from the amount won by bettors in respect of fixed-odds bets on horse races placed with a bookmaker:

(a) at racecourses operated by the applicant; and

(b) in premises other than a racecourse, in respect of horse races staged by the applicant,

as contemplated in s 128 of the KwaZulu-Natal Gaming and Betting Act 8 of 2010, read with part D.1 of the Schedule to the KwaZulu-Natal Gaming and Betting Tax Act 9 of 2020 ('the Gold Circle deduction') for the months of March, April and May 2023, within five days of the date of this order.

1.2 In all future months up to the date of this order, the first respondent is directed to effect distribution to the applicant, alternatively the KwaZulu-Natal Provincial Treasury, of the Gold Circle's deduction on or before the 20th day of the month following the month in question.

1.3 The first respondent is directed to pay the costs of the main application on the attorney and client scale, such costs to include the costs of two counsel where employed.

2. In relation to the counter-application and from the date of this order:

2.1 The applicant is entitled to payment of 3% of the distribution of tax provided for in part D.1 of the Schedule to the KwaZulu-Natal Gaming and Betting Tax Act 9 of 2010, deducted from the amount won by bettors in respect of fixed-odds bets which are:

(a) placed with a bookmaker at the racecourses which are specified in the racecourse operator's licence issued to the applicant in terms of s 89(1) of the KwaZulu-Natal Gaming and Betting Act 8 of 2010; and/or

(b) placed with a bookmaker in premises other than a racecourse, in respect of horseraces which are staged by the applicant at the racecourses specified in the racecourse operator's license issued to the applicant in terms of s 89 of the KwaZulu-Natal Gaming and Betting Act 8 of 2010.

2.2 Each party shall pay its own costs in the counter-application.

3. In relation to the application to strike out:

3.1 The following allegations contained in the applicant's answering affidavit in the counter-application and the further replying affidavit in the main application are hereby struck out:

(a) The word 'veiled' in paragraphs 7 and 8;

(b) The words 'egregiously unlawful' and 'rapacious' in paragraph 8;

(c) The words 'perverse argument' in paragraph 10;

(d) Paragraph 12;

(e) The last sentence in paragraph 47;

(f) The first sentence in paragraph 51 and the first sentence in paragraph 55;

(g) The last sentence of paragraph 63;

(h) Paragraph 84.2;

(i) Paragraphs 100.2 and 102;

(j) The first sentence in paragraph 133.4 and the last sentence in paragraph 135;

(k) Paragraph 138 and the last sentence of paragraph 141;

(l) Paragraph 177 and the last two sentences in paragraph 212.

3.2 Each party shall pay its own costs in the application to strike out.

[redacted]

POYO DLWATI JP

APPEARANCES

Date of Hearing:	2 August 2024
Date of Judgment:	14 February 2025
Counsel for applicant:	Adv M Du Plessis SC with Advocates Coutsoudis, Palmer and Mncube
Instructed by:	Barker's Attorney c/o Cajee Setsubi Chetty Inc.
Counsel for 1st, 2nd, 4th, 5th, 9th, 10th & 11th respondents:	Adv A Gabriel SC with Advocates Gounden, Shazi and Mdletshe
Instructed by:	Xaba Attorneys
Counsel for 3rd respondent:	Adv Dickson SC
Instructed by:	PKX Attorneys