



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 261/23

In the matter between:

**SUNWEST INTERNATIONAL (PTY) LIMITED T/A
GRANDWEST CASINO AND ENTERTAINMENT
WORLD**

First Applicant

**WORCESTER CASINO (PTY) LIMITED T/A
GOLDEN VALLEY CASINO AND LODGE**

Second Applicant

and

WESTERN CAPE GAMBLING AND RACING BOARD

First Respondent

**PROVINCIAL MINISTER OF FINANCE,
WESTERN CAPE**

Second Respondent

Case CCT 285/23

And in the matter between:

**EMFULENI RESORTS (PTY) LIMITED T/A
BOARDWALK CASINO AND
ENTERTAINMENT WORLD**

First Applicant

**TRANSKEI SUN INTERNATIONAL LIMITED T/A
WILD COAST SUN**

Second Applicant

and

EASTERN CAPE GAMBLING BOARD

First Respondent

**MEMBER OF THE EXECUTIVE COUNCIL
FOR FINANCE, EASTERN CAPE**

Second Respondent

Neutral citation: *Sunwest International (Pty) Ltd t/a Grandwest Casino and Entertainment World and Another v Western Cape Gambling and Racing Board and Another; Emfuleni Resorts (Pty) Ltd t/a Boardwalk Casino and Entertainment World and Another v Eastern Cape Gambling Board and Another* [2025] ZACC [18]

Coram: Madlanga ADCJ, Kollapen J, Majiedt J, Mhlantla J, Opperman AJ, Rogers J, Theron J and Tshiqi J

Judgment: Kollapen J (unanimous)

Heard on: 4 February 2025

Decided on: 29 August 2025

Summary: Gambling — Western Cape Gambling and Racing Act 4 of 1996 — Eastern Cape Gambling Act 5 of 1997 — proper interpretation of gambling tax provisions — freeplay credits — whether part of adjusted gross revenue

Section 167(3)(b)(ii) — general jurisdiction — nature of matters falling within scope — arguable point of law of general public importance which ought to be considered — arguable point of law not transcending the interests of the parties

Section 167(3)(b)(i) — constitutional matters — nature of matters falling within scope

ORDER

In Case CCT 261/23 *Sunwest International (Pty) Ltd t/a Grandwest Casino and Entertainment World and Another v Western Cape Gambling and Racing Board and Another*:

On application for leave to appeal from the Supreme Court of Appeal (hearing an appeal from the Full Court of the High Court of South Africa, Western Cape Division, Cape Town):

1. Leave to appeal is refused.
2. The applicants jointly and severally must pay the respondents' costs in this Court, including the costs of two counsel.

In Case CCT 285/23 *Emfuleni Resorts (Pty) Ltd t/a Boardwalk Casino and Entertainment World and Another v Eastern Cape Gambling Board and Another*:

On application for leave to appeal from the High Court of South Africa, Eastern Cape Division, Makhanda:

1. Leave to appeal is refused.
2. The applicants jointly and severally must pay the respondents' costs in this Court, including the costs of two counsel.

JUDGMENT

KOLLAPEN J (Madlanga ADCJ, Majiedt J, Mhlantla J, Opperman AJ, Rogers J, Theron J and Tshiqi J concurring):

Introduction

[1] This matter concerns two applications for leave to appeal which were heard together as they raise a common issue. This is whether a loyalty credit named “freeplay”, awarded by casino operators to selected gambling customers at cashless slot machines, is included in the taxable revenue of casino operators who issue freeplay. The answer lies in the proper interpretation of various interrelated provisions of the

Western Cape Gambling and Racing Act¹ (WC Act) and the Eastern Cape Gambling Act² (EC Act), which I will call the Acts.

[2] The applicants in both matters are subsidiaries of Sun International (South Africa) Limited (Sun International) which owns casinos across the country. In the first matter the applicants are Sunwest International (Pty) Limited and Worcester Casino (Pty) Limited, both casino operators in the Western Cape (WC applicants). The applicants in the second matter are Emfuleni Resorts (Pty) Limited and Transkei Sun International Limited, both casino operators in the Eastern Cape (EC applicants). In both matters, the first respondents are the Gambling Boards for their respective provinces: the Western Cape Gambling and Racing Board (WC Board) and the Eastern Cape Gambling Board (EC Board). The second respondents in both matters are the respective members of the provincial executive responsible for finance: for the Western Cape, the Minister of Finance, and for the Eastern Cape, the Member of the Executive Council for Finance (WC Minister and EC MEC respectively).

[3] The applicants are holders of casino operator licences granted in terms of the respective Acts. The Acts regulate gambling and betting taxes paid by casino operators, such as the applicants, to the respective Boards.

[4] In this Court, the WC applicants seek leave to appeal against the order of the Supreme Court of Appeal (SCA), which upheld an appeal against an order of the High Court of South Africa, Western Cape Division, Cape Town (WCHC). The EC applicants apply for leave to appeal directly to this Court against the order of the High Court of South Africa, Eastern Cape Division, Makhanda (ECHC) which dismissed a similar application for tax relief.

¹ 4 of 1996.

² 5 of 1997.

Background

[5] To incentivise gambling play, the applicants offer members of their loyalty programmes, their “Most Valued Guests”, non-cashable and non-transferable credits, called “freeplay” credits, which take the form of a right to use the applicants’ slot machines without these players having to pay. The alternative is “cashplay” credits, issued to a player in exchange for cash. These forms of credits are reflected separately in a player’s slot account. A player has a choice to play with either form of credit. Whichever they choose, every time a player plays on the applicants’ cashless slot machines, there is a concomitant deduction in the relevant part of the slot account to the rand value of their play.

[6] The present dispute arose following the applicants’ introduction of “BALLY”, a system used to distinguish between cashplay and freeplay. Prior to the introduction of BALLY, the system used by the applicants did not separate out freeplay from cashplay. After BALLY was introduced, the two forms of play could be distinguished, and the applicants sought to exclude freeplay credits as part of their taxable revenue so that they were liable only to pay tax on cashplay. A dispute between the Boards and the applicants about whether freeplay should be included in taxable revenue arose, which ultimately led the applicants in both cases to approach the respective High Courts for relief on the proper interpretation of the WC and EC Acts.

[7] The relevant taxing provisions are found in section 64(1) of the WC Act³ and section 57(4) of the EC Act⁴ which provide for gambling and betting taxes to be payable on “taxable revenue”. This is in turn defined in both Acts to mean “adjusted gross

³ Section 64(1) provides:

“From time to time and in the manner prescribed, there shall be paid to the Board gambling and betting taxes and levies by the holders of licenses as provided for in Schedules III and IV.”

⁴ Section 57(4) provides:

“There shall be paid from time to time and in the manner prescribed into the Provincial Revenue Fund fees and betting taxes on the bases, at the rates, at the times, in the amounts (if applicable) and by the holders of licences provided for in Schedules III and IV.”

revenue less admissible deductions as determined under this Act”.⁵ The definition of “adjusted gross revenue” (AGR) is found in Part A of Schedule III of both Acts.⁶ For present purposes, the relevant part of the definition of AGR is “the drop”. It is common cause that we are concerned with the definition of “drop” in relation to cashless machines. In the WC Act, the drop is defined in item 1 of Part A of Schedule III as “for cash-less slot machines, the amount deducted from players’ slot accounts as a result of slot machine play”. The EC Act defines the drop almost identically: “for cashless gambling machines, the amount deducted from players’ slot accounts as a result of gambling machines play”. The present dispute centres on whether freeplay, when utilised by a player, forms part of the “drop” and consequently AGR, for the purpose of calculating taxable revenue.

[8] The WCHC (sitting as a Full Court) found in favour of the WC applicants and held that, on a proper interpretation of the provisions, freeplay was not included in the “drop”.⁷ The WCHC therefore granted an order that freeplay credits do not form part of taxable revenue in terms of the WC Act and ordered the WC Board to off-set, against the WC applicants’ future liability to pay gambling tax, such amount as might be agreed

⁵ Item 1 of Part A of Schedule III of both Acts.

⁶ Item 1 of Part A of Schedule III of both Acts provides the definition of “adjusted gross revenue”. The relevant parts of the definition for present purposes are paragraphs (d) and (e) of the definition. The WC Act provides that “adjusted gross revenue” means—

- “(d) in relation to slot machines, other than those contemplated in subparagraphs (e) and (f) below operated by a licence holder in the Province, the drop, less fills to the machine and winnings paid out; provided that the initial hopper load shall not constitute a fill and shall not affect the calculation of adjusted gross revenue;
- (e) in relation to slot machines operated by a licence holder in the Province which are linked via a wide-area progressive system, the drop, less fills to the machine, less any contributions made by the licence holder which are payable in consequence of such wide-area progressive system in respect of such slot machines during the tax period, and less any winnings paid out which are not recoverable from the central fund in terms of the wide-area progressive system; provided that the initial hopper load shall not constitute a fill and shall not affect the calculation of adjusted gross revenue; provided further that where any surplus amount is distributed from the central fund to a licence holder or where any licence holder withdraws from a wide-area progressive system and in consequence of such distribution or withdrawal recovers or recoups during any tax period any contribution previously deducted under this subparagraph, such contribution so recovered or recouped shall be included in the licence holder’s adjusted gross revenue in the tax period in which the contribution is recovered or recouped.”

The EC Act provides an identical definition save for using “gambling machines” instead of “slot machines”.

⁷ *Sunwest International (Pty) Ltd v Western Cape Gambling and Racing Board* 2021 (2) SA 607 (WCC).

between the parties or proved by the WC applicants. The SCA upheld the WC Board's appeal, holding that on a proper interpretation of the provisions, freeplay was included in the AGR for purposes of calculating gambling taxes.⁸ This was because the target of the tax was not the income (or revenue) generated by the applicants, but the gambling activity itself. The ECHC, which delivered judgment after the WCHC's judgment but before the SCA's decision, dismissed the EC applicants' application on substantially the same grounds as those subsequently expounded by the SCA.⁹

Issues

[9] In this Court, there are two primary issues for determination. The first is whether this Court has jurisdiction to hear the matter and, if jurisdiction is established, whether leave to appeal should be granted. The second is whether freeplay is included in the definition of AGR in both Acts, and thus whether the casino operators are liable to pay gambling tax on the use of freeplay credits. This turns on the proper interpretation of "taxable revenue" in the WC and EC Acts, specifically, whether freeplay attracts liability for gambling tax.

Condonation

[10] The EC applicants apply for condonation for the late filing of their application for leave to appeal. Condonation is not opposed and the delay is adequately explained. Condonation is granted.

Replying affidavit

[11] The EC applicants sought leave to file a replying affidavit in this Court to address two claims made by the EC Board in that Board's answering affidavit which the EC applicants contend were not raised in the High Court litigation. The first claim is

⁸ *Western Cape Gambling and Racing Board v Sunwest International (Pty) Ltd t/a Grandwest Casino & Entertainment World* [2023] ZASCA 118 (Supreme Court of Appeal judgment).

⁹ *Emfuleni Resorts (Pty) Ltd t/a Boardwalk Casino & Entertainment World v Eastern Cape Gambling Board*, unreported judgment of the High Court of South Africa, Eastern Cape Division, Makhanda, Case No 1706/2021 at paras 28, 31-2 and 48-52 (Eastern Cape High Court judgment).

that it is not in the interests of justice for this Court to hear the matter because there is litigation on similar issues in other provinces. The EC Board alleges that the EC applicants are litigating “in stages” to build a precedent in favour of the exclusion of freeplay from taxation. The second claim is that freeplay has the same characteristics as non-negotiable chips, in the sense that cards on which freeplay are loaded can be transferred for value.

[12] The EC Board and EC MEC oppose the application for leave to file the replying affidavit because, they argue, the EC applicants ought, for two reasons, to have dealt with the claims upfront in their founding papers. First, the EC applicants ought to have known of the facts regarding the litigation in other provinces. Second, since the nature of freeplay is at the heart of the dispute, the EC applicants’ contention that non-negotiable chips and freeplay are distinguishable should have been made much earlier. The EC Board and EC MEC also contend that they will be prejudiced by the admission of the replying affidavit because they will not have had an opportunity to respond to it.

[13] The test for whether this Court should admit a replying affidavit is whether it is in the interests of justice to do so.¹⁰ The applicant must make out a case for the filing of a replying affidavit.¹¹ Importantly, a party is not entitled to file a reply as of right.¹² The EC applicants relied on their affidavit in support of their application to file a replying affidavit, which itself doubled as the replying affidavit. The essence of the applicants’ intention to file the replying affidavit is to answer two claims made by the EC Board. The applicants’ rebuttal to the claims made in the answering affidavit ought to have been foreseen by the EC applicants, and frankly, ought to have formed part of their primary case if relevant to it. Their reply does not provide anything new that will assist this Court in its disposition of the matter. It is therefore not in the interests of

¹⁰ *Hotz v University of Cape Town* [2017] ZACC 10; 2017 (7) BCLR 815 (CC); 2018 (1) SA 369 (CC) at para 41.

¹¹ *Id.*

¹² *African Congress for Transformation v Electoral Commission of South Africa and other cases* [2024] ZACC 7; 2024 (8) BCLR 987 (CC) at paras 68-9.

justice for the replying affidavit to be admitted. Leave to file a replying affidavit is refused.

Leave to appeal

Jurisdiction

[14] Jurisdiction is a “threshold requirement” to be met before this Court can consider a matter.¹³ It is not a mere tick-box exercise, a technical hurdle a litigant must overcome in order to get to the substance of a dispute. Jurisdiction is the “power vested in a court by law to adjudicate upon, determine and dispose of a matter”.¹⁴ It is well established that jurisdiction must be determined by the pleadings in this Court¹⁵ and that the merits of a matter cannot determine whether a court has jurisdiction to hear it.¹⁶ In what follows, I deal with jurisdiction on this premise.

[15] The Constitution assigns this Court jurisdiction over a defined set of matters.¹⁷ Section 167(3)(b) and (c) provides that the Constitutional Court—

- “(b) may decide—
 - (i) constitutional matters; and
 - (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court, and
- (c) makes the final decision whether a matter is within its jurisdiction.”

¹³ *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) (*Boesak*) at para 11. See also *Fraser v ABSA Bank Ltd* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) (*Fraser*) at para 35.

¹⁴ *Ewing McDonald & Co Ltd v M&M Products* [1990] ZASCA 115; 1991 (1) SA 252 (A) at 256F-G and *Gallo Africa Ltd v Sting Music (Pty) Ltd* [2010] ZASCA 96; 2010 (6) SA 329 (SCA) at para 6.

¹⁵ *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 75 and *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2015 (12) BCLR 1407 (CC); 2016 (1) SA 132 (CC) at para 132.

¹⁶ *Chirwa v Transnet Ltd* [2007] ZACC 23; 2008 (3) BCLR 251 (CC); 2008 (4) SA 367 (CC) at para 155.

¹⁷ Sections 167(3), (4) and (5) of the Constitution. Section 167(4) governs exclusive jurisdiction and section 167(5) governs confirmation proceedings. These provisions are not relevant for the purpose of this matter.

[16] There are two separate but related aspects of the jurisdiction-assigning provision. The first aspect, section 167(3)(b), assigns the substantive jurisdiction of the Court, and the second aspect, section 167(3)(c), clothes it with the power to determine whether a matter falls within its jurisdiction. To make this determination, this Court may consider procedural requirements in order for an application to properly serve before it in accordance with this Court's rules. By way of example, this Court may consider procedural issues such as service and condonation prior to making the decision whether a matter falls within its jurisdiction. Section 167(3)(c) is a necessary provision, because it is dispositive of the question of how this Court can conclude that it either has or lacks jurisdiction.

[17] The import of the substantive component, section 167(3)(b), is that the jurisdiction of this Court is not boundless. This Court has the jurisdiction to decide constitutional matters and, since the enactment of the Constitution Seventeenth Amendment Act,¹⁸ it has what has been termed "general jurisdiction" over a limited class of other matters. As this Court said in *Fujitsu*:¹⁹

"The whole point that the drafters of the Constitution Seventeenth Amendment Act sought to make was that, if a matter does not raise a constitutional issue, there should be stringent requirements before it can be entertained by this Court. These stringent requirements serve a good purpose, to ensure that non-constitutional matters that come before this Court truly deserve the attention of the highest court in the land."²⁰

[18] Section 167 requires this Court to operate within the boundaries of the powers assigned to it by law. When it does so, it shows fidelity to the Constitution and the principle of the separation of powers. And so, while this Court is the apex court, the provisions of the Constitution on how judicial authority is assigned must be honoured. In doing so, this Court must first determine, regard being had to section 167(3), whether

¹⁸ Of 2012.

¹⁹ *Fujitsu Services Core (Pty) Ltd v Schenker South Africa (Pty) Ltd* [2023] ZACC 20; 2023 (6) SA 327 (CC); 2023 (9) BCLR 1054 (CC).

²⁰ *Id* at para 90.

a matter is within its jurisdiction as the final arbiter in respect of that decision in terms of the Constitution.²¹ Equally, in taking that decision, this Court should be minded that it “has the power to protect its own jurisdiction and is under a constitutional duty to do so”.²²

[19] To recap, the core dispute between the parties is whether, on a proper interpretation of the Acts, freeplay forms part of taxable revenue. The applicants submit that this matter engages this Court’s jurisdiction, both on the grounds that it is a constitutional matter and also that it is one which raises an arguable point of law of general public importance which this Court ought to consider. I consider both those claims to jurisdiction below.

Constitutional jurisdiction

[20] This Court has jurisdiction over “constitutional matters”. On many occasions, the inevitable difficulty of conceptualising this limited form of jurisdiction in a system where the Constitution is supreme has occupied this Court.²³ In *Fraser*, this Court held, aptly:

“To attempt to define the limits of the term ‘constitutional matter’ rigidly is neither necessary nor desirable. Philosophically and conceptually it is difficult to conceive of any legal issue that is not a constitutional matter within a system of constitutional supremacy. All law is after all subject to the Constitution and law inconsistent with the Constitution is invalid.”²⁴

²¹ Section 167(3)(c) of the Constitution.

²² *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*) at para 51.

²³ See *id* at para 44; *Van der Walt v Metcash Trading Ltd* [2002] ZACC 4; 2002 (4) SA 317 (CC); 2002 (5) BCLR 454 (CC) at para 32; and *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) at para 124.

²⁴ *Fraser* above n 13 at para 36.

[21] Nonetheless, this Court has made clear that “[w]hile the conception of a constitutional matter is broad, the term is of course not completely open”.²⁵ In *NVM*,²⁶ this Court held:

“To a greater or lesser extent, the rights guaranteed in the Bill of Rights cover the whole field of human existence. Almost any case could be framed as touching on one or other fundamental right. This is not enough to make the case a constitutional matter.”²⁷

[22] This Court has repeatedly held that a matter cannot “somehow morph into a constitutional issue through the simple facility of clothing it in constitutional garb”.²⁸ In *Jiba*,²⁹ this Court offered guidance, holding that “[f]or a constitutional issue to arise the claim advanced must require the consideration and application of some constitutional rule or principle in the process of deciding the matter”.³⁰ Similarly, in *NVM*, this Court affirmed that in order for a case to be a constitutional matter “the resolution of a constitutional issue must be reasonably necessary in order to determine the case’s outcome”.³¹

[23] The applicants contend that this is a constitutional matter because the SCA and ECHC failed in their section 39(2) duty to interpret the legislation in accordance with the spirit, purport and objects of the Bill of Rights. They submit that the lower courts preferred an interpretation which renders the Acts unconstitutional despite there being a reasonable alternative interpretation which avoids that finding.³² This is so, say the

²⁵ Id at para 39.

²⁶ *NVM obo VKM v Tembisa Hospital* [2022] ZACC 11; 2022 (6) BCLR 707 (CC).

²⁷ Id at para 92.

²⁸ *Mbatha v University of Zululand* [2013] ZACC 43; 2014 (2) BCLR 123 (CC); (2014) 35 ILJ 349 (CC) at para 222.

²⁹ *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 (8) BCLR 919 (CC).

³⁰ Id at para 38. “Constitutional issue” is analogous terminology to “constitutional matter”. Other analogous terminology includes “constitutional issue of substance” and “constitutional question”. See, for example, *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1998 (12) BCLR 1458 (CC); 1999 (1) SA 374 (CC) at para 59 and *Minister of Public Works v Kyalami Ridge Environmental Association* [2001] ZACC 19; 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC) at para 23.

³¹ *NVM* above n 26 at para 88.

³² Section 39(2) of the Constitution provides:

applicants, because the manner in which the SCA and ECHC interpreted the Acts fails to promote the right to equality and the right not to be arbitrarily deprived of property.

[24] This Court has held that the interpretation of legislation in conformity with the constitutional duty to promote the spirit, purport and objects of the Bill of Rights, or the failure to do so, is a constitutional matter.³³ Section 39(2) creates a mandatory canon of statutory interpretation,³⁴ requiring every court to interpret statutes “through the prism of the Bill of Rights”.³⁵ This Court must carry out its own section 39(2) duty and it may also assume constitutional jurisdiction to scrutinise other courts in the exercise of their section 39(2) duty to ensure that the law develops in a manner consistent with the Constitution.³⁶ The failure of a court to adhere to its section 39(2) obligation risks reversal by this Court.

[25] It cannot however be the case that any allegation of a lower court’s failure to interpret legislation in line with the Bill of Rights, without more, raises a constitutional matter. If the mere invocation of section 39(2) were sufficient, parties could invariably seek to frame their case as one in which the courts below failed in their section 39(2) duties, thus automatically engaging the jurisdiction of this Court. In this way, the interpretation of all legislation by lower courts would potentially fall within the jurisdiction of this Court. The effect of this would be to give this Court essentially

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

For the purposes of this matter, the discussion will be confined to the part of section 39(2) concerning the interpretation of legislation.

³³ See, for example, *Fraser* above n 13 at para 38; *S v Shaik* [2007] ZACC 19; 2007 (12) BCLR 1360 (CC); 2008 (2) SA 208 (CC) at para 83; *MEC Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd* [2007] ZACC 25; 2008 (2) SA 319 (CC); 2008 (4) BCLR 417 (CC) at para 19; *S v Liesching* [2016] ZACC 41; 2017 (2) SACR 193 (CC); 2017 (4) BCLR 454 (CC) at para 21; and *Competition Commission of South Africa v Standard Bank of South Africa Ltd* [2020] ZACC 2; 2020 (4) BCLR 429 (CC) at para 39.

³⁴ Woolman “Application” in Woolman and Bishop (eds) *Constitutional Law of South Africa* Service 5 (2013) at 87.

³⁵ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC) at para 21.

³⁶ Seedorf “Jurisdiction” in Woolman and Bishop (eds) *Constitutional Law of South Africa* Service 5 (2013) at 10.

plenary jurisdiction under its constitutional jurisdiction and run the danger of allowing the simple clothing of an issue in constitutional attire to engage our jurisdiction.

[26] The experience of the German Federal Constitutional Court, the Bundesverfassungsgericht (GFCC), in how it has grappled with a similar issue may provide some useful basis for comparison.³⁷ The GFCC, like this Court, has ostensibly restricted jurisdiction over constitutional matters in a system of constitutional supremacy where the Constitution pervades all law.³⁸ In conceptualising an approach to its limited jurisdiction, the GFCC in 1964 developed a test known as the Heck Formula:

*“The . . . specific function of the [GFCC] would not be achieved if it were to review court decisions on questions of law in an unrestricted way like an appellate court, just because an incorrect decision could possibly affect the constitutional rights of the parties concerned. . . . Only when a court decision violates specific constitutional law, may the [GFCC] interfere on the basis of a constitutional complaint. Specific constitutional law has not been violated merely when a judgment has been incorrectly decided in terms of the ordinary law; instead the mistake of the lower court must lie in its disregard for constitutional rights.”*³⁹ (Emphasis added.)

[27] What emerges from this test is that the GFCC has looked to its function in determining whether it will hear a matter, thus dividing the task of developing the law between it and all other courts.⁴⁰ Only when a lower court’s interpretation concerns a disregard for its constitutional function should the supervisory role of the GFCC be triggered.

[28] With that approach in mind, it may be useful to have regard to this Court’s jurisdiction over the decisions of lower courts in interpreting legislation against the

³⁷ Id at 110 and 115.

³⁸ Id at 110.

³⁹ BVerfGE 18, 85, 92-3.

⁴⁰ Seedorf above n 36 at 112-14.

backdrop of its function. Allowing the simple clothing of an issue in constitutional garb to engage our jurisdiction would run counter to the function of this Court. This Court has affirmed its “responsibility of being the ultimate guardian of the Constitution and its values”.⁴¹ This important role was summed up in *Pharmaceutical Manufacturers*:

“The Constitutional Court occupies a special place in this new constitutional order. It was established as part of that order as a new Court with no links to the past, to be the highest court in respect of all constitutional matters, and as such, the guardian of our Constitution.”⁴²

[29] Of course, this Court alone cannot have, and does not have, the exclusive responsibility to ensure that all law is compliant with the Constitution.⁴³ The Constitution envisions a constitutional division of labour. This Court shares, with all other courts, fora and tribunals, the duty to ensure compliance with the Constitution, while retaining ultimate jurisdiction as the highest court in respect of constitutional matters.⁴⁴ It does not then second-guess the decisions of lower courts where no constitutional matter arises.

[30] This Court, in considering the question of whether its jurisdiction is engaged on the basis of an invocation of section 39(2), will refrain from finding that it has jurisdiction to interfere with the decision of a lower court where the allegation is in substance no more than that the court reached an incorrect decision. This much was said in *Fraser*:

⁴¹ *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) at para 72.

⁴² *Pharmaceutical Manufacturers* above n 22 at para 55.

⁴³ Seedorf above n 36 at 108 and 116. See also O'Regan “On the Reach of the Constitution and the Nature of Constitutional Jurisdiction: A Reply to Frank Michelman” in Woolman and Bishop (eds) *Constitutional Conversations* (Pretoria University Law Press, Cape Town 2008) 63 at 77:

“The principle of recognising the importance of the Constitution living in other courts throughout our legal system is to make sure that the rights and provisions of the Constitution live in our law in a real way.”

⁴⁴ *S v Pennington* [1997] ZACC 10; 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC) at para 10.

“A contention that a lower court reached an incorrect decision is not, without more, a constitutional matter. Moreover, this Court will not assume jurisdiction over a non-constitutional matter only because an application for leave to appeal is couched in constitutional terms. It is incumbent upon an applicant to demonstrate the existence of a *bona fide* constitutional question. An issue does not become a constitutional matter merely because an applicant calls it one.”⁴⁵

[31] Of course, in a system of constitutional supremacy, it may at times be difficult to discern when an incorrect decision becomes a genuine constitutional matter. While the Constitution is supreme and is the overriding grundnorm that permeates all law, it nonetheless does not always hold the answer to all legal questions.⁴⁶ This is not to say that a system of constitutional supremacy can allow for bifurcated or parallel legal systems where some areas of law are touched by the Constitution, while others remain untouched.⁴⁷ But within its normative framework, the Constitution affords considerable latitude for conflicting outcomes to be arrived at, as a result of non-constitutional considerations, which are equally consistent with its prescripts.⁴⁸ There are decisions which the Constitution “neither prohibits nor demands”⁴⁹ be made in a certain direction and in which consideration of constitutional factors, or differing weights attached to those factors, would not plausibly affect the outcome.

[32] What is the import of this for this Court assuming constitutional jurisdiction on the basis of an allegation of a section 39(2) failure? There may be instances where this Court could come to a different conclusion to the courts below, but that different conclusion would not be the result of this Court’s consideration of constitutional factors and neither conclusion would be inconsistent with the Constitution. This Court should ask, in assessing the decision of a lower court, whether there is a plausible case for

⁴⁵ *Fraser* above n 13 at para 40.

⁴⁶ Du Plessis “Interpretation” in Woolman and Bishop (eds) *Constitutional Law of South Africa* Service 5 (2013) at 152-4 and 158 and Seedorf above n 36 at 118-19.

⁴⁷ See *Pharmaceutical Manufacturers* above n 22 at para 44.

⁴⁸ See Seedorf above n 36 at 118-19 and Du Plessis above n 46 at 153.

⁴⁹ Seedorf *id* at 118-19.

supposing that a proper consideration of constitutional factors could lead to a different outcome.

[33] This question is not concerned with the merits of the interpretation contended for but with the subject-matter of the claim.⁵⁰ For the purposes of jurisdiction, this Court merely considers whether it is plausible to suppose that constitutional considerations could lead to a different outcome. If that threshold is met, this Court will then have jurisdiction to entertain the merits and determine whether or not those constitutional considerations do indeed lead to a different outcome. If it is not plausible to suppose that constitutional factors could lead to a different outcome, and that the outcome would be determined by other matters, such as factual issues or non-constitutional points of law, the matter will not be a constitutional matter.

[34] This approach is consistent with how this Court has conceptualised “constitutional matters” in *NVM* and *Jiba*.⁵¹ Similarly, in *Boesak*, the issue at hand was factual and the outcome could not plausibly have been affected by constitutional considerations.⁵² The Court held that “the Constitution must be implicated in some way before such a finding can be said to raise a constitutional issue within the jurisdiction of this Court”.⁵³ In recognising that there are some decisions which remain part of a single constitutional legal order but which may not turn on the Constitution for an answer, this Court should ask whether the lower court has acted within its constitutional bounds.

[35] This Court may assume jurisdiction on the basis of its supervisory role in terms of section 39(2) where a lower court has failed to take constitutional considerations into account at all and where such considerations could plausibly lead to a different

⁵⁰ See *Fredericks v MEC for Education and Training, Eastern Cape* [2001] ZACC 6; 2002 (2) SA 693 (CC); 2002 (2) BCLR 113 (CC) at para 11.

⁵¹ See [22].

⁵² *Boesak* above n 13 at paras 23 and 29.

⁵³ *Id.*

outcome.⁵⁴ Similarly, where a court has considered the Constitution and the allegation is that it has misdirected itself or not accorded those considerations sufficient weight, this Court will have jurisdiction where it is plausible to argue that this Court, by attaching adequate weight to those constitutional considerations, could reach a different outcome.⁵⁵

[36] How does this Court assess, for the purposes of jurisdiction, whether constitutional considerations could plausibly lead to a different outcome? This Court has previously expressed itself on invocations of section 39(2) that have engaged its jurisdiction. These instances provide some useful guidance on the types of factors this Court can consider. These are no more than indicators and do not purport to be decisive.

[37] In a number of cases, this Court has assumed jurisdiction on the basis of an alleged section 39(2) failure after having determined that fundamental rights may be implicated by an interpretation and having due regard to the potential seriousness of the implication at stake.⁵⁶ At the heart of the assumption of jurisdiction is that where these factors are present, it is plausible that proper consideration of constitutional factors could lead to a different outcome. For example, in *Fraser* the applicant contended that the interpretation of section 26(6) of the Prevention of Organised Crime Act⁵⁷ by the SCA failed to promote his right to a fair trial. This Court considered that “the right to have a criminal trial begin and conclude without unreasonable delay and the right to legal representation, as aspects of the right to a fair trial, may not be ignored in the interpretation”.⁵⁸ In this way, constitutional considerations or the weight attached to

⁵⁴ However, an important principle relevant to this consideration was articulated by this Court in *Phumelela Gaming and Leisure Ltd v Gründlingh* [2006] ZACC 6; 2006 (8) BCLR 883 (CC); 2007 (6) SA 350 (CC) where it was held at paras 27-8 that even if the lower court “does not expressly give consideration to the impact of the Bill of Rights . . . [i]t should however not be lightly assumed that the Court did not take this into account”.

⁵⁵ See *Chagi v Special Investigating Unit* [2008] ZACC 22; 2009 (2) SA 1 (CC); 2009 (3) BCLR 227 (CC) at para 14.

⁵⁶ See, for example, *Links v Department of Health, Northern Province* [2016] ZACC 10; 2016 (4) SA 414 (CC); 2016 (5) BCLR 656 (CC) at para 22 and *Maswanganyi v Minister of Defence and Military Veterans* [2020] ZACC 4; 2020 (4) SA 1 (CC); 2020 (6) BCLR 657 (CC) at para 32.

⁵⁷ 121 of 1998.

⁵⁸ *Fraser* above n 13 at para 45.

them plausibly had something to say about how the disputed interpretation ought to be resolved and this Court's jurisdiction, in the context of section 39(2), was triggered.

[38] It may also be plausible to suppose that proper consideration of constitutional factors would lead to a different outcome where the interpretation of the legislation in question is closely linked to a constitutional objective. For example, this Court has on a number of occasions been concerned with the interpretation of the National Credit Act (NCA).⁵⁹ This Court has considered the link between the NCA and the constitutional objectives the NCA seeks to achieve in assessing whether its constitutional jurisdiction was engaged.⁶⁰ In light of the important constitutional purposes of the legislation, interpretations of the provisions plausibly brushed up against the normative framework of the Constitution and it was arguable that the Constitution had to be taken into account. Although the interpretations in these cases did not ultimately turn on a specific right or constitutional rule, for jurisdictional purposes it was sufficient that this Court considered that the normative framework of the Constitution plausibly had something to say about how the disputed interpretation ought to be resolved.

[39] In sum, the threshold question to be answered in every matter where this Court's jurisdiction is sought to be invoked under section 167(3)(b)(i) through section 39(2) is whether there is a plausible case for supposing that a proper consideration of constitutional factors could lead to a different outcome. If there is, the allegation of the section 39(2) failure raises a constitutional matter.

[40] With this in mind, let me return to the matter at hand and the applicants' contention that the courts below failed in their section 39(2) duty. With respect to the right to equality, the applicants initially claimed that including freeplay in the calculation of taxable revenue irrationally differentiates between holders of casino

⁵⁹ 34 of 2005.

⁶⁰ See *Sebola v Standard Bank of South Africa Ltd* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) at para 36; *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) at para 16; and *Nkata v FirstRand Bank Ltd* [2016] ZACC 12; 2016 (4) SA 257 (CC); 2016 (6) BCLR 794 (CC) at paras 94-6.

licences whose business includes cashless slot machines, like themselves, and all other holders of gambling licences. This was said to be so because it obliged casinos to pay tax differently in respect of cashless slot machines as against any other gambling activity. Consequently, the interpretation opted for by the SCA and ECHC unjustifiably and unreasonably limited their constitutional right to equality under section 9(1) of the Constitution. The applicants abandoned this argument during the oral hearing, and correctly so. Nothing further need therefore be said about it.

[41] The applicants also argue that the SCA and ECHC's interpretation of the Acts fails to promote the right not to be arbitrarily deprived of property, because the interpretation imposes a tax liability on casino operators on monies that they have not received.

[42] What is evident from both the SCA and ECHC judgments is that neither ignored constitutional considerations in their interpretations of the Acts and were alive to the normative framework of the Constitution.⁶¹ They nonetheless found against the applicants. This Court must ask whether it is plausible that its consideration of the spirit, purport and objects of the Bill of Rights could lead to a different outcome on appeal or whether it could merely come to a different decision on the basis of non-constitutional factors.

[43] The applicants' case boils down to a contention that the ECHC and the SCA reached an incorrect decision on the interpretation of the Acts. It is not plausible to suppose that proper consideration of constitutional factors could lead to a different outcome on whether or not freeplay is included in the definition of AGR in the Acts. This Court does not plausibly have anything to add about the prescriptive framework of the Constitution in resolving this matter. Further consideration of the right not to be arbitrarily deprived of property could not plausibly lead to a different outcome on the interpretation. It would likewise not be plausible to argue that the Acts are closely

⁶¹ Supreme Court of Appeal judgment above n 8 at para 24 and Eastern Cape High Court judgment above n 9 at paras 31-2, 38 and 48-52.

linked to a constitutional objective, the consideration of which could lead to a different outcome. The Acts are concerned with the regulation of gambling and the imposition of gambling tax and are not intimately linked with broader constitutional objectives. The interpretation issue does not raise a constitutional matter and our constitutional jurisdiction cannot be located there.

[44] The applicants advance another reason why they say that the matter engages this Court’s constitutional jurisdiction. The applicants submit that the proper interpretation and scope of a taxing provision is a constitutional matter since a provincial legislature’s power to impose tax and levies derives from section 228(1) of the Constitution.⁶²

[45] This matter does not concern the power of a provincial government to collect tax in any sense that triggers constitutional concerns.⁶³ Every case on the interpretation of a tax provision in a sense involves a question as to whether the revenue authority is entitled to recover tax, since the taxpayer is invariably arguing that no or less tax is owing than on the revenue authority’s interpretation of the legislation. But not every question concerning the interpretation of fiscal legislation is a constitutional matter, and in this matter the issue is purely one of the proper interpretation of the Acts.

[46] None of the issues raised by the applicants are constitutional matters. The sole issue that arises and which is dispositive of the dispute is whether freeplay is included

⁶² Section 228(1) of the Constitution provides:

- “(1) A provincial legislature may impose—
- (a) taxes, levies and duties other than income tax, value-added tax, general sales tax, rates on property or customs duties; and
 - (b) flat-rate surcharges on any tax, levy or duty that is imposed by national legislation, other than on corporate income tax, value-added tax, rates on property or customs duties.”

⁶³ Compare the central issue that had to be decided by this Court in *Casino Association of South Africa v Member of the Executive Council for Economic Development, Environment, Conservation and Tourism* [2023] ZACC 39; 2024 (5) BCLR 611 (CC), which concerned the question whether a Provincial Executive’s delegated legislative power to impose provincial taxes or levies was in breach of section 228(1) of the Constitution and the principle of separation of powers.

in the definition of taxable revenue. That is not a matter that engages this Court's constitutional jurisdiction.

General jurisdiction

[47] The applicants claim that this matter also raises an arguable point of law of general public importance, which this Court ought to consider and determine in terms of section 167(3)(b)(ii) of the Constitution.

[48] The Constitution Seventeenth Amendment Act extended this Court's jurisdiction to deal with arguable points of law of general public importance which this Court finds that it ought to consider. This expansion must be understood in the context of the Constitution and its values. It seems to me, then, that section 167(3)(b)(ii) does not seek to transform the Constitutional Court into a generalist appellate court for all matters.⁶⁴ If this were so, section 167(3)(b)(ii) could simply have ended with "any other matter". But it goes further, by qualifying which types of matters constitute "other matters" that this Court will consider.⁶⁵ The extension of jurisdiction only gives this Court the power to entertain appeals within this defined category.

[49] Section 167(3)(b)(ii) is concerned with those matters that may not be constitutional matters, but which, by virtue of raising an arguable point of law that has importance to the public and would be in the interests of justice for this Court to consider, have implications for a legal system in which the Constitution is the supreme law. This Court, as the ultimate guardian of the Constitution and its values, has the authority only to deal with points of law that meet this standard. No fine line can be drawn in this respect. As this Court held in *Paulsen*,⁶⁶ general jurisdiction must be determined on a case by case basis.⁶⁷ It is a matter of degree, but non-constitutional

⁶⁴ This is precisely the function of the SCA.

⁶⁵ *Fujitsu* above n 19 at para 89.

⁶⁶ *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC).

⁶⁷ *Id* at para 23.

matters which do not rise to this standard can comfortably find finality in the SCA. Accordingly—

“not all litigants who knock on this Court’s doors will be given the opportunity to argue their case, either orally or in writing. We are directed by the Constitution as to which matters should be adjudicated by this Court.”⁶⁸

[50] In *Paulsen*, the first case considering this Court’s extended jurisdiction after the Constitution Seventeenth Amendment Act, it was held:

“Reduced to bare essentials, [section 167(3)(b)(ii)] provides for this Court to grant leave if—

- (a) the matter raises an arguable point of law;
- (b) that point is one of general public importance; and
- (c) the point ought to be considered by this Court.”⁶⁹

[51] The three grounds listed above are conjunctive. All three requirements have to be satisfied for the matter to engage this Court’s general jurisdiction. I will consider each of the grounds in turn and consider whether they are satisfied, based on what the applicants have pleaded.

Arguable point of law

[52] The obvious starting point in this exercise is for the applicants on the pleadings to identify the arguable point of law.⁷⁰ This leg of the test for general jurisdiction is bifurcated: “the point must be one of law; and it must be arguable”.⁷¹ The applicants identify the arguable point of law as the constitutionally compliant interpretation of the Acts. This closely mirrors the basis on which the applicants seek to engage our

⁶⁸ *Economic Freedom Fighters v Gordhan* [2020] ZACC 10; 2020 (6) SA 325 (CC); 2020 (8) BCLR 916 (CC) at para 30.

⁶⁹ *Paulsen* above n 66 at para 16.

⁷⁰ *Tiekiedraai Eiendomme (Pty) Ltd v Shell South Africa Marketing (Pty) Ltd* [2019] ZACC 14; 2019 (7) BCLR 850 (CC) (*Tiekiedraai*) at paras 30-1.

⁷¹ *Paulsen* above n 66 at para 20.

constitutional jurisdiction. Be that as it may, it is trite that legislation must be interpreted in a constitutionally compliant manner. On its own, this does not raise an arguable point of law. My reading of the applicants' pleadings reveals that the arguable point of law they appear to rely on is that freeplay is not included in a casino operator's AGR and consequently does not form part of its "taxable revenue" for purposes of the determination of gambling tax in terms of the Acts.

[53] This is a point of law, not fact,⁷² because it concerns the policy and normative content behind the imposition of gambling tax, and no evaluation of the facts is required to determine the point.⁷³ Is it arguable? This Court has held that in order to be arguable, "a point of law must have some prospects of success".⁷⁴ It must carry some degree of merit, substance, and have a measure of plausibility.⁷⁵ This requires this Court to make a value judgement on the particular circumstances of the case.⁷⁶ In my view, the fact that different divisions of the High Court and the SCA have expressed divergent views on the point suggests that the point of law is arguable, and I shall so assume.

General public importance

[54] A matter is of general public importance if it transcends the narrow interests of the litigants and implicates the interests of a significant part of the public.⁷⁷ An indicator of this is that the point carries substantial and broad-based consequences and effects, and it will likely bear upon the public interest.⁷⁸ This does not mean that it should or

⁷² It is certainly not a point of law which is mixed in with factual points, as was the concern with the point raised in *Competition Commission of South Africa v Media 24 (Pty) Ltd* [2019] ZACC 26; 2019 (5) SA 598 (CC); 2019 (9) BCLR 1049 (CC) at paras 134-5.

⁷³ Id at para 143.

⁷⁴ *Paulsen* above n 66 at para 22.

⁷⁵ Id at para 21.

⁷⁶ See id at para 23, where this Court provided examples of factors which may be of assistance on this question.

⁷⁷ Id at para 26.

⁷⁸ Id at para 25, quoting *SAJ v AOG (Petition 1 of 2013)* [2013] KESC 19 (KLR) at para 2; *Steyn v Gnechchi-Ruscione (Application 4 of 2012)* [2013] KESC 11 (KLR) at para 58.

will implicate the interests of society as a whole, but “it must implicate the interests of a section of the public, large enough to be regarded as of general importance”.⁷⁹

[55] The applicants contend that the law point is of general public importance because it plainly transcends the narrow interests of the parties and implicates the interests of a significant part of the public. This is no more than a restatement of the test on this aspect of general jurisdiction.⁸⁰ The applicants make the claim that the correct interpretation of the Acts will affect casino operators nationally, and it will impact on the fiscus of the Western Cape and of the Eastern Cape. I am unable to agree that the arguable point of law transcends the narrow interests of the parties for three reasons.

[56] First, nothing before us indicates that this issue is of relevance to other casino operators. A litigant must identify in clear language what it is that makes the point of law one of general public importance.⁸¹ No evidence was adduced to indicate that freeplay is in widespread use or “common-place”,⁸² that other casino operators use similar software to the BALLY system or that other casino operators offer freeplay at all. In oral argument, counsel for the applicants conceded that the papers are silent on whether any other casino groups have a similar sort of offering such as freeplay that would invoke the same kind of questions. If it is so that this issue is confined to Sun International, no evidence was adduced to assess Sun International’s share of the industry for this Court to conclude that a determination of this issue could have industry-wide effects. In any event, I will show later that there is nothing to indicate that this issue will affect other casinos in the Sun International group aside from those before us.

⁷⁹ *Tiekiedraai* above n 70 at para 40.

⁸⁰ *Paulsen* above n 66 at para 26.

⁸¹ *Id.*

⁸² See *Mokone v Tassos Properties CC* [2017] ZACC 25; 2017 (5) SA 456 (CC); 2017 (1) BCLR 1261 (CC) at para 16.

[57] It is simply not enough to make the bold claim that this matter affects the interests of other casino operators. In *Clicks Retailers*,⁸³ this Court considered whether an allowance under section 24C(2) of the Income Tax Act⁸⁴ was available to Clicks Retailers (Pty) Limited (Clicks), a retailer that operated a retail loyalty programme. There, in assessing whether the point of law was of general public importance, this Court considered how the decision in the matter would not only implicate the interests of Clicks but the tax treatment of loyalty programmes of other retailers who offer similar rewards programmes such as DisChem, Pick n Pay, Ster-Kinekor and Exclusive Books. In that matter, the similarities of those rewards programmes to the Clicks loyalty programme were specifically pleaded and the broad public impact was clearly identified.⁸⁵ This is not what the applicants have done here.

[58] A bald and unsubstantiated assertion, as we have here, that the arguable point of law is of general public importance falls short of demonstrating the public importance that the point of law triggers. This Court must ultimately be satisfied on the basis of the evidence before it that indeed the arguable point of law transcends the interests of the parties and has the degree of impact contemplated by this aspect of the test.

[59] Of course, it is possible that parties may litigate to protect their own interests but that the questions they raise may be of wider public importance. In *Ascendis Animal Health*,⁸⁶ this Court said:

“These questions undoubtedly go beyond the narrow interests of the parties. It is not disputed that the applicant approached this Court with these questions to safeguard its own interests. *However, that does not denude the legal questions of their objective public importance. Any order given by this Court will have a wider impact in the arena of patent litigation.* Accordingly, the infringement action and the subsequent order

⁸³ *Clicks Retailers (Pty) Ltd v Commissioner for the South African Revenue Service* [2021] ZACC 11; 2021 (4) SA 390 (CC); 2021 (10) BCLR 1102 (CC).

⁸⁴ 58 of 1962.

⁸⁵ *Clicks Retailers* above n 83 at para 27.

⁸⁶ *Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation* [2019] ZACC 41; 2020 (1) SA 327 (CC); 2020 (1) BCLR 1 (CC).

arising from it may bind only the parties; however, there is a general public interest in this decision that goes beyond the narrow interests of the parties because it requires the interpretation of section 61 of the [Patents] Act [57 of 1978].”⁸⁷ (Emphasis added.)

[60] This brings me to the second hurdle the applicants face, which is that the interpretive issue before us is remarkably narrow. Unlike in *Ascendis*, no wider public importance flows from the interpretation. The point of law before us is confined to the interpretation of the relevant provisions of the WC and EC Acts. The applicants have not argued that it is constitutionally impermissible to tax freeplay as a fundamental principle removed from the text of any legislation. The applicants accept that a ruling of this Court would not automatically exclude freeplay from the calculation of taxable revenue in other contexts, overruling the text of other provincial statutes. In any event, the text of other provincial statutes is not identical to the WC and EC Acts. As a result, based on the pleadings, the impact of this Court’s interpretation of the Acts and the resultant impact on casino operators or gambling boards is confined to its impact on the parties before us.

[61] Compare this to this Court’s finding of jurisdiction in *Big G Restaurants*.⁸⁸ The matter concerned whether income derived from patrons of certain Spur and Panarottis restaurants was deductible by the Spur or Panarottis restaurateur in terms of section 24C(2) of the Income Tax Act. It turned on whether a contract that imposes an obligation to incur future expenditure is so interlinked to a contract in terms of which income is earned, that the income earned in terms of the latter contract can be held to be income that accrues in terms of the former contract. In deciding that the matter engaged this Court’s general jurisdiction, this Court considered that a determination of the issue was likely to affect Spur franchisees throughout South Africa.⁸⁹ Not so here. In this matter, the applicants have failed to show that other Sun International casinos, aside from those before us, would be affected by a decision of this Court on this issue.

⁸⁷ Id at para 37.

⁸⁸ *Big G Restaurants (Pty) Ltd v Commissioner, South African Revenue Service* [2020] ZACC 16; 2020 (6) SA 1 (CC); 2020 (11) BCLR 1297 (CC).

⁸⁹ Id at para 14.

This narrow ambit means the point of law does not transcend the interests of the parties and cannot be said to be of general public importance.

[62] The high-water mark of the applicants' claim in relation to the importance of this matter for other casino operators and gambling boards is that this Court's ruling may be of interest to parties litigating on similar issues in other provinces. That it may be of interest does not automatically elevate the point of law into one of general public importance. There must be some form of substantial and broad-based consequence and effect arising from the disposition of the point of law that transcends the interests of the parties.

[63] Other instances where this Court has found that a point of law is of general public importance are illustrative. In *Diener*,⁹⁰ which concerned the interpretation of provisions of the Companies Act⁹¹ dealing with the ranking of claims for the remuneration and expense of business rescue practitioners, this Court held that the interpretation had "a significant impact on credit providers, and therefore the public".⁹² In *Shiva Uranium*,⁹³ which concerned the interpretation of section 139(3) of the Companies Act, this Court considered the public importance of the power to appoint a replacement for a business rescue practitioner appointed by a court. Given the important role business rescue practitioners play in business rescue proceedings, a "common phenomenon of our corporate life", there was public interest in clarity regarding the statutory provisions governing their appointment.⁹⁴ In *Coronation*,⁹⁵ this Court considered exemptions under section 9D of the Income Tax Act. There, the

⁹⁰ *Diener N.O. v Minister of Justice and Correctional Services* [2018] ZACC 48; 2019 (2) BCLR 214 (CC); 2019 (4) SA 374 (CC).

⁹¹ 71 of 2008.

⁹² *Diener* above n 90 at para 30.

⁹³ *Shiva Uranium (Pty) Ltd v Tayob* [2021] ZACC 40; 2022 (2) BCLR 197 (CC); 2022 (3) SA 432 (CC).

⁹⁴ *Id* at para 26.

⁹⁵ *Coronation Investment Management SA (Pty) Ltd v Commissioner, South African Revenue Service* [2024] ZACC 11; 2024 (6) SA 310 (CC); 2024 (9) BCLR 1128 (CC).

question was of “significant importance to the South African economy”.⁹⁶ In *Capitec*,⁹⁷ this Court considered the interpretation of section 16(3)(c) of the Value-Added Tax Act⁹⁸ and held that the case raised questions that “transcend Capitec’s interests and indeed the interests of banks”.⁹⁹

[64] There is no indication that the answer to the interpretive question in respect of the Acts before us will have an impact of the kind discussed. Here, we cannot conclude that the question transcends the interests of Sun International’s casinos in the Eastern Cape and Western Cape. It is an even further ask to suggest that it affects casinos outside of the Sun International stable. In addition, freeplay is only available to a select few of their patrons – some of the Most Valued Guests. The issue will not impact all Sun International customers nor will it have a significant impact on the general populace.¹⁰⁰

[65] There is a third reason the point does not transcend the narrow interests of the parties. The applicants’ appeal to the public impact of gambling taxes on the provincial fiscus does not in itself elevate the arguable point of law to one of general public importance. If this were so, the interpretation of any taxing provision, no matter how narrow its impact, would invariably satisfy the requirement of general public importance. Only the EC MEC provides some evidence that gambling revenue forms an important component of the Eastern Cape Provincial Government’s financial resources. We are thus left to speculate regarding the impact of gambling revenue on the financial resources of provincial governments outside of the Eastern Cape. The

⁹⁶ Id at para 46.

⁹⁷ *Capitec Ltd v Commissioner, South African Revenue Service* [2024] ZACC 1; 2024 (4) SA 361 (CC); 2024 (7) BCLR 841 (CC).

⁹⁸ 89 of 1991.

⁹⁹ *Capitec* above n 97 at para 50.

¹⁰⁰ Compare this to *Paulsen* above n 66 at para 27:

“It is manifest that both the proper interpretation of the NCA on the issues raised . . . will have a significant impact on the general populace. As noted in *Kubyana*, the NCA ‘regulates commercial activity undertaken by many people and institutions on a daily basis. The issues at stake are therefore of fundamental importance to many South Africans’.”

proposition that the interpretation of the Acts will impact the Western Cape and Eastern Cape provincial fiscuses does not, in itself, raise the point of law to the threshold of one of general public importance. Although the outcome of the matter may have consequences for provincial revenue-raising in the Eastern Cape and Western Cape, these knock-on effects do not change the nature and importance of the question at hand – a question of interpretation of two provincial gambling statutes which affects only the interests of the parties before us.

[66] It is plain that “[n]othing of general or wider importance” flows from the issue before us.¹⁰¹ If this matter were to engage this Court’s jurisdiction on the basis pleaded by the parties, it would have the result that the requirement of general public importance found in section 167(3)(b)(ii) would set the bar unacceptably low. There must be a purpose behind the prescriptive wording contained in section 167(3)(b)(ii). And this Court is obliged to protect that purpose.

[67] For all these reasons, I find that the arguable point of law is not of general public importance. Having failed to meet this threshold requirement, the matter does not engage this Court’s general jurisdiction.

Ought to be considered

[68] “Ought to be considered” adds a further requirement to be met once it is established that a matter raises an arguable point of law of general public importance.¹⁰² This aspect of the test depends on the interests of justice.¹⁰³ However, if a matter fails on either of the first two legs, as in this matter, the “ought to be considered” enquiry does not arise. This Court does not have jurisdiction, in the interests of justice, to

¹⁰¹ *Tiekiedraai* above n 70 at para 13.

¹⁰² See *id* at para 18 where this Court held that the litigant “must show more than that interesting and arguable questions of importance arise. It must show why the interests of justice require them to be decided in this litigation”.

¹⁰³ See *Paulsen* above n 66 at para 18 where this Court held:

“[A] holding that a matter raises an arguable point of law of general public importance does not inexorably lead to a conclusion that the matter must be entertained. Whether the matter will, in fact, receive our attention will depend on the interests of justice.”

consider an arguable point of law that is not of general public importance. This matter is clearly not the type of matter that the Constitution empowers or requires us to consider under section 167(3)(b)(ii).

Conclusion

[69] This is an ordinary matter of statutory interpretation, affecting the narrow interests of the parties before us. This matter does not engage this Court's constitutional or general jurisdiction. Therefore, the applications for leave to appeal must be dismissed.

[70] We record that the written submissions for the first respondent in the Western Cape case were prepared by John Newdigate SC, a well-respected advocate from the Cape Bar, who sadly passed away before the hearing of the matter in this Court.

Costs

[71] The respondents have been successful in this Court. It is just and equitable for the applicants to be ordered to pay the respondents' costs in this Court, including the costs of two counsel.

Orders

[72] In Case CCT 261/23 *Sunwest International (Pty) Ltd t/a Grandwest Casino and Entertainment World and Another v Western Cape Gambling and Racing Board and Another* the following order is made:

1. Leave to appeal is refused.
2. The applicants jointly and severally must pay the respondents' costs in this Court, including the costs of two counsel.

[73] In Case CCT 285/23 *Emfuleni Resorts (Pty) Ltd t/a Boardwalk Casino and Entertainment World and Another v Eastern Cape Gambling Board and Another* the following order is made:

1. Leave to appeal is refused.
2. The applicants jointly and severally must pay the respondents' costs in this Court, including the costs of two counsel.

In Case CCT 261/23

For the Applicants:

I Goodman SC and M Kruger instructed
by Webber Wentzel

For the First Respondent:

V Ngalwana SC and N Khooe instructed
by Marais Muller Hendricks
Incorporated (the written submissions
having been prepared by J A Newdigate
SC)

For the Second Respondent:

R T Williams SC and H Cassim
instructed by Office of the State
Attorney, Cape Town

In Case CCT 285/23

For the Applicants:

I Goodman SC and M Kruger instructed
by Webber Wentzel

For the First Respondent:

H J de Waal SC and N C de Jager
instructed by Tshangana Le Roux
Incorporated

For the Second Respondent:

H J de Waal SC and N C de Jager
instructed by Office of the State
Attorney, Johannesburg