



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 630/05
REPORTABLE

In the matter between:

DESERT PALACE HOTEL RESORT (PTY) LTD APPELLANT

v

NORTHERN CAPE GAMBLING BOARD RESPONDENT

Coram: Cameron, Conradie, Maya JJA, Combrinck, Cachalia AJJA

Heard: 14 November 2006

Delivered: 24 November 2006

Summary: A *'holder of a licence'* as contemplated by s 65 of the Northern Cape Gambling and Racing Amendment Act 5 of 1996, and s 81 of Act 6 of 2000 must have had a licence physically *'issued'* for it to be liable for payment of gambling levies and penalties.

Neutral citation: This case may be cited as *Desert Palace Hotel Resort v Northern Cape Gambling Board* [2006] SCA 143 (RSA)

JUDGMENT

CACHALIA AJA

[1] The respondent is a provincial gambling board ('the Board') and the appellant ('Desert Palace') a casino operating within its jurisdiction. The Board as plaintiff instituted proceedings in the Northern Cape Provincial Division against Desert Palace as defendant for the recovery of a penalty imposed by it purportedly in terms of the regulations promulgated under the Northern Cape Gambling and Racing Act 5 of 1996 ('the 1996 Act'). The Board had imposed the penalty for Desert Palace's non-payment of gambling levies for the period November 2000 to November 2001.

[2] It was common cause that Desert Palace applied to the Board for a casino operator licence in 1999. In a letter dated 17 August that year, the Board informed Desert Palace that the application had been approved on 11 August 1999 and that the time period referred to in the letter 'shall come into effect on the date of issuing the casino operator licence'. At the time the application was approved, the premises the casino was to operate from had not yet been erected. The casino began operating at temporary premises on 12 June 2000. However the Board issued a temporary licence to Desert Palace only on 16 October 2001, together with a directive that the licence was to operate retrospectively to the date on which the casino had commenced its operation. For reasons not relevant to this appeal, the retrospective application of that licence was withdrawn by court order granted after agreement between the parties. A new temporary licence was issued thereafter with effect from 22 October 2001.

[3] Desert Palace initially paid levies to the Board until November 2000 but on legal advice withheld further payment until 11 November 2001. The levy was eventually paid but the penalty not. As a consequence the Board instituted the present action for payment of the

penalty. Desert Palace resisted the claim contending that it was not a ‘*holder of a licence*’ as contemplated by the 1996 Act, and thus not liable for a penalty. In the alternative it contended that the regulation purporting to enable the Board to impose penalties for the non-payment of levies was not authorised by the empowering section of the Act.

[4] The stated case the parties placed before the court below in terms of Rule 33(1) required it to decide two questions:

- Whether Desert Palace was during the period 12 June to 11 November 2001 in law the ‘*holder of a licence*’ in terms of s 65 of the 1996 Act;¹ and
- In the event of its finding that Desert Palace was the ‘*holder of a licence*’, whether the Board was entitled to levy penalties on outstanding levies in terms of the Act read with Regulation 95 either before or after 28 May 2001. In this regard the court was asked to determine whether the promulgation of Regulation 95 was authorised by the Act’s enabling section.²

[5] The court below (Kgomo JP) decided both questions in favour of the Board and refused leave to appeal.³ This court however granted leave. With regard to whether Desert Palace was a ‘*holder of a licence*’, Desert Palace contended that for a ‘*holder of a licence*’ to fall within the terms of

¹ Section 65 reads as follows: ‘**Imposition of gambling and betting taxes.**–(1) Over and above any value-added tax or other sales tax, if any, and income tax which may be payable in terms of any other law, every **holder of a licence** (except a manufacturer, maintenance or supplier licence) shall be liable to, at such intervals as may be prescribed, pay a gambling levy on the gross win which such licence holder derives; from the conduct of gambling and which gambling levy shall be calculated on such basis and at a rate as may be prescribed, and be payable in the manner and before the date as prescribed: Provided that different rates may be so prescribed in respect of different types of licences.’

² The enabling provision is s 65 (3).

³ The judgment is reported as *Northern Cape Gambling Board v Desert Palace Hotel Resort (Pty) Ltd* [2005] 2 All SA 61 (NC).

s 65 of the 1996 Act, a formal document evidencing the licence must have been issued to it. It is common cause that no such formal document was issued during the period in question. (The retrospective application of the temporary licence issued on 16 October 2001 was withdrawn and another temporary licence issued with effect from 22 October 2001.) The Board's contention, on the other hand, was that the description '*holder of a licence*' does not contemplate a document having been issued to a licence holder, but bears a wider meaning in the sense of a grant of a privilege or right.⁴ Thus, contended the Board, Desert Palace became a '*holder of a licence*' when its application was approved on 11 August 1999.

[6] The court below, on the basis of the undisputed fact that Desert Palace had operated a casino for the relevant period, albeit without a licence that was formally issued to it, held that it was nevertheless a '*holder of a licence*' as contemplated by s 65 of the 1996 Act. In arriving at this conclusion the court apparently considered it inequitable that Desert Palace derived a financial benefit from operating the casino but demurred when required to pay the gambling levy.⁵ Thus, so the court reasoned, 'regardless of the objective truth of the matter, Desert Palace is deemed . . . to have been issued with a licence and had, accordingly, become a licence-holder'.⁶

[7] In my view the court below approached the matter on the wrong basis: First, it had no power to 'deem' Desert Palace a '*holder of a licence*' if the interpretation of the statute did not provide for deemed licences. Second it placed undue emphasis in its approach to the matter

⁴ Cf *President of the RSA: In re Constitutionality of the Liquor Bill 2000* (1) SA 732 (CC) para 56.

⁵ *Northern Cape Gambling Board v Desert Palace* (above) para 19.3.

⁶ *Northern Cape Gambling Board v Desert Palace* (above) para 24.

on the facts and on what it saw as the equities, instead of approaching it as a matter of statutory interpretation. When interpreting a statute, the factual circumstances of a case have no bearing on the analysis.

[8] The proper approach to be followed when considering a statutory provision was formulated by Wessels AJA in *Stellenbosch Farmer's winery Ltd v Distillers Corporation (SA) Ltd and Another*⁷ as follows:

'In my opinion it is the duty of the Court to read the section of the Act which requires interpretation sensibly, ie with due regard, on the one hand, to the meaning or meanings which permitted grammatical usage assigns to the words used in the section in question and, on the other hand, to the contextual scene, which involves consideration of the language of the rest of the statute, as well as the "matter of the statute, its apparent scope and purpose, and within limits, its background". In the ultimate result the Court strikes a proper balance between these various considerations and thereby ascertains the will of the Legislature and states its legal effect with reference to the facts of the particular case which is before it.'

[9] The provincial statutes relevant to this appeal are the 1996 Act before and after its amendment on 28 May 2001,⁸ and the Northern Cape Gambling and Racing Amendment Act 6 of 2000 ('the 2000 Act'). The 1996 Act (before amendment) was the governing statute at the time the Board approved Desert Palace's application in August 1999. It was replaced on 2 June 2000⁹ by the 2000 Act, which largely re-enacted its predecessor's provisions. The 2000 Act was, in turn, repealed by Act 3 of 2001¹⁰ which, as I have mentioned, came into effect on 28 May 2001. Act 3 of 2001, in effect, revived the 1996 Act in an amended form. To

⁷ 1962 (1) SA 458 (A) at 476E-G. Also quoted with approval in *Feldman v Migdin* 2006 (6) SA 12 (A) para 16.

⁸ See the Northern Cape Gambling and Racing Amendment Act 3 of 2001. It was promulgated on 8 June 2000 by Notice 30 in Provincial Gazette No 519, deemed effective from 2 June.

⁹ See s 113 of Act 6 of 2000.

¹⁰ The repeal was effected by s 71 of Act 3 of 2001.

summarise, three statutory regimes apply to the period relevant to this dispute: from August 1999 (when the licence application was approved) until the promulgation of the 2000 Act on 2 June 2000, the 1996 Act applied; thereafter, and until its repeal on 28 May 2001, the 2000 Act was the operative statute; and for the remaining period with which we are concerned, until 11 November 2001, the revived 1996 Act (as amended) applied. Inexplicably the parties were unaware of the 2000 Act when they presented their cases in the court below. As a consequence that court did not consider it; although for the purpose of deciding whether Desert Palace was a *'holder of a licence'* the differences between the statutes are immaterial.

[10] Section 81(1) of the 2000 Act corresponds to s 65(1) of the 1996 Act. It provides as follows:

‘ . . . every **holder of a licence** (except a manufacturer, maintenance or supplier licence) shall be liable to, at such intervals as may be prescribed, pay a gambling levy on the gross win which such licence holder derives from the conduct of gambling and which gambling levy shall be calculated on such basis and at a rate as may be prescribed, and payable in the manner and before the date as prescribed: Provided that different rates may be so prescribed in respect of different types of licences.’

[11] The Act does not define what a *'licence'* is but merely states that it means a licence *'issued'* in terms of s 26. Section 26(1) makes provision for eleven kinds of licences. Section 26(2) requires of any licence that it be in writing.¹¹ Critically a licence holder has a duty to display the licence on the licensed premises (s 45) and on demand to produce the *'licence or certificate concerned'* (s 46). Self-evidently this would not be possible

¹¹ This was not a requirement of the 1996 before its amendment by Act 3 of 2001.

without a licence holder being physically in possession of a document capable of being displayed or produced.

[12] The licence we are concerned with, as mentioned earlier, is a ‘*casino operator licence*’. It is defined¹² as ‘*any licence issued in terms of section 48*’. Section 48 requires of such licences that they ‘*be issued*’,¹³ that they are ‘*link(ed) to the premises specified in the licence*’¹⁴ and that they ‘*authorise . . . the playing in or on the premises or such parts of the premises as are specified in the licence . . .*’.¹⁵

[13] So, unless the ‘*issued*’ licence describes the ‘*premises*’ from where the casino is to operate, it will not comply with s 48. In my view the preceding paragraphs provide strong indications that the legislature intended a ‘*holder of a licence*’ as contemplated in s 81 of the Act to be capable of physically possessing a valid licence in the form of a document issued to it by the Board.¹⁶ Not only that but its contents must display the authority granted to the casino operator.

[14] But it is s 36 of the Act which, I think, is decisive of this appeal. It reads thus:

‘Temporary licences in respect of incomplete premises.’—(1) If an application for a licence is granted by the Board in respect of premises not yet erected, . . . the Board may, upon being furnished with the required forfeitable guarantee, issue a temporary licence to the applicant concerned, subject to the compliance of such conditions or requirements, referred to in the temporary licence, with regard to those premises as

¹² Section 1.

¹³ Section 48(1).

¹⁴ Section 48(6).

¹⁵ Section 48(7).

¹⁶ 10 *Lawsa* (reissue) para 295.

the Board may determine, within such period as may likewise be determined and referred to.

(2) . . .

(3) The period determined under subsection (1) . . . shall not be longer than 24 months . . .

(4) When the Board is satisfied that the premises in respect of which a temporary licence has been granted under subsection (1), have been substantially completed in accordance with the plan thereof approved by the Board, the conditions and requirements determined by the Board have been complied with and [the] premises are suitable for the purpose for which they will be used under the licence concerned, the Board shall issue the licence in accordance with section 31 (3) to the applicant concerned.

(5) . . .

(6) The provisions of this Act shall, subject to subsection (1), *mutatis mutandis* apply to temporary licences, and in such application a reference in this Act to a licence shall, where applicable, also be construed as a reference to a temporary licence.’

[15] The section provides for the issue of a temporary licence after the Board grants an application for a licence in respect of premises not yet erected. That licence is issued for a limited period subject to such conditions as the Board may determine. When the erection of the premises is completed according to the Board’s specifications, the Board must then issue a licence. The section therefore envisages a three stage process: first the *grant* of an application; second the *issue* of a temporary licence and third the *issue* of the licence. It clearly distinguishes the grant or approval of an application for a licence from the issuing of such a licence. It follows that for a casino operator to be a ‘*holder of a licence*’ the Board must not only have approved its application for a licence, but also have physically issued a document to it.

[16] I mentioned earlier that in this case the licence application was approved before the erection of the casino premises. Section 36 which applies to ‘*temporary licences in respect of incomplete premises*’ is therefore applicable. The Board’s letter to Desert Palace dated 17 August 1999 evidences nothing more than an approval of a casino operator licence. This much was conceded before us in argument by the Board. The Board’s Chairman understood that clearly when he stated in the letter that the licence ‘shall come into effect on the date of issuing the casino operator licence’. Implicit in this statement is that the issue of a licence will follow later. Moreover the letter makes no reference to any condition referred to in s 36(4) to be complied with before the Board may issue a licence. It follows that the board’s contention that the word ‘*licence*’ must mean a privilege or right and not a document evidencing such privilege or right, must fail.¹⁷

[17] For these reasons I conclude that Desert Palace was not a ‘*holder of a licence*’ as contemplated by s 81 of the 2000 Act for the period 12 June 2000 to 28 May 2001, when that Act was repealed. On the same basis Desert Palace was not a ‘*holder of a licence*’ as contemplated by s 65 of Act 5 of 1996 for the remaining period, 28 May 2001 to 11 November 2001, because the provisions in the 1996 Act were revived substantially unchanged. Accordingly for the purposes of both the 2000 Act and the 1996 Act (as amended) the appellant was not the ‘*holder of a licence*’. This conclusion makes it unnecessary to consider the second question referred to in para 4. It follows that the appeal must succeed.

¹⁷ The board made reference to several provisions it contended supported its construction. These include ss 10, 13, 19, 27, 28, 29, 30, 31, 32, 33, 34, 37, 40, 42 and 44. It is unnecessary to analyse them. The contention is unmeritorious.

[18] I make the following order. The appeal succeeds with costs including the costs of two counsel. The order of the court below is substituted with the following:

‘The plaintiff’s action is dismissed with costs.’

A CACHALIA
ACTING JUDGE OF APPEAL

CONCUR:

CAMERON JA
CONRADIE JA
MAYA JA
COMBRINCK AJA