IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Not Reportable

Case No: 14370/2017P

In the matter between:

AFRISUN KZN (PTY) LTD t/a SIBAYA CASINO
AND ENTERTAINMENT KINGDOM **APPLICANT**

and

KWAZULU-NATAL GAMING
AND BETTING BOARD **1ST RESPONDENT**

VARIOUS APPLICANTS FOR LICENCES/
AUTHORISATIONS TO OPERATE
ELECTRONIC BINGO TERMINALS **2ND & 3RD RESPONDENTS**

ORDER

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1. The application to file a supplementary founding affidavit is dismissed with costs, including those consequent upon the employment of two counsel where this was done.

2. The main application is dismissed with costs, including those consequent upon the employment of two counsel where this was done.

3. No costs shall be recoverable in respect of the authorities which any party sought to provide to the court.

JUDGMENT

Delivered on: 5 October 2018

Gorven J

[1] This application concerns the gambling game of bingo. An entity offering this game has required a licence. The licensing was governed by the KwaZulu-Natal Gambling Act 10 of 1996 and its successor, the KwaZulu-Natal Gaming and Betting Act 8 of 2010 (the Act). Initially, this game was played making use of physical cards (paper bingo). At a certain point, what are referred to as electronic bingo terminals (EBTs) were introduced. This proved to be fertile contested terrain. It has spawned a great deal of litigation since at least 2006. In October 2017, the Act was amended to deal expressly with EBTs. Among other things, the definition of 'bingo' was amended to include:

'a game, whether played in whole or in part by electronic means or otherwise-

(a) for consideration, using cards or other devices, including devices that depict cards . . .'.

This brought about disputes concerning permissions required to use EBTs. Those disputes spawned this application. It should be said at the outset that much of what purports to be evidence in the affidavits is legal argument. The papers are unnecessarily prolix, exceeding 1 200 pages.

[2] The parties who have entered the lists in this application shall be referred to as follows. The applicant shall be referred to as Sibaya and the first respondent as the Board. Two other entities, not specifically joined or named in the application, have become involved. The first is Vitubyte (Pty) Ltd, which

trades as Goldrush Bingo and Entertainment Malvern, which shall be referred to as Goldrush. The other is Galaxy Bingo KZN (Pty) Ltd, which shall be referred to as Galaxy. How this came about is that Sibaya did not cite and join entities using, or wishing to use, EBTs. It was considered sufficient to informally serve the application on the attorneys of those entities which had previously been involved in litigation concerning EBTs. As will be seen below, entities other than Galaxy and Goldrush are using, or wishing to use, EBTs.

[3] The application was launched on 19 December 2017 and set down as a matter of urgency on 21 December 2017. The relief sought was in two parts:

'FIRST ORDER PRAYED

1. That the rules and forms relating to service and time limits are hereby dispensed with in terms of Rule 6(12) of the Uniform Rules of Court and that this application be heard as a matter of urgency.

2. That a rule *nisi* do issue calling upon the Respondents to show cause, if any, on the day of 2018 at 09h30, or so soon thereafter as Counsel may be heard, why an Order in the following terms should not be made:

2.1 That the First Respondent is interdicted and restrained from:

2.1.1 Granting any licences or authorisations to use, operate or make electronic bingo terminals available for play in any bingo hall in the Province of KwaZulu-Natal, arising from applications it has received and which are referred to in its letter dated 14 December 2017 . . . and any further applications that may be submitted thereafter, until it has:

2.1.1.1 advertised the applications in the Provincial Gazette and in at least two newspapers circulating in the Province of KwaZulu-Natal;

2.1.1.2 made the applications available for public inspection;

2.1.1.3 afforded interested parties the opportunity to make representations in regard to the applications;

2.1.1.4 held a public hearing into the applications;

2.1.1.5 made a decision after considering the representations made by interested parties;

pending the final determination of this application for the relief in the second order prayed of the Notice of Motion.

2.2 That the First Respondent disclose the identities of the applicants that have made the applications it has received and which are referred to in its letter dated 14 December 2017

referred to above, and the identities of the applicants in further applications that may have been submitted thereafter, together with their addresses and contact details, within five days of service of this Order;

2.3 That the First Respondent shall pay the costs of the application for the First Order Prayed, save in the event that any other Respondents oppose such relief that the costs shall be payable by the Respondents jointly and severally the one paying the other(s) to be absolved, such costs to include the costs consequent upon the employment of two counsel.

3. That the Order in 2.1 above shall operate as an interim interdict with immediate effect.

4. Further or alternative relief.

SECOND ORDER PRAYED

5. It is declared that the First Respondent is obliged in terms of the KwaZulu-Natal Gaming and Betting Act 8 of 2010 ("the KZN Act") as well as the Regulations promulgated in terms thereof, and/or the agreement concluded in June 2012 between inter alia the Applicant and the erstwhile Gambling Board . . . and/or section 4 of the Promotion of Administrative Justice Act 3 of 2000, before granting any licences or authorisations to use, operate or make electronic bingo terminals available for play in any bingo hall in the Province of KwaZulu-Natal, arising from applications it has received and which are referred to in its letter dated 14 December 2017 . . . and any further applications that may have been submitted thereafter, to –

5.1 advertise the applications in the Provincial Gazette and in at least two newspapers circulating in the Province of KwaZulu-Natal;

5.2 make the applications available for public inspection;

5.3 afford interested parties the opportunity to make representations in regard to the applications;

5.4 hold a public hearing into the applications;

5.5 make a decision after considering the representations made by interested parties.

6. That the First Respondent is directed to:

6.1 ensure that proper notice is published to inform interested parties of the above applications, in the Provincial Gazette and in at least two newspapers circulating in the Province of KwaZulu-Natal;

6.2 make the above applications available for public inspection and to inform interested parties including the Applicant of the period when and the place where the applications will lie open for inspection;

6.3 inform interested parties including the Applicant, of the opportunity that is afforded to them to make representations in regard to the applications;

6.4 inform interested parties including the Applicant of the dates of the public hearings relating to the above applications;

6.5 make its decision in each of the applications, only after it has considered the representations made by interested parties including the Applicant;

6.6 inform the Applicant of its decisions in each application, once it has made its decisions, forthwith, and also simultaneously provide its reasons for its decisions.

7. It is declared that the First Respondent is obliged to require all applications for the use of electronic bingo terminals to be submitted for consideration in terms of the process described in this Order, before any prospective or existing licence holder is permitted to make use of electronic bingo terminals at any location in KwaZulu-Natal.

8. That the First Respondent shall pay the costs of the application for the Second Order Prayed, save in the event that any of the other Respondents oppose such relief, in which event the costs shall be payable by the Respondents jointly and severally the one paying the other(s) to be absolved, such costs to include the costs consequent upon the employment of two counsel.

9. Further or alternative relief.'

[4] Goldrush and Galaxy deposed to answering affidavits on 20 December 2017 and the Board to one on 21 December 2017. These were, perforce, deposed to as a matter of urgency. They did not purport to be complete answers to the founding papers. On 21 December 2017, Chetty J struck the application from the roll to allow the respondents to deliver further answering affidavits. He found that the application was not so urgent as to warrant being heard on such short notice. At that point, Sibaya had the option of invoking practice rule 9.1 which provides:

'If the applicant wishes to seek interim relief pending the opposed hearing, and the matter cannot be accommodated or placed . . . on the ordinary motion court roll, representations shall be made to the senior civil judge on duty to give the necessary directions for an urgent hearing.'

Sibaya did not do so. The matter was only set down again once all of the affidavits had been delivered.

[5] The last of the supplementary answering affidavits was delivered on 2 February 2018. Sibaya delivered its replying affidavit on 16 March 2018. It was obliged under the rules to do so by 14 or 15 February 2018. I mention this because, at the hearing, it was submitted on Sibaya's behalf that the matter remains urgent. I shall deal with this in due course. The replying affidavit ran to 177 pages, with an additional 349 pages of annexures. Galaxy has applied to strike out certain paragraphs in the replying affidavit on the basis that much of it was hearsay. It was submitted that the deponent had made it clear that she did not bear personal knowledge of the subject matter. In the view I take of the matter, it is not necessary to decide this issue.

[6] On 15 August 2018, Sibaya brought an interlocutory application for leave to file a supplementary founding affidavit (the new affidavit). Apart from costs, this was the sole relief claimed in the notice of application. The proposed new affidavit was annexed. The new affidavit sought to inform the court that, after the matter was struck from the roll, the Board had gone ahead and authorised the installation and use of EBTs. In support, Sibaya annexed a letter from the attorneys for the Board dated 13 April 2018 detailing various decisions concerning EBTs that had been made. Sibaya complained that this had been done while the application was pending. In argument, however, counsel conceded that unless interdicted from doing so, the Board was obliged to attend to all matters within its remit.

[7] In the new affidavit, Sibaya said that a separate application would be launched to review and set aside the decision or decisions in question. No amendment to the relief set out in the notice of motion (the original relief) was foreshadowed in the affidavit. No amended relief was sought in the notice of application to introduce the new affidavit. In particular, Sibaya did not indicate that it would seek to impugn any of those decisions in the present application. It

set down the interlocutory application to be heard with the main application on 14 September 2018.

[8] On 30 August 2018, Sibaya delivered heads of argument running to almost 100 pages. These dealt with the original relief. The other three parties delivered heads of argument on 4 September 2018. These, likewise, dealt with the original relief. This was, of course, the only relief being sought at this stage. On 7 September 2018, Sibaya delivered a document styled 'Revised draft order that will be sought on 14 September 2018' (the 7 September document). The order sought is:

'1. That the rules and forms relating to service and time limits are hereby dispensed with in terms of Rule 6(12) of the Uniform Rules of Court and that this application be heard as a matter of urgency.

2. It is declared that the decision of the KwaZulu-Natal Gaming and Betting Board ("the Board") of 8 March 2018 to renew the bingo licences with new conditions that removed the conditions that restricted the licences to only engage in paper bingo and excluded the use of electronic bingo terminals, and the decisions to grant the applications for operational approvals for the use of electronic bingo terminals, as reflected in the letter 13 April 2018 . . . are invalid, due to the Board's failure to follow a fair process before making such decisions.

3. Whether the decisions ought to be set aside and what further consequential relief ought to be granted arising from this Order, are reserved for determination in the review application to be instituted by the applicant.

4. Any outstanding applications for operational approvals by any bingo licensees as at the date hereof, are hereby stayed pending the outcome of the review application.

5. The applicant is directed to institute such application within 15 days of this Order if it has not done so as at the date hereof.

6. That the First Respondent together with Vitubyte (Pty) Ltd and Galaxy Bingo KwaZulu-Natal (Pty) Ltd shall jointly and severally pay the costs of the application, the one paying the others to be absolved, such costs to include the costs consequent upon the employment of three counsel where employed, and otherwise of two counsel.

7. Alternatively to paragraphs 2 to 6 hereof, an order as follows.

8. It is declared that the decision of the KwaZulu-Natal Gaming and Betting Board ("the Board") of 8 March 2018 to renew the bingo licence of Vitubyte (Pty) Ltd t/a Goldrush Bingo

and Entertainment Malvern, with new conditions that remove the conditions that restricted the licence to only engage in paper bingo and excluded the use of electronic bingo terminals, and the decisions to grant the applications for operational approvals made by Vitubyte (Pty) Ltd for the amendment of internal control systems, amendment of the approved floor and surveillance system plans, the transport of gaming equipment, and the certification of installation of electronic bingo terminals, as reflected in the letter dated 13 April 2018 . . . are invalid, due to the Board's failure to follow a fair process before making such decisions.

9. Whether the decisions ought to be set aside and what further consequential relief ought to be granted arising from this Order, are reserved for determination in the review application to be instituted by the applicant.

10. The applicant is directed to institute such application within 15 days of this Order if it has not done so as at the date hereof.

11. That the First Respondent together with Vitubyte (Pty) Ltd shall jointly and severally pay the costs of the application, the one paying the others to be absolved, such costs to include the costs consequent upon the employment of three counsel where employed, and otherwise of two counsel.

12. That no order for costs is made as regards the involvement of Galaxy Bingo KwaZulu-Natal (Pty) Ltd in this matter.

13. Further or alternative relief.'

[9] The first issue to decide is whether to admit the new affidavit. On the basis that it was delivered purely to provide information, the Board did not object to its introduction. It delivered an answering affidavit in anticipation of the new affidavit being admitted. Goldrush responded in similar fashion.

[10] Galaxy opposed its introduction on two bases. First, that the new affidavit was irrelevant to the relief sought. The original relief concerned the procedure which Sibaya contended the Board should follow. This contrasted with the new affidavit which stated what procedure Sibaya said had been followed. Secondly, that Galaxy would be prejudiced if the affidavit was introduced. This is because Galaxy had not previously seen the Board's letter of 13 April 2018 or the other annexures of the new affidavit. The new affidavit alleged a basis to review the

decisions mentioned. Galaxy had not been involved in these decisions. It had not had the opportunity to research the facts referred to in the new affidavit or obtain relevant documents and could thus not respond to them. Sibaya had not tendered a postponement of the main application if the court admitted the new affidavit. If the new affidavit was admitted, the averments contained in it would stand unchallenged.

[11] Over time, various tests have been posited for the introduction of affidavits additional to those allowed as of right. It has been recognised that this is not simply for the asking. However, the test or approach is not capable of being reduced to a finite list with boxes to be ticked. Each case depends on its own facts. It is trite that the court has a discretion whether or not to do so. That discretion must be exercised judicially. The most reliable guiding principle in exercising that discretion is fairness to all parties.[1]

[12] As to the first ground of objection raised by Galaxy, the new affidavit is termed a supplementary founding affidavit. Such an affidavit ordinarily serves to supplement the cause of action advanced in the notice of motion. New evidence is adduced in support of the relief already claimed or in support of amended relief. In the present matter, the new affidavit sets out steps which the Board has taken since the launch of the application. These have no bearing on the original relief. The original relief reflects what Sibaya says the Board is obliged to do when granting permissions to operate EBTs. As such, the new affidavit does not relate to, or advance, the original relief. No amended relief was sought in the interlocutory application. This has the inevitable result that, at the time the interlocutory application was launched, the new affidavit was irrelevant to the relief sought. Galaxy's first ground of objection was therefore well founded.

[13] As to the second ground, Galaxy complained that it would not have the opportunity to put up an answer if the new affidavit was admitted. This

[1] *Milne, NO v Fabric House (Pty) Ltd* 1957 (3) SA 63 (N) at 65A.

presentiment was confirmed at the hearing. Sibaya contended that, if the new affidavit was admitted, the court should decide the matter without affording Galaxy the opportunity to put up an answering affidavit. Sibaya claimed that Galaxy had had sufficient time to answer. Unlike the Board and Goldrush, it had not availed itself of this opportunity. The submission was that Galaxy should have followed suit in case the new affidavit was admitted.

[14] This is a most extraordinary position to adopt. Sibaya was out of time in delivering its replying affidavit. It became aware of the decisions mentioned in the new affidavit when it received the letter dated 13 April 2018 on 15 April 2018. Despite this, Sibaya waited until 15 August 2018, a period of four months, before launching the interlocutory application. The interlocutory application was set down on the same date as the main application. No attempt was made to have it decided in time to allow the delivery of further affidavits, even with abridged time limits. The new affidavit did not seek to make out a case that it be introduced as a matter of urgency. It did not seek to abridge the usual time limits for delivering answering affidavits. The notice of motion for its admission did not request an order dispensing with the usual time limits.[2] Nor did the new affidavit or the notice of the interlocutory application even purport to place the other parties on terms to put up answering affidavits by a specific date.

[15] Unless and until the new affidavit is admitted, it does not form part of the papers. Before that, there is no obligation on any other party to answer it. Once admitted, if other parties have not delivered answering affidavits in anticipation, they would ordinarily be entitled to an adjournment to do so. But the basis on which Sibaya sought the introduction of the new affidavit was that Galaxy should not be afforded this opportunity. It made no attempt to justify this procedure in the circumstances of the matter. That Sibaya did so on that basis,

[2] This is done if a case can be made out for requiring truncated time limits. If the court agrees and a party has neglected to comply with the time limits set by the applicant, that party assumes the risk. See *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) 782C-D.

militates against the admission of the new affidavit. To admit the new affidavit would offend the *audi alteram partem* principle which is fundamental to the rule of law.

[16] In the document delivered on 7 September 2018, the original relief was abandoned. This is presumably because events have overtaken that application. In response to my enquiry during his initial argument, counsel for Sibaya confirmed that Sibaya was no longer seeking the original relief. He indicated that only the new relief was being sought. The new relief relates to decisions taken subsequent to the launch of the application. A decision is said to have been made on 8 March 2018. The only basis for the new relief arises in the new affidavit. This relies on a statement in the letter of 13 April 2018 from the Board's attorneys to the following effect:

'As the nature of the decisions did not mean the increase in approved gaming positions of the said licensees, neither the KZN Act nor the Promotion of Administrative Justice Act 3 of 2000 required any form of public participation. As such, our client did not publish the said applications.'

It is on the basis that no public participation process took place that Sibaya seeks to have the decisions in question declared invalid. It is also on this basis that Sibaya said that it would launch review applications to set aside those decisions.

[17] The attitude of both the Board and Goldrush to the introduction of the new affidavit was premised on its simply providing information. As mentioned, the new affidavit did not seek the new relief or any amendment of the original relief. However, when the 7 September document was delivered, the new affidavit took on a different hue. It was then no longer only to be introduced to furnish information. It was to be relied upon to found the new relief. In their provisional affidavits answering the new affidavit, the Board and Goldrush had both indicated that they would oppose any review applications launched by Sibaya. As a result of the change in the use of the new affidavit, they both

withdrew their consent to its admission during argument. It seems to me that they were perfectly justified in doing so in the light of the history of this litigation.

[18] The new affidavit says that the decision of 8 March 2018 is invalid. It seeks to impugn other decisions of the Board mentioned in the 13 April 2018 letter. These include the following. First, the approval, on 26 March 2018 and 9 April 2018 respectively, of applications for amendments of what are termed ICS by Goldrush and Galaxy Bingo Amanzimtoti (Pty) Ltd respectively. Secondly, the approval, on 23 and 29 March 2018 respectively, of applications in terms of Rules 20.1 and 24.1 promulgated under the Act for amendment of system floor plans by Poppy Ice Trading 18 (Pty) Ltd (Poppy Ice) and Goldrush. Thirdly, the authorisations in respect of transportation of gaming equipment granted, on 14 and 15 March 2018 respectively, to Goldrush, Poppy Ice and Galaxy Bingo Amanzimtoti (Pty) Ltd. Finally, the certification of installations of EBTs, on 29 March 2018 and 5 April 2018 respectively, granted to Goldrush and Poppy Ice.

[19] Other than Goldrush, none of the entities receiving the various permissions has participated in the application. The point of non-joinder was taken in respect of the main application. The response of Sibaya was twofold. It said it had informally notified attorneys who have been acting for these entities in other litigation and none of them had shown any interest in the application. Secondly, these entities fell under groups of companies which included Galaxy and Goldrush and must be taken to be aware of the application. I do not consider it necessary to decide those points. What cannot be gainsaid, however, is that none of the entities in question was given any kind of notice that the new relief would be sought. None was given notice of the application to introduce the new affidavit. Sibaya says that it will apply to review at least some of these decisions and set them aside. These entities might then be confronted with a

review application where this court has already declared that the permissions were invalid.

[20] It seems to me that, in the circumstances, those entities not before the court may be prejudiced by the introduction of the new affidavit.[3] For declaratory relief to be competent, an affected party must ordinarily be cited.[4] I do not need to, nor do I, decide the point of non-joinder. The absence of notice to those entities does, however, have a bearing on the exercise of my discretion. Another factor to be weighed is that Sibaya wanted the matter to be dealt with without any adjournment.

[21] I see no prejudice resulting to Sibaya if the new affidavit is excluded. It intends to review the decisions of the Board referred to in the new affidavit. It says it will do so on the basis set out in this application, viz. that a public participation process is required for each of the decisions. If it succeeds, this will include a finding on what procedure is required by the relevant legislative provisions. This will deal with the issues raised in the original relief and the new relief. Clarity will be obtained as to how the Board must proceed in the future. All parties who are affected will be joined and have their say. The record of the decisions will be available, as will any other relevant documents.

[22] I do not believe that admitting the new affidavit would be fair to all parties in the light of all the factors set out above. I accordingly exercise my discretion against granting the relief sought in the interlocutory application. The new affidavit is not admitted to form part of the papers.

[23] In its material parts, s 21(1)*(c)* of the Superior Courts Act 10 of 2013 provides:

'A Division . . . has the power-

. . .

[3] *Morudi & others v NC Housing Services and Development Co Limited & others* [2018] ZACC 32 para 29.
[4] *National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd & others* 2015 (2) BCLR 182 (CC) paras 53 and 58.

(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'

This wording follows that of the old Supreme Court Act.[5] It is clear that, even if a case is made out for such a right or obligation, the court is vested with a discretion whether or not to grant declaratory relief.

[24] If the new affidavit is excluded, there is no basis for granting any of the new relief. There are simply no facts before the court concerning the taking of any of the decisions sought to be declared invalid. The new relief would at least require the admission of the new affidavit. Counsel for Sibaya accepted this to be the position. However, in reply, he submitted that the original relief could nevertheless be granted. Based on the document of 7 September 2018 and the election of counsel for Sibaya at the outset, counsel for all the parties limited their argument on the substantive issues to the new relief. In the circumstances, accordingly, it would be impermissible to allow Sibaya to resurrect its prayer for the original relief when it had been indicated that it was no longer sought and no argument on it had been advanced.

[25] It is therefore unnecessary to traverse the contours of when declaratory relief is appropriate. The lack of any factual foundation means that the application must fail. All of the parties made use of at least two counsel. The Board made use of three. I do not regard this as having been necessary. It follows, accordingly, that the costs of two counsel should be allowed in the order.

[26] Before granting the order, I believe it to be appropriate to make certain comments on the procedures followed in this matter. As I indicated, the papers ran to almost 1 200 pages. Much of this was taken up by judgements and legislation being annexed and with legal argument as opposed to evidence. This was inappropriate. It was all the more so in an application where all of the

[5] Section 19(1)*(a)*(iii) of the Supreme Court Act 59 of 1959.

parties agreed that the issue was a legal one arising from the interpretation of documents of one form or another. In addition, Sibaya and the Board sought to deliver photocopies of authorities comprising in the main South African case law. These totalled nearly 1 800 pages. It was indicated that these would not be received. It may be appropriate to make a copy available to the court where specific foreign case law, which might not be readily accessible, is referred to. It is clearly not appropriate to run up costs, either to a client or to other parties, by photocopying South African case law. This practice is to be deplored and no such costs will be recoverable in the present matter. I trust that the legal personnel concerned will not seek to recover those costs from their clients but that is not a matter on which I can pronounce.

[27] In the result:

1. The application to file a supplementary founding affidavit is dismissed with costs, including those consequent upon the employment of two counsel where this was done.

2. The main application is dismissed with costs, including those consequent upon the employment of two counsel where this was done.

3. No costs shall be recoverable in respect of the authorities which any party sought to provide to the court.

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Gorven J

Date of Hearing: 14 September 2018

Date of Judgment: 5 October 2018

Appearances

For the Applicant:	N Singh SC, with him T Dalrymple Instructed by Knowles Husain Lindsay Inc. Locally represented by Cajee Setsubi Chetty Inc.
For the 1st Respondent:	AE Potgieter SC, with him K Gounden and G Mamvura Instructed by Venns Attorneys
For Goldrush Malvern:	B Roux SC, with him M Smit Instructed by Cliffe Dekker Hofmeyr Inc. Locally represented by Ayoob Attorneys
For Galaxy Bingo KZN:	M Pillemer SC, with him P Farlam SC Instructed by Edward Nathan Sonnebergs Locally represented by Mason Inc.