Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE

CASE No: 14867/095

In the matter between:

PEARL BETTING CC	**First Applicant**
HILTON ALEXANDER HASSON	**Second Applicant**

and

WESTERN CAPE GAMBLING AND RACING BOARD	**First Respondent**
THE CHAIRPERSON OF THE WESTERN CAPE GAMBLING AND RACING BOARD	**Second Respondent**

REASONS FOR JUDGMENT DELIVERED : 9 SEPTEMBER 2009

MOOSA, J:

Introduction

[1] This matter came before me as a matter of extreme urgency in the Motion Court on 24 July 2009. The urgency was dictated by the fact that the licences issued, by First Respondent to enable First Applicant to operate as a bookmaker and Second Applicant as a "key employee" of First Applicant, were to expire at twelve midnight on the day the matter was argued before me.

[2] After having read the papers filed in the matter and having heard counsel for the parties, I granted a mandatory interdict authorising First and Second Applicants to carry on their respective bookmaking activities under the existing licences pending the review proceedings instituted by them. The authority was granted subject to the existing conditions attached to such licences or any such additional requirements which may lawfully be imposed by First Respondent.

[3] I would have preferred to have more time to give consideration to this matter, but because of the extreme urgency of the matter, I issued the order and indicated that I am prepared to furnish reasons should I be requested to do so. On 28 July 2009, I was requested by Respondents' Attorneys to furnish reasons for my order.

[4] In giving such reasons, I would not like to pre-empt the outcome of the review proceedings. There are a number of legal and factual issues that have been raised and it would be best that the court reviewing the matter authoritatively pronounce on those issues. To the extent that I may be required to do so, I merely express a *prima facie* view. The reasons follow.

The Facts

[5] On 23 April 2009, Applicants applied for the renewal of their respective licences. On 13 July 2009, Second Applicant was informed telephonically that the applications were considered at the meeting of First Respondent on 30 June 2009 and the applications were declined. The decisions and the reasons therefore were formally conveyed to Applicants in writing on 15 July 2009. Applicants requested First Respondent to reconsider the decisions but it refused such request.

[6] The reason given by First Respondent for its decisions was that First Applicant did not qualify in terms of section 28(b)(ii) of the Western Cape Gambling and Racing Act, No 4 of 1996 (the "Act") for a bookmaker's licence. The application of Second Applicant was accordingly also declined. Section 28(b)(9)(ii) provides that *"in order to qualify for the licence, a company must be of good financial standing and have adequate means to undertake and sustain the activity for which the licence is required".* Applicants accordingly brought the application for a mandatory interdict *pendente lite* as a matter of extreme urgency.

The Law

[7] The requirements for interim relief are fourfold: first, the right which is the subject matter of the main action and which the applicant seeks to protect by means of the interim relief is clear or, if not clear, is *prima facie* established though open to some doubt; second, a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; third, a balance of convenience in favour of granting the interim relief and fourth, the absence of any other satisfactory remedy. (**Setlogelo v Setlogelo** 1914 AD 221 and **L F Boshoff Investments (Pty) Ltd v Cape Town Municipality** 1969 (2) SA 256 (C) at 267A-F.)

[8] Counsel for Respondents at the outset of the hearing before me, strongly relied on the case of **Coalcor (Cape) (Pty) Ltd and Others v Boiler Effeciency Services CC and Others** 1990 (4) SA 349 (C) in support of the Respondents' case. He indicated that Respondents' case stands or falls on the authority of the **Coalcor** case. In my view, such reliance was misplaced. The case is distinguishable on the facts and the law. I will return to that case shortly.

The Case for the Parties

[9] Applicants contended that First Respondent's decisions fall to be set aside on the bases that they were unlawful and procedurally unfair in that they were founded on an error of law; that they were taken for a reason not authorised by the Act; that irrelevant considerations were taken into account and relevant considerations were not considered; and that the decisions were not rationally connected to the purposes of section 40 of the Act and the information before it.

[10] Respondents opposed the application essentially on two grounds: the first was that Applicants have no reasonable prospects of success in the review proceedings and the second was that Applicants have failed to meet the requirements for the granting of an interim interdict and, more particularly, failed to demonstrate a *prima* right or that the balance of convenience favoured them.

Evaluation

[11] Before evaluating the prospect of success of the review proceedings in this matter, I will discuss whether the requirements for the interim relief have been met. The first requirement was a clear right or at least a *bona fide* right open to some doubt. It is common cause that Applicants had valid licences which were granted to them in 2007. Such licences were renewed in 2008. In 2009 they timeously applied for the renewal of the licences. A probity investigation was conducted by executive officials of First Respondent. Following such investigation, they recommended to First Respondent that the licences be renewed subject to certain conditions. First Respondent, without affording Applicants a hearing, summarily and by the stroke of a pen cancelled and/or revoked the licences. Applicants had the necessary licences to conduct the bookmaking business. The review

proceedings are designed to establish such clear right and the interim relief sought was to protect such right pending the outcome of such review proceedings. In my view Applicants had a clear right, but if I was wrong on that aspect they at least had a *bona fide* right. .

[12] The second requirement was a well-grounded apprehension of irreparable harm If the interim relief was not granted and Applicants succeeded in their review proceedings. In that event First Applicant would have been forced to close its bookmaking business; the goodwill that had been established since the commencement of the business would have been destroyed; difficulty would have been experienced in recovering monies owed by punters; the prospects of negotiating with funders and/or partners to inject more capital into the business to make it more viable and expand its operations, would have come to nought and those employees, including Second Applicant, who were dependent on the business for a living, would have lost their livelihood ,especially in the present economic turn down and if Applicants succeeded in the review proceedings it would have been almost impossible to re-establish the business. The prejudice that Applicants would have suffered if the interim relief was not granted, would by far have exceeded any prejudice that First Respondent would have suffered if the interim relief was granted. I was therefore of the view that the Applicants had met the second requirement for interim relief.

[13] The third requirement was a balance of convenience of granting the interim relief. The Applicants are challenging the decisions of the First Respondent in the review proceedings on the basis of unlawfulness and procedural unfairness. They contended that First Respondent was not competent to “revoke” their licences under section 40 of the Act, which provide for the annual renewal of the licences. They contended further, that it should have made use of the powers set out in section 42 of the Act which provided for the suspension or revocation of licences and the procedures dictated by section 23 of the Act.

[14] At the time of granting the interim relief, I was of the *prima facie* view that the jurisdictional facts did not justify First Respondent from failing to renew Applicants' licences. If they were concerned about the financial standing of First Applicant, First Respondent should have given serious consideration to imposing those conditions contained in the recommendation to the Probity Investigation Report after having given Applicants an opportunity to make representation in connection therewith. If it, however, felt that the financial standing of First Applicant *prima facie* justified the revocation of the licences, it should have ordered an investigation and hearing in terms of section 23 of the Act. Such steps would have met the criterion of procedural fairness. .

[15] Applicants had a vested interest in the licences and they had a legitimate expectation that they would be renewed. If First Respondent intended depriving them of the licences, it should have afforded them an opportunity to make representation. The failure to do so, in my view, was not only unfair but also unjust. I therefore concluded that Applicants had made out a *prima facie* case and there were reasonable prospects of success in the review proceedings not only on the lawfulness of First Respondent's decisions but also on the procedural fairness of such decisions. I was accordingly satisfied that the balance of convenience favoured me granting the interim relief.

[16] The last requirement was the question of alternative remedy. I do not think that the Respondents seriously contested the fact that Applicants had no suitable alternative remedy. The question of damages was not a practical alternative remedy as it would have been virtually impossible to quantify. In my view Applicants would have been left remediless if the interim relief were not granted and Applicants succeeded in their review

proceedings. In such event, Applicants would not only have suffered serious prejudice, but a grave injustice would have been perpetrated against them.

[17] I now return to the case of **Coalcor** on which counsel for Respondents strongly relied. Respondents contended that Applicants were not seeking to protect its rights pending the determination of the review proceedings but sought the very relief that it was seeking in the review proceedings. In my view, this contention is misconceived. Applicants were seeking a mandatory interdict to retain the status quo pending the determination of the review proceedings. This is temporary relief and is not the same relief that the Applicants are seeking in the review proceedings, which, if granted, is permanent of nature.

[18] In the **Coalcor** case the applicants sought an interdict restraining the first respondent from trading from certain property, in coal and coal products. A similar interdict was granted previously to the applicants by a single judge and subsequently approved by the full bench of the division. At the time such interdict was granted, the property was not zoned for commercial purposes. When the second interdict application was brought, the property was already rezoned for commercial purposes. The applicants brought review proceedings to set aside the decision to rezone the property. The court, in refusing the application for an interim interdict, held that the decision to rezone the property was valid though voidable.

[19] **Farlam, AJ**, as he then was, distinguished the **Coalcor** case on the facts from the case of **Airoadexpress (Pty) Ltd v Chairman, Local Transportation Board, Durban, and Others** 1986 (2) SA 663 (A) on which counsel for the applicants relied. **Kotze, JA**, in the **Airoadexpress** case, referring to a line of decisions dealing with the granting of

mandatory orders for the issue of temporary liquor licences or the temporary extension of existing licences, pending proceedings for the review of refusals to renew existing liquor licences, said at 674B:

> *"For more than half a century interim relief in the form of mandatory orders to prevent prejudice or injustice has been decreed in several of the provinces."*

Kotze, JA went on to discuss the inherent jurisdiction of the court to grant relief *pendente lite* to prevent harm and injustice and said at 676C:

> "*An inherent power of this kind is a salutary power which should be jealously preserved and even extended where exceptional circumstances are present and where, but for the exercise of the power, a litigant would be remediless, as is the case here."*

[20] **Farlam, AJ**, in distinguishing the case on the facts went on to say:

> *"I agree with the submission advanced by counsel for first respondent that the* **Airoadexpress** *case and the liquor licensing cases referred to therein were distinguishable from the present case in that they did not concern claims for orders restraining parties from performing acts which at present are lawful and which are permitted by an administrative act which has not been set aside. It is one thing to order an official to do something temporarily pending the setting aside of an administrative act and another thing altogether to order some other party to desist from acting pursuant to an order which is valid until set aside."*

The **Pearl Betting** case was foursquare in line with the **Airoadexpress** case and a careful scrutiny of the **Coalcor** case shows that it supports the case of Applicants rather than that of Respondents.

The Order

[21] For reasons stated above, I was satisfied that Applicants met all the requirements for the interim relief and accordingly granted the order as set out in annexure “A” hereto.

E MOOSA