REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

CASE NO: 2014/39853

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

5.11.15
DATE

SIGNATURE

In the matter between:

PHUMELELA GAMING AND LEISURE LTD **APPLICANT**

and

THE GAUTENG GAMBLING BOARD **1ST RESPONDENT**
OTHER RESPONDENTS **2ND TO 9TH RESPONDENTS**

J U D G M E N T

WRIGHT J

1. The applicant is a public company that administers the sport of horse racing and conducts the business of a totalisator in Gauteng and other places. The applicant owns and operates TAB betting establishments which take bets from the public in horse racing and other sports.

2. The first respondent Board is a statutory body established under section 3 of the Gauteng Gambling Act, 4 of 1995. Under section 4(1)(a) the Board has the function and power to oversee and control gambling activities in Gauteng. Under section 4(1)(c) the functions and powers of the Board include " *to exercise such powers and perform such functions and duties as may be assigned to the board in terms of this Act and any other law.*" The second to fourth respondents are voluntary associations representing bookmakers in Gauteng and elsewhere. The fifth to ninth respondents are private companies conducting bookmaking businesses.

3. The applicant is licenced by the Board to conduct horse race meetings at Turffontein. The licence was issued on 15 February 2002. Under condition 10 of the licence the applicant "*shall make available visual broadcasts of race meetings for betting purposes. The licencee shall be entitled to* ***recover reasonable costs*** *for visually broadcasting such race meeting information, provided that such costs are approved by the Board."* (My emphasis). In my view, and subject to what I say in paragraphs 11 and 12 below, the applicant is not entitled to make a profit on visually broadcasting under condition 10. It may only recover its costs provided they are reasonable and the Board approves the recovery. The costs are recovered from bookmakers who receive the broadcasts on tv sets in their shops.

4. The applicant formed a partnership with two other companies. The partnership, under the name of Tellytrack, broadcasts visual coverage of horse races. Under clause 11.1 of the partnership agreement, concluded in about April 2013, an Executive Committee directs and controls the management and affairs of the partnership business subject to the provisions of the partnership agreement. The applicant may appoint four members of the seven member Executive Committee. The other two partners between them appoint the remaing three members. In effect, the applicant calls the shots in the partnership. The other two partners are not joined in the application. The applicant speaks for them.

5. Over time, the applicant improved the broadcasts, mainly by the addition of international content. It wishes to realise what it alleges is the market value of its product. The bookmakers baulk.

6. On 9 October 2014 the Board was seized of the impasse. The applicant and the other parties to this application appeared before the Board. They were legally represented. The Board postponed the hearing and made an interim order. The order is contained in a letter dated 24 October 2014. The relevant part reads " *In the interim, Phumelela is directed to ensure that the status quo ante, regarding the provision of the entire Tellytrack channel to bookmakers, is immediately restored at the price at which the Tellytrack channel was provided in 2013 plus inflation. Any excess costs incurred by Tellytrack's clients are to be credited to such clients.*"

7. The applicant, aggrieved at the interim order, launched an urgent application on 30 October 2014. In Part A, temporary relief was sought pending Part B. In Part B the applicant seeks the review of the Board's decision to grant the order. By agreement, Part A was removed from the roll after the parties came to a temporary arrangement and the question of costs was reserved. Part B is now before me. There is no appearance for the fourth respondent.

8. The applicant alleges different breaches of its right to fair administrative process. Without putting too fine a point on it, the applicant alleges that it was not warned that the order might be granted, the decision was unlawful, the Board failed to consider relevant considerations, the Board was not authorised by the Act to take the decision and the Board was not entitled to return to the position that had pertained earlier and the decision was unreasonable.

9. Written submissions to the Board on behalf of the bookmakers had given warning of what was in the air. Mr Vetten, for the present second respondent, alluded to such an order during argument. In my view, this disposes of the first complaint.

10. The first complaint is also met, and the other complaints are met, by the fact that at the hearing the applicant, in the person of its CEO, Mr Du Plessis said "*We are abiding by our licence conditions, although they are **uncomfortable** to us we have been complying with our licence conditions and we will continue to comply with our licence conditions for the foreseeable future.*" (My emphasis). Mr Roodt, the applicant's attorney addressed the Board saying the

same thing in different words. The Board took its cue from Mr Du Plessis's undertaking as repeated by Mr Roodt.

11. One of the items on the agenda for 9 October 2014 was an application by the applicant to amend the licence by the deletion of condition 10 at least insofar as the condition might impose an obligation on the applicant to broadcast coverage from racetracks other than that at Turffontein. The day before the hearing the applicant gave notice that it intended applying to the Board for leave to withdraw the amendment application on the ground that the amendment was not necessary. The applicant had taken fresh legal advice along the lines argued by counsel for the applicant in the present application and as set out in the next paragraph of this judgment.

12. Mr Cockrell SC, for the applicant argued before me that because the licence is limited to Turffontein in Gauteng it is of no concern to the Board that Tellytrack broadcasts feed from racetracks in other places, local or international. It is not necessary for me to decide the correctness of this submission. The point is that Mr Du Plessis and Mr Roodt could only have been uncomfortable with having to abide by a condition with which they did not agree or which they interpreted differently to how the bookmakers understood the condition. Mr Du Plessis and Mr Roodt were alive to different interpretations put on the condition by the applicant and the bookmakers but nevertheless chose to tell the Board that the applicant would abide the condition, uncomfortable as that was for the applicant. At a minimum, the Board reasonably understood Mr Du Plessis and Mr Roodt to convey such a message.

13. In these circumstances the order can hardly be said to be beyond the Board's powers as set out in section 4(1)(a) of the Act particularly when read in conjunction with the undertaking as framed by Mr Du Plessis and repeated by Mr Roodt. In my view, part of the functions and powers of the Board under section 4(1)(c) include those set out in section 4(1)(a).

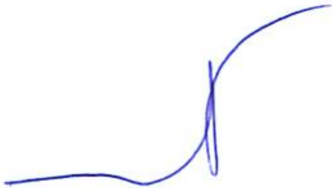
14. The applicant points to the fact that the order has an effect on Tellytrack and not just on the applicant. Given that the applicant controls Tellytrack and represents it, the applicant has the power, as between it and the other two partners, to order the passing of the necessary debits and credits in the books

of the partnership to give effect to condition 10 and the order. Were this not the case the application would founder on the non-joinder of the other two partners in the partnership.

15. These findings make it unnecessary for me to deal with other defences.

Order

1. Part B of the application is dismissed.
2. The applicant is to pay the costs of all the respondents other than those of the fourth respondent. These costs are to include those of two counsel where so employed including senior counsel where so employed. The costs are to include those relating to Part A on the same basis.



GC WRIGHT J
JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

On behalf of the Applicant:	Adv A Cockrell SC
	Adv A Friedman
Instructed by:	Roodt Inc

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On behalf of the 1st Respondent:	Adv IV Maleka SC
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On behalf of the 2nd Respondent:	Adv D Vetten
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On behalf of the 3rd Respondent:	Adv J Wilson
Instructed by:	JH Nicholson Stiller and Geshen
	031 202 9751
On behalf of the 5th to 9th Respondents:	Adv CJ Hartzenberg SC
Instructed by:	Grant and Swanepoel Attorneys
	087 357 0902
Dates of Hearing:	3 and 4 November 2015
Date of Judgment:	6 November 2015