IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO: 1706/2021

In the matter between:

EMFULENI RESORTS (PTY) LTD
t/a BOARDWALK CASINO & ENTERTAINMENT WORLD First Applicant

TRANSKEI SUN INTERNATIONAL LIMITED
t/a WILD COAST SUN Second Applicant

and

THE EASTERN CAPE GAMBLING BOARD First Respondent

THE PROVINCIAL MINISTER OF FINANCE,
EASTERN CAPE Second Respondent

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

....
DATE SIGNATURE

JUDGMENT

POTGIETER J

Introduction

[1] The applicants are seeking a declaratory order in the following terms:

1.1 that Freeplay credits used to bet on gambling machines at the Applicants' casinos do not constitute part of the "*drop"* for purposes of the computation of adjusted gross revenue in terms of Part A of Schedule III read with section 57(4) of the Eastern Cape Gambling Act No. 5 of 1997 ("the EC Act");

1.2 that Freeplay credits accordingly do not form part of taxable revenue for the purposes of item 1(a) of Part B of Schedule III to the EC Act.

[2] In the event of the declaratory relief being granted, the applicants are seeking:

2.1 a refund from the Provincial Revenue Fund of the amounts paid as a result of the inclusion of Freeplay credits as part of the "*drop";*

2.2 in the alternative, that the First Respondent be ordered to set off the amounts against the Applicants' future liability to pay gambling tax in terms of section 57 read with Schedule III of the EC Act.

[3] The principal issue accordingly is whether the non-cashable promotional credits, known as Freeplay, made available to members of the Sun International loyalty programme, the Most Valued Guests ("MVGs") to bet on cash-less slot machines, are included or excluded from the applicants' adjusted gross revenue ("AGR") for purposes of calculating the gambling tax payable by the applicants having regard to the provisions of the EC Act and its Schedules. The question for determination is the proper interpretation of the relevant statutory provisions.

Background to the dispute

[4] The applicants are the holders of casino licences issued by the first respondent ("the EC Board"). The first applicant operates the Boardwalk Casino in Gceberha and the second applicant operates the Wild Coast Casino in Bizana both situated in the Eastern Cape Province. The applicants are subsidiaries of Sun International (SA) Limited ("SISA"). Another entity Sun International Management Limited ("SIML"), which was incorporated as a division of SISA, assisted the subsidiaries of SISA with the management of casinos across the country.

[5] During or about 2013, SIML introduced a new casino management computer system, called the BALLY, which is able to differentiate between credits[1] paid for by players from their own funds and Freeplay credits generated by the casino. SIML thereafter lobbied the Gambling Boards of each province where SISA operated casinos to allow the operating entities to exclude Freeplay for the purposes of calculating gambling taxes.

---

[1] The dispute in this matter relates to the operation of cash-less slot machines. In order to play on these machines, players have to obtain a personalised player's card. Credits are loaded on the card and used to play the machine. Freeplay are credits provided free of charge to MVGs by casinos as a marketing tool to promote gambling. Players ordinarily purchase credits with their own funds if they wish to play a machine. Freeplay is basically aimed at stimulating machine play based on the reasoning that once players had exhausted the Freeplay credits they are stimulated to continue playing using their own funds.

[6] SIML contended that Freeplay does not represent cash as it comes into being without any financial contribution by the customer and that the casino does not give any money or redeemable value to customers through Freeplay. It contended that as a consequence, the value of Freeplay does not increase what is known as a casino's "*drop"* as defined in the EC Act.
[7] The issue concerning Freeplay was canvassed in an exchange of correspondence between the parties. It was first dealt with in letters from SIML to the EC Board dated 1 May 2015 and 19 October 2015 respectively which explained the concept.

[8] In subsequent correspondence dated 10 August 2016 the applicants' attorneys claimed that Freeplay does not constitute an "*amount"* for purposes of calculating the "*drop".* The attorneys requested confirmation from the EC Board that Freeplay could be deducted from the "*drop"* and indicated that their clients would be happy to reach an agreement with regard to any amounts that they had overpaid.

[9] The EC Board responded on 22 August 2016 indicating that the casinos were not permitted to exclude Freeplay pending a decision on the matter.

[10] In a presentation to the EC Board, on 24 November 2017, SIML claimed that Freeplay was a potent form of stimulating and increasing gambling revenue in that for every R1.00 spent on Freeplay another R17.00 is generated from the player's own resources. This was apparently aimed at allaying the concerns of the provincial authorities that the exclusion of Freeplay would result in a significant loss of gambling tax.

[11] The parties were unable to resolve their differences which resulted in the present litigation.

The nature of Freeplay

[12] The applicants describe Freeplay as a credit which is loaded onto a player's card account as a reward for loyalty. It is offered to qualifying loyalty programme customers, known as the Most Valued Guests ("MVGs"), to enhance their gambling experience at the applicants' casinos. Freeplay is not redeemable for cash but merely allows a player to use the credit amount to bet on a slot machine at the applicants' casinos. It is denominated in Rand value so that players are able to appreciate the value proposition associated with Freeplay and are able to entertain themselves with Freeplay to the extent of the Rand value without impacting on their own financial resources. However, if the player wins when utilising Freeplay, the winnings may be converted into cash as the casino is obliged to honour the payment of any such winnings accruing to the player.

[13] MVG customers intending to utilise Freeplay would insert their personalised player cards into the slot machine. The Freeplay amount and the cash amount representing the player's own resources are reflected separately on the slot machine and the player has the option to download either of the credits to the slot machine. Players thus have the option of deciding how much Freeplay and how much of their own cash they wish to play with. If Freeplay or cash credits are utilised to play they are deducted from the player's relevant slot account in the course of and as a result of playing the particular slot machine.

[14] Freeplay is provided to MVGs as part of a marketing tool directed at increasing the revenue of the applicants' casinos. The trend is that once players have used up their Freeplay credits, they often continue to gamble using their own financial resources. Freeplay thus stimulates gambling. The applicants are only able to generate revenue if players use their own financial resources to play on the slot machines, once Freeplay has been exhausted.

Legislative background

[15] Section 57(4) of the EC Act provides that "[t]*here shall be paid from time to time and in the manner prescribed to 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."

[16] Item 1(a) of Part B of Schedule III to the EC Act requires the holder of a casino operator licence to pay gambling tax on its *"taxable revenue".*

[17] *"Taxable revenue"* is defined in Item 1 of Part A of Schedule III as meaning *"adjusted gross revenue less admissible deductions".* It is common cause that Freeplay is not an admissible deduction.

[18] *"Adjusted gross revenue"*, in turn, is defined in Item 1 of Part A of Schedule III. It is common cause that only paragraphs (d) and (e) of that definition are relevant for present purposes in that the applicants' casinos operate gambling machines that are set up in a manner that accords with paragraphs (d) and (e). Some of these machines are linked to a Wide-Area Progressive system (provided for in paragraph (e) of the definition), while the remaining machines are either standalone machines or are linked to the progressive systems of the Boardwalk and Wild Coast casinos respectively (provided for in paragraph (d) of the definition).

[19] The relevant paragraphs of the definition provide that *"adjusted gross revenue"* means:

> *"(d) in relation to gambling machines including limited gambling machines, other than those contemplated in paragraph (e) 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 gambling 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 gambling*

machines during the tax period, and less any winnings paid out which are not recoverable from the central fill and shall not affect the calculation of adjusted gross revenue: 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 paragraph, 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 following further definitions are of relevance:

"fills" means-

"(a) in relation to table games, the issue of additional chips to the table; and

(b) in relation to gambling machines, the replenishment of coins or tokens in the hopper.

"hopper" means *"a receptacle within a gambling machine which receives, until full, coins or tokens inserted into the machine and from which winnings are paid out if there are sufficient coins to do so.*

"winnings" means that total amount of-

(a) any cash;

(b) the monetary value stated on every token, chip, voucher or stamp redeemable for money or value;

(c) the value of any credits won as a result of obtaining a winning result on a gambling device and transferred onto any smart card in a cashless gaming system;

(d) the cost to the licence holder of any asset,

paid or granted by the licence holder to or for the benefit of any person as winnings in consequence of any stake accepted by the licence holder: Provided that where any winnings are paid out in the form of an annuity, only the amount of such an annuity payment made by the licence holder or the cost of a

purchased annuity, where such an annuity is purchased by the licence holder, may be excluded in the determination of adjusted gross revenue.

[20] Item 1 of Part A of Schedule III defines the *"drop"* as:

"in relation to gambling machines, the total amount of money and tokens removed from the dropbox, or for cash-less gambling machines, the amount deducted from players' slot accounts as a result of gambling machines play".

(Emphasis supplied)

"*Drop box"* is defined as meaning-

"(a) in relation to table games, a locked container permanently marked with the game, shift and number corresponding to a permanent number of the table, into which all currency exchanged for chips or tokens or credit instruments at the table and all other documents pertaining to transactions at the table must be placed; and

(b) in relation to gambling machines, a container in a locked portion of the machine or its cabinet used to collect the money and tokens which are retained by the machine and are not used to make automatic payouts from the machine, which container is permanently marked with the number of the machine".

[21] It should be pointed out that the applicants' gambling machines are coinless (although they accept bank notes for purchasing credits) and that Freeplay credits are only ever played using a player's personalised card and are never played with cash. As a result, for the purposes of assessing whether Freeplay forms part of the *"drop"*, it is common cause that the relevant part of the definition for the purposes of this application

is *"the amount deducted from players' slot accounts as a result of gambling machines play".*

Applicable principles of statutory interpretation

[22] The principles applicable to the interpretation of statutes have been authoritatively set out as follows in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[2]:

> *"Interpretation is the process of attributing meaning to the words used in a document, be it legislation…, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. …consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. …The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute is to cross the divide between interpretation and legislation. …The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision…"*

---

[2] 2012(4) SA 593 (SCA) at 603E-604D

[23] The Supreme Court of Appeal ("SCA") has emphasised the importance of the language of a particular provision in *Tshwane City v Blair Atholl Home Owners Association*[3] where the court observed that it –

> *"has consistently stated that in the interpretation exercise the point of departure is the language of the document in question. Without the written text there would be no interpretive exercise. In cases of this nature, the written text is what is presented as the basis for a justiciable issue".*[4]

The court furthermore remarked that –

> *"This court's more recent experience has shown increasingly that the written text is being relegated and extensive inadmissible evidence has been led. The pendulum has swung too far."*[5]

[24] The SCA has indicated that *Endumeni* and later cases –

> *"emphasise that the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but also by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of the sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result".*[6]

The court emphasised that –

---

3 2019(3) SA 398 (SCA)
4 At [63]
5 At [64]
6 *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd & Others* 2022(1) SA 100 (SCA) para [50]

"The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text".[7]

[25] The SCA has indicated that the interpretation of a statute is a unitary exercise in which the words used by the legislature must be read in the context of the statute as a whole, having regard to the apparent purpose to which it is directed and in the light of the materials known to the persons who made the statute and the circumstances attendant upon its enactment. I proceed to deal with the interpretation of the relevant provisions bearing these considerations in mind.

The proper interpretation of the EC Act

[26] The dispute between the parties, crisply put, is whether the value of Freeplay credits must be included when the gaming levies (gambling tax) are calculated that are payable by the applicants to the EC Board for the benefit of the Provincial Revenue Fund. The applicants take the view that Freeplay need not be included while the respondents take the opposite view. This requires a determination of the proper meaning of the relevant provisions of the EC Act having regard to the established principles of statutory construction referred to earlier. The parties have advanced conflicting contentions in this regard.

(i) *The case of the applicants*

[27] Briefly stated, the applicants contended that the financial position of the casino cannot improve when Freeplay is used to play a particular game. Customers do not pay anything for Freeplay which does not derive from the player's own financial resources. The casino does not give any money or redeemable value to customers who are

[7] at para [51]

provided with Freeplay. It is a notional credit that has been created by the casino which can only be used to bet on a slot machine at the casino. When Freeplay is used to play a particular game, the casino does not receive any revenue from that game. If the player loses, the casino is in the same (neutral) financial position as it was before the Freeplay was used. If the player wins, the casino is worse off since it has to pay the winnings from its own financial resources.

[28] The relevant provisions of the EC Act prescribe the rate at which gambling taxes must be paid by the holder of a casino licence. The purpose of the legislation, according to the applicants, is to impose a tax on the revenue that licensees receive by virtue of holding casino licences. This appears from Item 1(a) of Part B of Schedule III of the EC Act which pegs the gambling tax to a percentage of *"taxable revenue".* The purpose of the gambling tax is to raise public funds from licence holders, in proportion to the financial benefit (revenue) that the licence holders receive by virtue of holding the licence. The obligation to pay the gambling tax in section 57(4) is based on the underlying premise that the licensee has acquired the revenue and is therefore *"better off"* financially. The gambling tax is thus linked to the acquisition of revenue. Freeplay does not increase the casino's revenue or leave it *"better off"* financially. A particular Freeplay transaction will (at best) leave the casino in a neutral financial position if the player loses or (at worst) decrease the casino's revenue if the player wins in which event the winnings must be paid out.

[29] The applicants accordingly submitted that Freeplay does not form part of the *"drop"* in that:

> (a) the EC Act defines the *"drop"* in the context of cash-less gaming machines as *"the total amount of money and tokens deducted from players' slot accounts as a result of gambling machines play";*
> (b) the word *"amount"* in the definition of *"drop"* should be interpreted to refer to amounts deducted from a player's slot account <u>which represent revenue in the hands of the casino</u>;

(c) because Freeplay can never be exchanged for cash, has no financial value and is a credit that has been created by the applicants in circumstances where no *quid pro quo* was received from the player, it does not represent revenue and it accordingly is not an *"amount"* for the purposes of determining whether it forms part of the *"drop"*.

[30] Given that Freeplay does not form part of the *"drop"*, it necessarily follows that it does not form part of AGR or of taxable revenue within the meaning of Schedule III. The applicants accordingly submitted that the relevant legislation, properly interpreted in the light of its context and purpose, provides that Freeplay does not constitute an *"amount"* which is deducted from players' slot accounts as a result of slot machines play. The term *"amount"* in the context of the EC Act can only sensibly be interpreted to mean an amount which reflects actual revenue in the hands of the casino. In the event of any ambiguity, the provision must be interpreted *contra fiscum* and according to the applicants the interpretation contended for by them should therefore prevail.

[31] The applicants further argued that in any event, legislative provisions must be interpreted to render them compatible with the Constitution and to *"better"* promote the spirit, purport and objects of the Bill of Rights. These injunctions, according to their argument, support the interpretation advanced by the applicants. In general, a tax on income is dependent on the improved financial position of the taxpayer. The underlying principle is that a person whose financial position has improved is required to share a portion of the increase with the *fiscus.* It would violate the principle of rationality and section 25(1) of the Bill of Rights if a gaming levy were to be imposed in circumstances where there has been no increase in revenue on the part of the person liable to pay the gaming levy. If a licensee is no better off in a financial sense as a result of a particular transaction, it would be irrational to require the licensee to pay tax on its neutral or impoverished financial position. That would also amount to an arbitrary deprivation of property in breach of section 25(1) of the Bill of Rights.

[32] If the respondents' interpretation were correct, the applicants would be required to pay a gaming levy in circumstances where their financial position has not improved

because they receive no revenue as a result of a particular Freeplay transaction. The applicants submitted that in order to avoid this unconstitutional outcome, the definition of *"drop"* should be interpreted so as not to include Freeplay credits.

(ii) *The respondents' case*

[33] The respondents contended that on the clear wording of the relevant legislation, the *"drop"* in respect of cash-less machines means *"the amount deducted from players' slot accounts as a result of gambling machines play".* Freeplay is loaded onto a player's card account. In the course of playing Freeplay credits on a particular slot machine, the Freeplay credits are downloaded onto the slot machine and reflected as credits with which to gamble. If a bet is made, the relevant amount is deducted from the player's slot account.

[34] The respondents contended that having due regard to the relevant definition, it is clear that Freeplay forms part of the *"drop"* when utilised by a player. It is an amount deducted from the player's slot account as a result of slot machines play. In line with the unambiguous meaning of the relevant wording of the EC Act, Freeplay consequently forms part of the casino's AGR for the purpose of levying gambling tax.

[35] The fundamental principle, subject to the need to contextualise the provision and read it purposively and sensibly, is that words in a statute must be given their ordinary meaning, unless to do so would result in an absurdity. Whilst due regard must be paid to context and purpose from the outset, the text of the EC Act is the logical starting point in a matter such as the present one. When this correct legal approach is followed, the meaning of the EC Act is clearly apparent, namely that Freeplay forms part of the applicants' AGR.

[36] The respondents contended that the applicants attempt to divert attention from the text and plain meaning of the relevant provisions of the EC Act with unsubstantiated claims regarding the apparent purpose of gambling taxation (and tax in general), such as that the obligation to pay tax is based on the underlying premise that, in this instance, the licensee has acquired income and is financially *"better off".* The applicants erred by using their "self-made" purpose as the starting point and to impose it on the definition of AGR in the EC Act thereby straining the text to fit in with the pre-determined purpose.

[37] The relevant provisions deal with the imposition of gambling taxes. Their purpose is thus to impose taxes on the gambling and betting activities of players at the casino. The tax is aimed at the activities of players and not the financial position of the licensee. The provincial legislature has prescribed the exact basis for calculating the gambling tax in clear and unambiguous terms. The EC Act does not restrict the basis for imposing gambling taxes to instances where there is financial gain by virtue of holding a gambling licence on the underlying premise that the licensee has acquired the revenue and is *"better off"* financially as contended by the applicants.

[38] The respondents further contended that the constitutional considerations raised by the applicants do not support their case. The legislative treatment of Freeplay for purposes of levying gambling taxes represents a policy choice by the provincial legislature. The latter is constitutionally empowered to impose gambling taxes but barred from levying income tax by section 228(1)(a) of the Constitution. Gambling taxes are legitimately attached to the granting of gambling licences and the concomitant raising of revenue for the provincial *fiscus.* This form of taxation does not concern the *fiscus* sharing in the subject's improved financial position, but is more akin to the imposition of so-called *"sin taxes"*. It was not an irrational way for the Eastern Cape provincial legislature to pursue this goal by having chosen to include Freeplay in the calculation of AGR for the purpose of gambling taxation. The applicants failed to explain why gambling taxes must be linked to income or an improved financial position in order for it to be rational. The inclusion of Freeplay does not remotely resemble an arbitrary deprivation of property in breach of section 25(1) of the Constitution. It is in fact the

election by the licence holder to voluntarily award Free play credits that attracts the tax liability. The business strategy of the casino is irrelevant to the proper interpretation of the legislation. The respondents accordingly contended that the applicants failed to show that the inclusion of Freeplay in the AGR amounts to the arbitrary deprivation of property.

Evaluation

[39] As indicated, the issue to be determined is simply what the relevant provisions of the EC Act mean having due regard to the text as read sensibly in the context of the statute as a whole and in the light of the purpose to which it is directed. The fairness or reasonableness of including Freeplay credits in calculating the AGR for purposes of determining gambling taxes in the province is not before the court. I apprehend the apposite approach to be followed in this matter in considering the relevant text, to be as conveyed by the following dicta in *Cape Brandy Syndicate v Inland Revenue Commissioners*[8] relating to the interpretation of fiscal legislation referred to in *Glen Anil Development Corporation Ltd v Secretary for Inland Revenue*[9], namely –

> *"It simply means that in a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."*

The same principle with regard to the construction of taxing statutes, as set out in *Partington v The Attorney-General 21 L.T. 370 at 375,* was referred to with approval in *Commissioner for Inland Revenue v George Forest Timber Co Ltd*[10]*:*

---

8 [1921] 1 KB 64 at 71
9 1975(4) SA 715 (A) at 727A
10 1924 AD 516 at 531-2

> *"If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the law the case might otherwise appear to be. In other words, if there be an equitable construction, certainly such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute".*

[40] Item 1 of Part A of Schedule III of the EC Act contains a detailed definition of the term *"adjusted gross revenue"*, which could be accepted for present purposes as effectively meaning the *"drop".* The provincial legislature accordingly provided a technical and specific definition of AGR. The term *"drop"* is equally precisely defined in the EC Act and the operative section of the definition for present purposes is *"the amount deducted from players' slot accounts as a result of gambling machines play".* It is readily apparent that no distinction is drawn with regard to the source of the *"amount"* deducted. The definition in particular draws no distinction between any *"amount"* loaded onto the slot account by players from their own funds or from any other source such as Freeplay. The definition simply entails any amount *"deducted"* from the slot accounts of players. There is also no indication in the unambiguous text that the amount deducted should represent income in the hands of the licensee. The contrary conclusion contended for by the applicants would require impermissibly reading non-existent text into the definition which would amount to legislating and not statutory interpretation. Looking fairly at the language used and simply adhering to the text, there is no scope for limiting the import of the term *"amount"* in that fashion.

[41] The evidence indicates that players have two slot accounts reflected on their players' cards, namely one representing cash (being their own resources) and the other Freeplay credits (obtained from the casino without charge). They have the choice to draw from either. Every time the player plays the slot machine there is a concomitant deduction from the relevant account. The definition of the *"drop"* does not expressly or by necessary implication distinguish between the two accounts. It follows from the clear

and unambiguous wording of the definition that a deduction from either account forms part of the *"drop".* In view of the relevant text, there is accordingly no basis for excluding Freeplay from the *"drop"* or from the AGR.

[42] A consideration of the relevant statutory purpose and context supports the above conclusion. It is readily apparent from the heading of section 57 of the EC Act, namely *"Imposition of fees and taxes"*, that it is a fiscal or taxing provision. It deals specifically with what is referred to in Item 1 of Part B of Schedule III as a *"gambling tax"* which is calculated as a percentage of *"taxable revenue"* which in turn is determined by making *"admissible deductions"* from the *"adjusted gross revenue".* The latter is in effect determined by deducting players' winnings from the *"drop".* The clear purpose of the provision is to levy a gambling tax on the specified basis. There is no reference to the financial position of the licensee.

[43] In considering the context provided by the EC Act as a whole, it is striking that the definition of the *"drop"* in relation to cash (other) gambling machines refers to *"the total amount of money and tokens removed from the dropbox".* In this instance as well, there is no distinction regarding the source or origin of such *"money"* and *"tokens".* Tokens which may have been acquired as part of a promotion for no consideration are not treated differently from any other tokens, for example, those acquired by players from their own resources.

[44] Furthermore, the definition of the *"drop"* in relation to table games refers to the total amount of money, chips or tokens contained in a physical dropbox. In this instance there is also no distinction drawn between *"chips"* and *"tokens"* obtained for no consideration as part of a promotion or those obtained by players from their own resources. Significantly the applicants conditionally accept, apparently for practical reasons, that Freeplay forms part of the *"drop"* as far as table games are concerned and thus form part of *"revenue"* when the Freeplay chips or tokens end up in the dropbox. On the applicants' argument, however, Freeplay utilised in cash-less slot machines must be treated differently and be excluded from gambling revenue. Notwithstanding

their apparently contradictory position in respect of table games, the applicants contended that their stance with regard to cash-less machines reflected the correct construction of the EC Act insofar as Freeplay was concerned. There is no apparent rational reason for the provincial legislature to have drawn this distinction between table games and cash-less machines. It is apparent from the clear wording of the EC Act as a whole that there should be a uniform application of tax to all forms of gambling. There is no logical or common-sense reason why the *"drop"* in respect of cash-less slot machines should be interpreted differently from that in respect of table games or even other (cash) slot machines.

[45] The definition of the term *"gambling machine"* in the EC Act also supports the conclusion that Freeplay should be included in the AGR. It is defined, in relevant part, as:

> *"any mechanical, electrical, video, electronic, electro-mechanical or other device, contrivance, machine or software, other than an amusement machine, that-*
> *(a) is available to be played or operated upon payment of a consideration; and*
> *(b) may, as a result of playing or operating it, entitle the player or operator to a pay out, or deliver a pay out to the player or operator;"*

The term *"consideration"* is defined in the EC Act as:

> *"(a) money, merchandise, property, a cheque, a token, a ticket, electronic credit, credit, debit or an electronic chip, or similar object; or*
> *(b) any other thing, undertaking, promise, agreement or assurance;*
> *regardless of its apparent or intrinsic value, or whether it is transferred directly or indirectly;"*
>
> (Emphasis supplied)

[46] Freeplay credits clearly fall within the emphasised sections of the above definition and accordingly constitute *"the amount deducted from players' slot accounts as a result of gambling machines play".*

[47] I agree with the respondents' submission that the purpose of the relevant provisions is to impose taxes on the gambling and betting activities of players and not on the financial position of the licensee. The imposition of the gambling tax is not dependent upon or in any way connected to an improvement in the financial position of the licensee when Freeplay credits are played. Any deduction from the player's slot accounts in the case of cash-less slot machines, regardless of the source of the credit being deducted, forms part of the *"drop"* which constitutes the AGR as explained above. The tax is focussed on deductions from players' slot accounts when they bet on slot machines. It is directly linked to the activities of players when betting on slot machines regardless of the resultant financial position of the licensee. The imposition of the tax is triggered by the activity of placing bets on slot machines and the concomitant deductions from the players' slot accounts.

[48] The issue whether the taxpayer made a "profit" or is financially "better off" is in effect relevant only for the purpose of calculating certain taxes such as income tax and capital gains tax. This aspect is irrelevant to the imposition of most other taxes such as VAT, customs and excise, donations tax, the petrol levy, transfer duty and property rates to name a few. I agree with the respondents' submission that gambling tax is akin to the imposition of *"sin taxes"* such as on alcohol, tobacco products and now sugar and even excise duty on luxury goods. The targeted activity (gambling, drinking and smoking) is not prohibited but the imposition of a *"sin tax"* is aimed at deterring the conduct and simultaneously raising money for the *fiscus*. It is unrelated to the improved financial position of the taxpayer. For example, excise duty is imposed as soon as the goods leave the "*controlled facility*" or warehouse. It is irrelevant that the goods leaving the warehouse would be used in some promotional campaign and will not generate revenue.

[49] In my view, there is no constitutional consideration that militates against the conclusion that Freeplay is to be included in the *"drop"*. Section 228(1)(a) of the Constitution empowers provinces to impose gambling taxes but prohibits them from

levying, *inter alia,* income tax. The imposition of gambling taxes is a legitimate corollary to granting gambling licences as a means of raising revenue for the provincial fiscus.[11] It was not irrational for the Eastern Cape provincial legislature to include Freeplay in the calculation of the AGR, in pursuit of this goal. This amounted to a policy choice which is not subject to scrutiny by this court. I agree with the submission by the respondents that it is not a requirement for rationality that the gambling tax must necessarily be linked to income or the improved financial position of the licensee as in the case of, for example, income tax which the provincial legislature is in any event precluded from levying. Section 57(4) of the EC Act clearly does not (and cannot) deal with the levying of tax on income but with a different form of taxation linked to gambling activities.

[50] The uncontroverted evidence in respect of the economic context of the Eastern Cape Province provides further support for the rationality of the policy choice not to exclude Freeplay in calculating gambling revenue. It shows that the province is under severe pressure to meet its financial obligations. A staggering 71.46% of its inhabitants live below the poverty line with an unemployment rate of 43.8% as at the end of the 1st quarter of 2021. There is no indication that the situation has improved since. The funding received from the national government in the form of Equitable Share and Conditional Grants is insufficient to fund priority projects and programmes and has been subjected to significant and continuing cuts, for example, by so much as R29 billion in the 2021 Medium Term Expenditure Framework. The province finds itself in the position where it requires all the revenue that it can lawfully collect and receive to meet its financial commitments and to alleviate the levels of poverty and hardship experienced by its inhabitants. Gambling revenue is the second-highest income generator next to motor vehicle licensing revenue for the province's own revenue stream. Were Freeplay to be excluded from the AGR there will be an immediate and sharp drop in gambling tax revenue for the province. These were the circumstances attendant upon the enactment of the EC Act and undoubtedly part of the material known to and taken into account by

---

[11] cf *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000(1) SA 732 (CC) para [56]: *"It also seems to me that the term 'liquor licenses' in its natural signification encompasses not only the grant or refusal of the permission concerned, but also the power to impose conditions pertinent to that permission, as well as the collection of revenue that might arise from or be attached to its grant".*

the provincial legislature. It was accordingly sensible and business like for the Province to include Freeplay in calculating gambling tax.

[51] There is no merit in the applicants' argument that the inclusion of Freeplay in determining gambling revenue for purposes of taxation, amounts to the arbitrary deprivation of property. I agree with the following conclusion of the court in *Pienaar Brothers (Pty) Ltd v Commissioner, South African Revenue Service & Another*[12]*:*

> *[108] … Applicant's argument seems to proceed from the premise that a person who incurs a liability imposed by law, suffers a deprivation of property. Section 25(1) is intended to deal with situations where the law takes away or interferes with the use and enjoyment of assets. The fact that a law creates a civil liability does not in itself deprive the taxpayer of property unlawfully. If it were otherwise, every tax, levy, fee, fine and administrative charge would constitute deprivations for purposes of s25(1).*
> *…*
> *[110] It was therefore submitted that applicant had to establish that the impugned provisions give rise to a substantial interference with property rights that go beyond the normal restrictions on property use or enjoyment in a democratic society. In my view it cannot be argued that all taxes involve a 'deprivation' of property in the context of s25(1). A state cannot exist without taxes. Society receives benefits from them. Taxes are not penalties. Neither can they be, without any qualification, be* [sic] *regarded as unjust deprivation of property use".*

[52] In the present instance, licensees are not compelled by the legislation to award Freeplay credits but do so voluntarily as a marketing tool forming part of their business model. It is the adoption of this strategy that results in the payment of higher taxes. This could be easily avoided by electing not to promote gambling in this manner but rather opt for other recognised promotions such as providing free meals or accommodation at casinos for MVGs thereby creating additional job opportunities for the benefit of the local community. The applicants have accordingly not succeeded to establish that the

---

[12] 2017(6) SA 435 (GP)

failure to exclude Freeplay from the AGR amounted to the arbitrary deprivation of property.

[53] I should add that I have been referred to and have had due regard to three judgements in other divisions of the High Court that dealt with a similar question whether Freeplay forms part of gambling income and is subject to gambling tax.[13] Those cases dealt with legislation that is to some extent comparable to the EC Act and concluded that Freeplay is excluded in those provinces. The judgements are informative but are not of direct assistance in this matter that deals with the proper interpretation of the relevant legislation that is applicable in the peculiar context and situation in the Eastern Cape Province. Needless to say, I am not bound by any of these decisions which could at best only be persuasive.[14] Suffice it to indicate that I am not persuaded that on a proper interpretation of the relevant provisions of the EC Act the conclusion in any of these cases should be followed in this matter. I do not deem it necessary to deal with these matters in any further detail. I have similarly been referred to and have had regard to three judgements from foreign jurisdictions.[15] These matters dealt with differently worded provisions and concern completely different contexts and were therefore of even less assistance in the present matter. Nothing further needs to be said about these cases.

[54] Some arguments were advanced by the parties concerning the question whether Freeplay increases gaming revenue over time. The issue has also been dealt with in the papers and has been referred to *en passant* earlier in this judgment. I agree with the applicants' submission that there is no need to determine this issue for present

---

13 *Sun International (South Africa) Ltd v Chairperson of the North West Gambling Review Tribunal & others* [2018] ZANWHC 62; *Teemane (Pty) Ltd t/a Flamingo Casino v Chairperson of the Northern Cape Gambling Board* 2023/2016; *Sun West International & Another v Western Cape Gambling and Racing Board & Another* 2021(2) SA 607 (WCC)

14 *Manong & Associates (Pty) Ltd v City of Cape Town* 2009(1) SA 644 (EqC) para [14]

15 *Commissioners For Her Majesty's Revenue and Customs (Appellant) v London Clubs Management Limited (Respondent)* [2020] UKSC 49; *First Gold Inc Mineral Palace LP & Four Aces Gaming Llc v South Dakota Department of Revenue and Regulation* 2014 S.D. 91; *Pueblo of Isleta v Michelle Lujan Grisham Civ No* 17-654 KG/KK. These decisions are difficult to access but copies thereof have been provided to me by the parties for which I am grateful.

purposes which concern the proper interpretation of the relevant provisions of the EC Act. I accordingly refrain from addressing this issue any further.

[55] There is a dispute between the parties as to whether the applicants would be entitled to rely on the *conditio indebiti* for recovering any overpayments of gambling tax in the event of the application succeeding. In view of the conclusion to which I have come on the merits of the matter, there is no need to deal with the issue in any detail. For the sake of completeness, I merely indicate that in my view there is no reason why taxes that were incorrectly paid, could not be recovered pursuant to the principles of unjustified enrichment. If such a case were made out in this matter, I would have ordered the repayment of those amounts that were overpaid and that had not become prescribed. In the event, this was not necessary.

Conclusion

[56] It follows from what is set out above, that the applicants have failed to make out a case for the relief being sought and that the application falls to be dismissed.

[57] I am not persuaded by the applicants' submission that the *Biowatch* principle should apply in respect of the issue of costs in this matter. This case concerns statutory interpretation in the context of gambling legislation and as a corollary, the applicability of the common law *conditio indebiti.* I do, however, accept that the litigation is to some extent in the public interest and important to clarify a particular aspect of gambling revenue in the province. In the circumstances I accept the respondents' submission that regardless of the outcome, it would be fair for each party to bear its own costs.

[58] In the result, I make the following order:

(a) the application is dismissed;

(b) each party shall pay its own costs.

_____

D.O. POTGIETER

JUDGE OF THE HIGH COURT

APPEARANCES

For the applicants:	Adv N Ferreira and Adv Louw, instructed by Nolte Smit Attorneys, 51A Hill Street, Makhada
For the first & second respondents:	Adv H.J De Waal SC and Adv N De Jager, instructed by Le Roux Inc. Attorneys, 101 Cape Road, Mount Croix, Gqeeberha
Date of hearing:	06 October 2022
Date of delivery of judgment:	24 February 2023