



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

| | |
|------------------------------|--------|
| Reportable: | YES/NO |
| Of Interest to other Judges: | YES/NO |
| Circulate to Magistrates: | YES/NO |

Case number: 2334/2023

In the matter between:

RESTIVOX (PTY) LTD t/a CRAZY SLOTS FREE STATE

Applicant

and

EDUARD WILLEM CRONJE t/a FISHERMAN'S BAR

Respondent

HEARD ON: 20 JULY 2023

JUDGEMENT BY: LOUBSER, J

DELIVERED ON: 14 SEPTEMBER 2023

[1] This is an opposed application where the applicant prays for the following relief in its notice of motion:

1. That the respondent is to forthwith grant the applicant access to the premises known as Fisherman's Bar, situated at 9 Dreyer Laan, Roodewal, Bloemfontein, and to permit the applicant when attending on the said premises, to remove 4 Limited Payout Machines from such premises.
2. That, in the event that the respondent refuses to permit the applicant access to the said premises on demand for removal of the said Limited Payout Machines, the Deputy Sheriff is authorised to enter upon the said premises together with representatives of the applicant for the purposes of removing the said machines from the said premises.

3. That the respondent be ordered to pay the applicant the sum of R37 857.00
4. That the respondent be ordered to pay the costs of this application.

[2] The facts on which the applicant relies for this relief, appears from the founding affidavit, deposed to by its manager. According to her, the applicant is the holder of a route operator licence issued to it in terms of the provisions of section 71 of the Free State Gambling and Liquor Act.¹ This licence permits the applicant to make available limited gambling machines for play at licenced sites.

[3] It is further stated in the founding affidavit that altogether three written agreements were concluded between the applicant and the respondent to pave the way for the Fisherman's Bar to become a licenced site in order for it to obtain limited gambling machines from the applicant. The first of these agreements was concluded on 10 November 2021, and is referred to as a Cost to Pay by Site Operator agreement. In terms thereof, the applicant became authorised by the respondent to apply to the Free State Gambling Board for a site operator's licence on behalf of Fisherman's Bar. The costs of the application incurred by the applicant would be paid back to the applicant by the respondent from date of operation of the machines over a period of 52 weeks from the date on which the site becomes operational. The amount so paid by the applicant would be regarded as an interest free loan.

[4] On the same day, the second agreement was also concluded. This agreement is referred to as a Route and Site Operator agreement, and it makes provision for a site data logger to be installed by the applicant on the site of the respondent to enable the monitoring of the gaming activities on the site by the applicant. The data so collected will determine the amount owing by the respondent to the applicant for the use of the machines, which amount will be calculated on the basis of the gross win on the machines, less the remuneration to which Fisherman's Bar is entitled to in terms of the agreement. Should the agreement be terminated, the respondent is obliged to permit the applicant to remove the gaming machines, since the machines would remain the sole and exclusive property of the applicant.

¹Act 6 of 2010

- [5] The third agreement was concluded on 27 October 2022, and is styled “Addendum to Route Operator and Site Operator Agreement”. A reading of the terms thereof shows that it is actually a loan agreement envisaged by the Cost to Pay by Site Operator agreement, and referred to earlier herein. In terms of this loan agreement, the respondent has to pay back all costs of the licence application and the renewal costs of the licence to the applicant. An annexure to the loan agreement sets out all the cash disbursements already incurred by the applicant on behalf of the respondent prior to and on the date of the installation of the first gaming machines. The total of these disbursements is indicated as the sum of R37 857.00, repayable over a period of 52 weeks in weekly instalments of R728.02 each. In the event of default, the full amount outstanding would become due and payable.
- [6] Clause 3.6 of this loan agreement stipulates that the applicant shall have the right to remove the gaming machines should the respondent fail to make payments on any amounts due to the applicant for three consecutive weeks.
- [7] It is further stated in the founding affidavit that the applicant installed four Limited Payout Machines at the Fisherman’s Bar pursuant to the Route and Site Operator agreement. However, the respondent failed to pay to the applicant the amount that was due to it in terms of this agreement, and as a result, the applicant cancelled the agreement on 14 March 2023. The manager of the applicant says in the founding affidavit that the applicant is, in the premises, not entitled to possess the gaming machines any longer. In addition, the respondent remains indebted to the applicant in the amount of R37 857.00 in terms of the loan agreement, she says.
- [8] In his answering affidavit, the respondent does not dispute the existence of the three agreements on which the applicant relies, nor does he dispute the terms of the respective agreements. He also does not dispute the fact that he is still in possession of the four Limited Gaming Machines installed by the applicant. Furthermore, he does not dispute his non-payment of amounts allegedly owing to the applicant, but those allegations he deny only on the premise that he has no knowledge thereof, or that it is actually the applicant who is in breach of contract, and not himself.

- [9] The respondent's defence that he has no knowledge, primarily relates to the R37 857.00 he allegedly owes in terms of the loan agreement. He says that he has no knowledge of the disbursements and charges incurred by the applicant in obtaining his operating licence and the renewal thereof. This he says despite the fact that he has signed the loan agreement on 27 October 2022 which includes the annexure setting out all the disbursements and charges paid on his behalf. This defence raised by the respondent, therefore has no merit.
- [10] The respondent's defence of breach of contract by the applicant relates to his alleged failure to pay the total gross win, less the remuneration to which the Fisherman's Bar is entitled to, in terms of the Route and Site Operator agreement. As mentioned earlier, this agreement entitled the applicant to cancel the agreement and to remove its machines in the event of the respondent failing to pay his fees for the machines.
- [11] The respondent further states in his answering affidavit that he was at all times willing to pay, but only if the applicant rectified its breach of contract. He himself is therefore not in breach, he says.
- [12] The respondent then sets out the breach of contract committed by the applicant. Firstly, the machines provided by the applicant, were not up to standard, he says. However, he does not provide any facts at all to show why the machines were not up to standard. As a consequence, this allegation carries no weight. Secondly, the respondent makes the blunt allegation that "the curtains were not hung". Again he does not provide any information at all in this regard, and therefore this allegation is also not convincing. Thirdly, the respondent alleges that he was not afforded the opportunity by the applicant to attend courses as a site operator, which formed part of the agreement.
- [13] In the last-mentioned respect, the Route and Site Operator agreement provides as follows in clause 6.2 thereof: "The Route Operator shall at its expense, provide for the Site Operator and its employees such training in the operation, repair, maintenance of Gaming Machines and the Site Data Logger as the Route Operator may determine to be appropriate." The obligation to provide training is therefore subject to a determination by the applicant that the specific training is

appropriate, and it is not an obligation that the applicant had to fulfil irrespective of the circumstances. This alleged breach by the applicant therefore cannot be labelled as a breach in the true sense of the word.

[14] In addition, the respondent alleges that the necessary signs have not been erected by the applicant, and that the area around the machines has not been “finalised” by the applicant. Clause 6.1 of the agreement falls in the same category as clause 6.2, and provides as follows: “The Route Operator shall, at its expense, supply and maintain at the Site such point of sale materials, fixtures, signs and promotional materials as the Route Operator may from time to time determine to be appropriate.” For the same reasons mentioned in relation to clause 6.2, an alleged breach in this respect can also not be labelled as a breach in the true sense of the word.

[15] Lastly, the respondent alleges that no invoices were delivered by the applicant. Here he contradicts himself. Earlier in his answering affidavit, he did mention that he was not provided with formal invoices, but he added that he only received a text message with the relevant figures. His defence in this respect is therefore neither here nor there.

[16] The applicant filed a replying affidavit in which the respondent’s allegations of breach by the applicant are denied. In particular, it is denied that the respondent or his employees never received any training from the applicant, and a training form signed by an employee of the respondent is attached to the affidavit to prove that training was provided by the applicant. The applicant also pointed out that it had no obligation to provide curtains for the machine area. Furthermore, the applicant annexed to its replying affidavit photographs of signs it had erected in the gambling area, as well as photographs showing that it has demarcated the gambling area from the rest of the tavern.

[17] In the foregoing, this Court has to find that the respondent has failed to raise any valid defence to the applicant’s claim for removal of the machines and for payment. For this reason, the issue of reciprocal obligations between contracting parties does not arise. In addition, the defences were raised in such a bald and sketchy manner that it cannot be found that a real, genuine or *bona fide* dispute of

fact between the parties became established on the papers. In such a case in motion proceedings a Court may proceed on the basis of the correctness of the applicant's version if it is satisfied as to the inherent credibility of the applicant's factual averments.²

[18] The application must therefore succeed. I can find no reason why costs should not follow the result, and the following order is therefore made:

1. The respondent is ordered to forthwith grant the applicant access to the premises known as Fisherman's Bar, situated at Roodewal, Bloemfontein, and to permit the applicant to remove four Limited Payout Machines from such premises.
2. In the event of the respondent refusing such access to the applicant, or refusing the applicant to remove the said machines, the Deputy Sheriff is authorised to enter the said premises together with representatives of the applicant, and to remove the said machines.
3. The respondent is ordered to pay to the applicant the sum of R37 857.00.
4. The respondent is ordered to pay the costs of the application.

P. J. LOUBSER, J

| | |
|---------------------|---|
| For the applicant: | Adv. J. Ferreira |
| Instructed by: | Cliffe Dekker Hofmeyr Inc., Sandton c/o Noordmans Inc., Bloemfontein |
| For the respondent: | Adv. N. van der Sandt |
| Instructed by: | Willie J Botha Inc. Bloemfontein |

² Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 620 (AD) at 635 A-B