

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2020/23294

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED
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DATE
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SIGNATURE

In the matter of:

SUHAIL ESSACK

First Plaintiff

NASEERA CASSIM

Second Plaintiff

And

SUN INTERNATIONAL SOUTH AFRICA (PTY) LTD

First Defendant

NORTH WEST GAMBLING BOARD

Second Defendant

NATIONAL GAMBLING BOARD

Third Defendant

JUDGMENT

BESTER AJ

[1] The plaintiffs sue the first defendant for losses incurred by the first plaintiff gambling at Sun City, a casino owned by the first defendant. The first defendant delivered an exception to the particulars of claim.

The claim

[2] The plaintiffs plead that the first plaintiff is a businessman, who is married to the second plaintiff under Islamic rites. He was designated as an excluded person for all gaming entities in Gauteng and nationally, as from 6 November 2017. Although not specifically pleaded, it appears from the notice attached to the particulars of claim that the exclusion was done at his own request, in Gauteng. The first defendant operates a casino at Sun City, is a licensee in respect thereof, and is subject to the North West Gambling Act, 2 of 2001.

[3] As to the conduct complained of, the plaintiffs plead that the first plaintiff obtained free and unfettered access to the casino, remained on the premises freely and unhindered, was permitted by the first defendant to *“use the second plaintiff’s card on the basis that his own card was banned and/or despite knowing that he was not the owner of the card”* and allowed to *“draw money”* on the card, was encouraged and permitted to gamble by the first defendant, and lost the sum of R5.2 million.

[4] On the basis on these allegations, the plaintiffs advance two causes of action, a claim relying on the breach of a statutory duty and Aquilian liability.

[5] For the statutory claim, the plaintiffs aver that the National Gambling Act 7 of 2004, the North West Gambling Act 2 of 2001 and the North West Gambling Regulations impose obligations on the part of the first defendant with *“the benefits flowing from the non-observance of the duties imposed are for the benefit of the plaintiffs alternatively the first plaintiff”*. The only provisions specifically pleaded are regulations 22(2) and 23 under the North West Gambling Regulations. The ‘benefits’ are not identified in the pleading.

[6] Regulation 22 provides:

- “(1) An excluded person who enters licenced premises from which he or she is excluded or partakes in any gaming from which he or she is excluded, shall be guilty of an offence.
- (2) A person excluded from premises in another province shall not partake in gambling activities in the Province.”

[7] Regulation 23 imposes duties upon the licensee as follows:

- “(1) Whenever an identified excluded person enters or attempts to enter or is upon licenced premises from which he or she is excluded, the licensee and its agents or employees shall –
 - (a) request such excluded person not to enter, or if on the premises, to immediately leave;
 - (b) notify the South African Police Service to evict such person if such excluded person fails to comply with the request of the licensee, its agents or employees; and

(c) notify the Board of the presence of any excluded person on the licenced premises.

(2) A licensee shall not knowingly allow an excluded person to partake in any gambling from which such person is excluded.”

[8] The plaintiffs plead the following allegations regarding the first defendant’s alleged breach of statutory duties:

“12. The first defendant’s conduct ... constituted a breach/es of its statutory duty/duties and caused the plaintiffs, alternatively the first plaintiff to suffer damages in that:

- a. the plaintiff was an excluded person;
- b. the first defendant allowed the first plaintiff to enter upon and/or to remain on its premises;
- c. the first defendant did not take the prescribed measures as contemplated in the NWGR¹ to refrain the first defendant from entering upon its premises or to remove him therefrom;
- d. the first defendant facilitated the first plaintiff in gaming at its premises; and
- e. the first defendant did not take any steps to prevent the first plaintiff from gaming at its premises.”

[9] In the alternative, the plaintiffs plead that the first defendant “*owed the plaintiffs, alternatively the first plaintiff a duty of care to ensure that the first plaintiff does not obtain access to the first defendant’s casino for purposes of*

¹ North West Gambling Regulations.

engaging in gambling activities.” The plaintiffs plead that this duty arises from the following facts:

“16.1 By engaging in the business of facilitating gaming and becoming a licensee, the first defendant took on the obligation to ensure that it conducts its business responsibly and reasonably and in particular;

16.1.1. to prevent an excluded person from entering or remaining on its premises;

16.1.2. to not facilitate or allow an excluded person to engage in gaming activities; and

16.1.3. to safeguard the use of the second plaintiff’s card by a third party.

16.2 The plaintiffs aver that the first defendant was negligent in the conduct of its business in permitting or bringing about a situation whereby the first plaintiff engaged in gambling activities at its premises, and for the reasons more fully set out in paragraph 8 above.

16.3 The first defendant knew or reasonably ought to have known that by allowing the first plaintiff access to and/or permitting him to remain on the licenced premises and/or facilitating and/or permitting him to engage in gaming, the first plaintiff could suffer harm.

16.4 The first defendant knew or reasonably should have known that the first plaintiff was not the authorised holder of the second plaintiff’s card and that the use of the second plaintiff’s card by the first plaintiff could result in harm to the second plaintiff.

16.5 The first defendant was negligent in that it failed to take steps to prevent the first plaintiff from using the second plaintiff’s card,

alternatively the first defendant was grossly negligent in that it facilitated such use.

16.6 The first defendant was negligent in that it failed to take measures to prevent the first plaintiff from entering upon and/or remaining on the licenced premises.

16.7 The first defendant was negligent in that it failed to prevent the first plaintiff from participating in gaming activities, alternatively facilitated such gaming activities.

16.8 As a result of the aforesaid the first plaintiff suffered harm.”

The exception

[10] The first defendant advanced four grounds of exception. It contends that the particulars of claim do not disclose a cause of action based on regulations 22 and 23 of the North West Gambling Regulations, or otherwise in terms of the National Gambling Act, the North West Gambling Act or the North West Gambling Regulations. The plaintiffs’ failure to refer to any specific provisions in the National Act or the North West Act gave rise to a separate ground, namely that the particulars of claim are vague and embarrassing.

[11] The first defendant also contends that the particulars of claim do not disclose a cause of action under the *Lex Aquilia* on the basis that the facts pleaded do not give rise to a common law duty on the part of the first defendant to the plaintiffs. As a result, it argues, the particulars of claim lack the necessary

avermment that the first defendant's conduct towards the first plaintiff was wrongful.

[12] Lastly, the first defendant contends that the particulars of claim do not disclose a cause of action in favour of the second plaintiff at all. Ms Bismilla, for the plaintiffs, indicated that the second plaintiff does not rely on regulation 23, and that her Aquilian claim is limited to an alleged duty on the part of the first defendant to have safeguarded the second plaintiff's 'card' against abuse by the first defendant. The first plaintiff does not rely on the allegations regarding the card for his claims. Ms Bismilla conceded, correctly in my view, that insufficient allegations have been made to establish a claim in favour of the second plaintiff. The fourth ground of exception was thus conceded.

[13] In **Pretorius** the Constitutional Court summarised the principles pertaining to exceptions:

"In deciding an exception a court must accept all allegations of facts made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts. The purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment which is so serious as to merit the costs even of an

exception. It is a useful procedural tool to weed out bad claims at an early stage, but an overly technical approach must be avoided.”²

The statutory claim

[14] The particulars of claim identify only regulations 22 and 23. The relevance of regulation 22 is clear – it provides that the first plaintiff, who was listed as an excluded person in Gauteng, is also an excluded person in the North West Province. The duties relied upon by the plaintiffs, are those contained in regulation 23, and Ms Bismilla’s argument on behalf of the plaintiffs was appropriately limited to reliance thereon.

[15] Although the plaintiffs need not necessarily specify a statutory provision, it must be clear from the pleading that a particular provision is relevant and operative.³ The plaintiffs do not identify any provisions in the National Gambling Act or the North West Gambling Act, and the only reasonable reading of the particulars of claim is that the statutory claim is limited to reliance on regulations 22 and 23, with the statutes referred to forming part of the legislative framework within which the regulations find application. In the circumstances I do not agree with the first defendant that the pleading is vague and embarrassing.⁴

² **Pretorius and Another v Transport Pension Fund and Others** 2019 (2) SA 37 (CC) in [15]. Footnotes have been omitted.

³ **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others** 2004 (4) SA 490 (CC) in [27].

⁴ See **Jowell v Bramwell-Jones and Others** 1998 (1) SA 836 (W) at 899B/C – 900A on the approach to an exception that a pleading is vague and embarrassing.

[16] In **Olitzki** the Supreme Court of Appeal explained the place of statutory provisions in damages claims as follows:

“Where the legal duty the plaintiff invokes derives from breach of a statutory provision The focal question remains one of statutory interpretation, since the statute may on a proper construction by implication itself confer right of action, or alternatively provide the basis for inferring that a legal duty exists at common law. The process in either case requires a consideration of the statute as a whole, its objects and provisions, the circumstances in which it was enacted, and the kind of mischief it was designed to prevent. But where a common-law duty is at issue, the answer now depends less on the application of formulaic approaches to statutory construction than on a broad assessment by the Court whether it is ‘just and reasonable’ that a civil claim for damages should be accorded. ‘The conduct is wrongful, not because of the breach of the statutory duty per se, but because it is reasonable in the circumstances to compensate the plaintiff for the infringement of his legal right’. The determination of reasonableness here in turn depends on whether affording the plaintiff a remedy is congruent with the court’s appreciation of the sense of justice of the community. This appreciation must unavoidably include the application of broad considerations of public policy determined also in the light of the Constitution and the impact upon them that the grant or refusal of the remedy the plaintiff seeks will entail.”⁵

[17] Gambling in South Africa is regulated at both national and provincial level, it being an area of concurrent legislative competence in terms of Schedule 4 to the Constitution. The National Gambling Act provides the overarching framework for the regulation of gambling, including establishing uniform rules and standards and national regulatory institutions, whilst much of the

⁵ **Olitzki Property Holdings v State Tender Board and Another** 2001 (3) SA 1247 (SCA) in [12]. Footnotes omitted. The passage was endorsed in **BE obo JE v MEC for Social Development, Western Cape** 2022 (1) SA 1 (CC) in [11].

detail is addressed in provincial legislation, which also allows for the establishment of provincial institutions.

[18] The National Gambling Act, in its preamble, as follows:

“It is desirable to establish a certain uniform rules and standards, which will safeguard people participating in gambling and their communities against the adverse effect of gambling, applying generally throughout the Republic with regard to casinos, racing, gambling and wagering, so that -

*gambling activities are effectively regulated, licenced, controlled and policed;

*members of the public who participate in any licenced gambling activity are protected;

*society and the economy are protected against over-stimulation of the latent demand for gambling; and

*the licensing of gambling activities is transparent, fair and equitable;”

[19] Section 14 of the National Gambling Act deals with excluded persons. Subsections (1) to (6) provide for persons to register themselves for exclusion from gambling activities, and for circumscribed interested parties to apply to a competent court for a person’s exclusion.

[20] Section 14(7) requires the National Gambling Board to establish and maintain a national register of excluded persons, and to make the information in the register continuously available to each provincial licensing

authority and every person who is licensed to make a gambling activity available to the public.

[21] Subsections (10) and (11) sets out the duties of gambling licensees in respect of taking steps to prevent excluded persons to participate in gambling.

[22] Item 7 of the Schedule of Transitional Provisions to the National Gambling Act provides that, despite the coming into operation of section 14, sub-sections (1) to (6) remain inoperative until a day declared by the responsible Minister by notice in the Gazette, after the National Gambling Board has established the National Register of excluded persons required by section 14(7). It also provides that sub-sections (10) to (12) remain inoperative with respect to any gambling activity other than the use of limited pay out machines, until the date declared by the responsible Minister. The Minister has not yet published notice of this date.

[23] Sun City is in the North West Province, where gambling is regulated at provincial level by the North West Gambling Act 2 of 2001. The preamble to the Act recognises, amongst others: -

“AND WHEREAS it is recognised that public confidence and trust and the health, safety, general welfare and good order of inhabitants of the Province are dependent upon the strict regulation of all persons, premises, practices, associations and activities relating to gambling.”

- [24] This Act does not contain provisions similar to those contained in the National Act regarding prohibited persons. However, Chapter 4 of the North West Gambling Regulations⁶ deals with excluded persons. Regulation 16 empowers the North West Gambling Board to establish a list of persons to be excluded from premises licenced under the Act and the regulations and provides the criteria to be applied for inclusion on that list. This includes self-exclusion. Various provisions, set out in Regulations 17 to 21, seek to give effect to the need to ensure publicity and fairness in the exclusion process.
- [25] Regulation 22 prohibits a person excluded in another province (such as the first plaintiff) from partaking in gambling activities in the North West Province.
- [26] Regulation 23 imposes a duty upon a licensee to not knowingly allow an excluded person to partake in any gaming from which such person is excluded. It also must request an excluded person not to enter, or if on the premises, to immediately leave, it must notify the South African Police Service to evict such a person if he fails to comply with the request, and it must notify the Provincial Gambling Board of the person's presence on the licensed premises.

⁶ North-West Gambling Regulations, 2002 published under GN353 of 2002 in pg5823 of 25 November 2002, as amended.

- [27] The statutory regime overseeing gambling activities has, as one of its functions, the protection of participants in gambling activities and protecting their communities against the adverse effects thereof.
- [28] Regulation 22(1) stipulates that it is an offence for an excluded person to enter licenced premises and to partake in any gaming from which he is excluded. Mr Friedman, appearing for the first defendant, submitted that, as the regulation does not make it an offence to not adhere to regulation 23, this is indicative that the legislation does not impose a duty on the first defendant. However, this loses sight of section 82(1)(i) of the North West Gambling Act, which stipulates that a person who contravenes or fails to comply with any provision of the Act or any regulation made under section 84 is guilty of an offence.
- [29] In my view, the significance of the transgressions being offences is rather that they indicate that the obligations of both the excluded person and the licensee are owed to Society, which the legislation seeks to protect, through the State. Thus, the licensee must notify the South African Police Service if a person refuses to leave licenced premises and notify the Provincial Gambling Board of the presence of an excluded person on the licenced premises.
- [30] In **Junmao**⁷ Blieden J considered an exception to a similar claim under the Gauteng Gambling Act 4 of 1995 and regulations, which are identical to the

⁷ **Junmao v Akani-Egoli (Pty) Ltd t/a Gold Reef City Casino and Theme Park** 2004 JER 0665 (W).

North West regulations considered here. He concluded that the duties imposed by the regulations upon the licensee are not to assist a compulsive gambler who requested to be evicted, but a duty to the Province or State, through the Gambling Board.⁸ My conclusion that the duties are for the benefit of the Community seems to me to be in line with this conclusion. The regulatory framework establishes institutions to protect the interests of the Community.

[31] Sight should not be lost of the fact that the first plaintiff is the author of his own misfortune. Having voluntarily placed himself on the list of people excluded from gambling, he nonetheless went to the Sun City Casino and, on his own version, lost a substantial amount of money.

[32] The plaintiffs' proposition implies that a compulsive gambler may retain his winnings when transgressing the regulations but hold the licensee of the gambling establishment liable for his losses. Such a lopsided approach does not serve the purpose of the provision, and is not in the public interest.⁹

⁸ **Junmao** *supra* at p 16.

⁹ See **Cool Ideas v Hubbard** 2014 (4) SA 474 (CC) in [28]:

"A fundamental tenet of statutory interpretation is that the words in a Statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

[a] that statutory provisions should always be interpreted purposively;

[b] the relevant statutory provision must be properly contextualised; and

[c] all statutes must be construed consistently with the constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purpose of approach referred to in [a]."

- [33] In my view, the regulations, considered as a whole and in the context of the regulation of gambling overall, do not provide that the first plaintiff should be afforded a civil remedy where a licensee such as the first defendant does not adhere to the prescripts of regulation 23.
- [34] There is a further reason why the claim does not withstand scrutiny at the exception stage. The plaintiffs do not rely on knowledge of the first plaintiff's identity on the part of the first defendant. This cannot be a requirement, they submit, because any licensee could simply evade its responsibilities by choosing not to identify patrons and rely on their lack of knowledge as a defence. However, as the first defendant points out, regulation 23 expressly prohibits a licensee from not knowingly allowing an excluded person to partake in any gambling.
- [35] It follows that the allegations contained in the particulars of claim are not sufficient to establish a claim based on a breach of a statutory duty contained in the North West Gambling Regulations. In the result, the first defendant's exception that the particulars of claim do not disclose a cause of action on the basis of the breach of a statutory claim, must be upheld.

The Aquilian claim

[36] The first principle of the law of delict is that everyone must bear the loss he or she suffers, and *Aquilian* liability provides for an exception to the rule.¹⁰

An act or omission causing pure economic loss, such as is claimed by the plaintiffs, is also not *prima facie* wrongful.¹¹ This accords with the central constitutional values of freedom and dignity. As Ngcobo J remarked in **Barkhuizen**, albeit in the context of contractual freedom, “*Self-autonomy, or the ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity*”.¹²

[37] In **Steenkamp N.O.** the Constitutional Court considered the following as relevant factors to be considered when determining wrongfulness:

“Our courts ... and courts in other common-law jurisdictions readily recognise that factors that go to wrongfulness would include whether the operative statute anticipates, directly or by inference, compensation of damages for the aggrieved party; whether there are alternative remedies such as an interdict, the review or appeal; whether the object of the statutory scheme is mainly to protect individuals or advance public good; whether the statutory power conferred grants the public functionary a discretion in decision making; whether an imposition of liability for damages is likely to have a ‘chilling effect’ on performance of administrative or statutory function; whether the party bearing the loss is the author of its misfortune; whether the harm that ensued was foreseeable. It should be kept in mind that in the determination of wrongfulness, foreseeability of

¹⁰ **Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA** 2006 (1) SA 461 (SCA) in [12].

¹¹ **Telematrix** *supra* in [13].

¹² **Barkhuizen v Napier** 2007 (5) SA 323 (CC) in [57].

harm, although ordinarily a standard for negligence, is not irrelevant. The ultimate question is whether on a conspectus of all relevant facts and considerations, public policy and public interest favour holding the conduct unlawful and susceptible to a remedy in damages.”¹³

[38] **Junmao**¹⁴ concluded that an excluded person does not have a common law delictual claim flowing from the equivalent Gauteng statutory provisions. The plaintiffs accepted in argument that this was the status of the law in 2004. They argued, however, that it should be re-evaluated because there has been a change in the *boni mores* of society, and that current legal convictions favour a delictual claim in these circumstances.

[39] They were, however, unable to point to any South African cases or academic articles in support of this contention. They relied on a 2010 report by the Gambling Review Commission¹⁵ as illustrating that provisions regarding the exclusion of persons from gambling are for their personal protection. Significantly, however, the portion referred to, appears in the section under the heading “The social impact of gambling”, and merely states, with reference to the National Gambling Act, that it contains a range of measures to protect the vulnerable and minimise the potential negative socio-economic impact of gambling. It takes the matter no further than what we have seen from the preamble of that Act, which commenced in 2004.

¹³ **Stenkamp N.O. v Provincial Tender Board, Eastern Cape** 2007 (3) SA 121 (CC) in [42]. Footnotes omitted.

¹⁴ **Junmao** *supra*.

¹⁵ *Review of the South African Industry and its Regulation*, a report prepared by the Gambling Review Commission, September 2010.

[40] The first defendant pointed to the foreign cases supporting the conclusions reached in **Junmao**, referred to in that judgment, as showing that in common law jurisdictions, such claims are not recognised. The Court referred to **Merrill v Trump Indiana**¹⁶, a case from the United States Court of Appeals for the Seventh Circuit. The plaintiff requested to be placed on an exclusion list, but the casino failed to do so, whereafter he gambled and suffered losses. The court concluded that the casino should not be held responsible for the destructive effects of his relapse into gambling.

[41] The next case considered was **Reynolds v Katoomba**¹⁷, a judgment in the Court of Appeal of the Supreme Court of New South Wales. The plaintiff claimed damages on the basis that the club knew that he was a gambling addict and that it failed to take adequate steps to stop or discourage him from gambling, after having undertaken and agreed to ensure that he does not continue to gamble. The Court rejected his argument that the club owed him a duty of care. The Court referred to **Reeves v Commissioner of Police**¹⁸ where Lord Hoffmann said:

“... there is a difference between protecting people against harm caused to them by third parties and protecting them against harm which they inflict upon themselves. It reflects the individualist philosophy of the common law. People of full age and sound understanding must look after themselves and take responsibility for their actions. This philosophy

¹⁶ **Merrill v Trump Indiana Inc.** 320 F.3d 729; 2003 US App Lexis 3507; 7 Gaming Law Review 305.

¹⁷ **Reynolds v Katoomba RSL All Services Club Ltd** [2001] NSWCA 234.

¹⁸ **Reeves v Commissioner of Police of the Metropolis** [2001] 1 AC 360 at 368C-D.

expresses itself in the fact that duties to safeguard from harm deliberately caused by others are unusual and a duty to protect a person of full understanding from causing harm to himself is very rare indeed.”

[42] The plaintiffs however contend that, in the light of developments in foreign jurisprudence, the conclusion reached in **Junmao** that no cause of action under the common law exists on these facts, should be reconsidered. They accepted that all the cases relied upon are distinguishable on the facts. They submitted, however, that the approaches followed in these cases are relevant, and should sway this Court to conclude that the common law should be developed to recognise a claim in the current circumstances. The first defendant, on the other hand, pointed out that the facts of these cases are critically important if they are to be of any value to this Court.

[43] In **Paton Estate v Ontario Lottery and Gaming Corporation**¹⁹ the Ontario Court of Appeal stated that “*more may be expected when an individual is obviously addicted to gambling and out of control*”. However, such a broad statement is of little if any value in considering this exception. Regulation 23 already stipulates what is expected of the licensee. The question is whether a failure to adhere to those requirements establishes wrongfulness for purposes of a delictual claim, which the reference to the statement does not address.

¹⁹ **Paton Estate v Ontario Lottery and Gaming Corporation (Fallsview Casino Resort and OLG Casino Brantford)** 2016 ONCA 458 [Paton Estate C], Rev’g 2015 ONSC 3130 [Paton Estate SC].

[44] In **Calvert v William Hill Credit Limited**²⁰, bookmakers introduced a voluntary arrangement for self-exclusion by the closure of accounts. The plaintiff followed the system but for procedural failures was able to continue gambling, following which he lost a substantial amount of money. The court rejected his argument that there was a duty of care on the bookmakers to prevent or mitigate the consequences of his self-inflicted harm in those circumstances. On appeal, he argued for a specific duty arising from particular undertakings given to him that would not allow him to make a telephonic bet. This was not adhered to. The Appeal Court, for procedural reasons, was willing to accept the finding of the court of first instance that on the special facts of the case there was a duty to implement the assurances but did not determine the point. The appeal ultimately failed on a causation point. This case is thus not of assistance to the plaintiffs.

[45] **Dennis v Ontario Lottery and Gaming Corporation**²¹ concerned a request to certify a class action under section 5(1) of the Class Proceedings Act, 1992, which sets out requirements to be fulfilled in order for a class to be certified. One of those requirements is that the pleadings must disclose a cause of action. However, the relevant statutory provision set a very low bar, and a claim would only fail at the certification stage if it is plain and obvious that it cannot succeed. Contrary to the South African approach, Canadian law

²⁰ **Calvert v William Hill Credit Limited** [2005] NSWSC 1223.

²¹ **Dennis v Ontario Lottery and Gaming Corporation** 2013 ONCA 501. Aff'g 2011 ONSC 7024 (Div Ct), Aff'g 2010 ONSC 1332.

adopts a principle that novel claims should almost never be excluded at the exception phase.²² The application was dismissed on the basis that a class action was not appropriate as individualised inquiries were needed into the nature, degree and consequences of each proposed class member's gambling propensity.

[46] The passage relied upon by the plaintiff appears in the judgment in the context of the appropriateness of a class action, and lists factors to be considered in individualised claims. It seems to me a different inquiry from whether a cause of action is disclosed. Neither the court of first instance, nor the Appeal Courts were willing to recognise a general duty of care by the Ontario Lottery and Gaming Corporation to self-excluded gamblers. At best, the court was willing to accept that the plaintiffs might succeed but there were *"many significant legal hurdles for the appellants to overcome in making out a claim, in particular, the exclusion of liability clause and the release in the self-exclusion form as well as the difficult issue of proximity and duty of care and negligence."*²³ The case does not assist the plaintiffs either.

[47] In **Ross v British Columbia Lottery Corporation**²⁴ the plaintiff brought an unjustified enrichment claim based on the notion that her gambling contracts with the casinos were unenforceable because she was self-excluded at the time of her gambling. She also brought a negligent

²² **Dennis (Appeal Court)** at para 73.

²³ **Dennis (Court of Appeal)** at para 73.

²⁴ **Ross v British Columbia Lottery Corporation** 2014 BCSC 320.

misstatement claim. This, it seems, was based on an alleged promise by casino employees that the plaintiff would be ejected from the casino if she tried to gamble and suffer a loss, and that this promise turned out to be untrue. Neither of these two causes of actions are of assistance in the current matter.

[48] The plaintiff also brought a negligence claim which was rejected by the court. It held that the defence did not owe her a duty of care to prevent gambling losses, although they did have a duty to introduce and implement a self-exclusion programme. The programme had as one of its core components the requirement that the problem gambler had a primary obligation to control her gambling by enrolling in the programme. Again, I find no support in this case for the plaintiffs' contention that there are developments in other jurisdictions suggesting that a change in South African convictions of the community have taken place over the past 17 years.

[49] **Burrell v Metropolitan Entertainment Group**²⁵ was considered at the exception stage, on the assumption that the pleaded facts would be established at trial, similar to the approach followed in our courts. This claim was also in the context of a self-exclusion programme. The relevant regulations made it an offence both for an excluded person to enter and gamble at a casino and for the casino to allow the excluded person to

²⁵ **Burrell v Metropolitan Entertainment Group** 2011 NSCA 108.

gamble. The Court saw this as evidence of a regulatory scheme in which there were reciprocal obligations on both the problem gambler and the casino to protect the gambler from himself. The court acknowledged a starting point of the enquiry as personal autonomy but concluded that the legislature had struck a rational balance between the personal autonomy of gamblers and the duties of the licensee, which included the promotion of gambling, so that it would be inappropriate to acknowledge a delictual duty of care on top of this structure. The Court found that it could not be entertained that a problem gambler may “*test the tables and keep his winnings, if any, but recover any deficit in a tort claim akin to gambling loss insurance.*”²⁶ If anything, this case, of which, of all the foreign cases referred to, is the closest to the current matter of the facts and the legislation, speaks against the plaintiffs and is very much in line with the exception raised by the first defendant.

[50] **Sinclair v New Zealand Racing Board**²⁷ involved a claim brought by the victim of problem gambling – the plaintiff was defrauded by a problem gambler who enticed her through a romantic relationship to lend him large sums of money to fuel his gambling. The court upheld the objection to the claim on the basis that the plaintiff was not part of an identifiable class to

²⁶ In [43].

²⁷ Sinclair v New Zealand Racing Board [2015] NZHC 2067.

whom the defendants could be said to owe a duty of care, which would imply an extensive duty of indeterminate liability.

[51] I conclude that none of the foreign decisions relied upon by the plaintiffs support their proposition that there has been a shift in the *boni mores* in common law jurisdictions in favour of recognizing a claim as pleaded by the plaintiffs. There is thus no support for the proposition that this Court should conclude that the *boni mores* of our society has shifted in favour of recognising a claim such as that proposed by the first plaintiff.

[52] I am satisfied that the legal position as stated in **Junmao** is still a correct statement of the legal convictions of the community. The first plaintiff has also for the alternative claim not pleaded sufficient allegations to sustain a cause of action against the first defendant.

Conclusion

[53] For the above reasons I conclude that the particulars of claim do not disclose a cause of action against the first defendant. The exception was conceded in respect of the second defendant. The exception should thus be upheld, with costs. This should include the costs occasioned by the delivery of additional submissions after the hearing.

[54] An earlier exception was met with an amendment that gave rise to the particulars of claim in their current form. The first defendant, correctly in my view, seeks the costs of the previous exception, including the preparation of heads of argument in respect hereof.

[55] In the circumstances I make the following order:

- 1) The first defendant's exception to the plaintiffs' amended particulars of claim is upheld with costs, including the costs of the additional submissions.
- 2) The plaintiffs are liable for the first defendant's wasted costs in respect of its first exception dated 14 December 2020 and the preparation of the heads of argument in respect thereof filed on 10 February 2021.
- 3) The plaintiffs are granted leave to amend their particulars of claim by notice of amendment given within 20 days from the date of this order.
- 4) If the plaintiffs fail to give such notice of amendment their claim is dismissed with costs.

A Bester
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Heard:

22 November 2021

Judgment:

24 May 2022

Counsel for the Plaintiffs:
Instructed by:

Adv S Bismilla
Hajibey-Bhyat Inc

Counsel for the First Excipient:
Instructed by:

Adv A Friedman
Herbert Smith Free Hills South Africa
Attorneys Inc