



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 648/2021

In the matter between:

GOLDRUSH GROUP (PTY) LTD

APPELLANT

and

NORTH WEST GAMBLING BOARD
MEMBER OF THE EXECUTIVE COUNCIL
FOR ECONOMY AND ENTERPRISE
DEVELOPMENT, NORTH WEST
PROVINCE

FIRST RESPONDENT

SANTOSAT (PTY) LTD

THIRD RESPONDENT

SANTOSCAN (PTY) LTD

FOURTH RESPONDENT

GOLDRUSH SLOTS GAMING

NORTH WEST (PTY) LTD

FIFTH RESPONDENT

SANGRO HOLDINGS 1 (PTY) LTD

SIXTH RESPONDENT

PHOKONG INVESTMENTS AND

PROJECTS (PTY) LTD

SEVENTH RESPONDENT

K201985410 (SOUTH AFRICA) (PTY) LTD

EIGHTH RESPONDENT

EDITH MAMOTSE MPHATSE

NINTH RESPONDENT

**MPHO RADIKOJANA
RESPONDENT**

TENTH

Neutral citation: *Goldrush Group (Pty) Ltd v North West Gambling Board and Others* (648/2021) [2022] ZASCA 164 (28 November 2022)

Coram: PONNAN, GORVEN and HUGHES JJA and MJALI and GOOSEN AJJA

Heard: 2 November 2022

Delivered: 28 November 2022

Summary: Locus standi – shareholder – declaration of rights affecting company – own interest litigant – principles governing standing – financial interest only – interests of justice not served – no basis for locus standi.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Snyman AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Gorven JA (Ponnan and Hughes JJA and Mjali and Goosen AJJA concurring):

[1] This appeal arose from requirements forming part of bingo operator and route operator licences in the North West Province. Gambling in that province is regulated by the North West Gambling Act 2 of 2001 (the Act) and overseen by the North West Gambling Board (the Board). The appellant is Goldrush Group (Pty) Ltd (Goldrush) which, at the time of the application giving rise to this appeal, held 40 percent of the shares in the third to fifth respondents (the licensee companies). The balance of the shares in the licensee companies were held by the sixth to tenth respondents (the local PDI shareholders). The licensee companies were formed for the purpose of responding to a request for applications (the 2009 RFA) for gambling licences. Pursuant to their applications, the third and fourth respondents were granted bingo operator licences and the fifth respondent a route operator licence. At the instance of Goldrush, the licensee companies appointed a

management company, Goldrush Group Management (Pty) Ltd, a wholly owned subsidiary of Goldrush.

[2] The 2009 RFA for bingo licences contained the following provisions:

a) 'Local PDI' was defined as meaning, 'a natural black person who is a resident within the North West Province or a juristic person in whom the majority ownership, employment and beneficitation is held or accrues to natural persons who are resident in the North West Province'.

b) 'Resident' was defined as meaning 'a natural person who is ordinarily a resident of the country in terms of the Income Tax Act, 1962 (Act No. 58 of 1962) as amended, and who is ordinarily a resident of the North West Province and has a fixed or permanent residential address in the province; provided that such person was physically residing in the province for a period or periods exceeding twenty four (24) months prior to the lodgement of the application in terms of this RFA and remains such for the life of any licence issued in respect of this RFA'.

c) Under the heading 'Corporate Structure', was the following provision: 'A Bingo Operation must be owned by at least 60% local PDIs. All local PDIs shall be citizens of the Republic of South Africa and shall reside in the North West Province.'

For purposes of this matter, the RFA for a Limited Payout Machine contained identical provisions.

[3] The licences issued pursuant to the 2009 RFA all contained a requirement that at least 60 percent of the shareholding in a company with a licence must be held by local PDIs (the local PDI requirement). In addition, 50 percent of the boards of directors of the licenced entities were required to be made up of local PDIs who had to be involved in management.

[4] The licences were renewed annually, as is required under s 41 of the Act. The local PDI requirement has formed part of each renewed licence. In 2015 the Board issued a further Request for Applications (the 2015 RFA) in which the local PDI requirement was retained.

[5] Goldrush said that when the licensee companies began to operate, it experienced difficulty in persuading the local PDI shareholders to make their agreed financial contributions to running the licensee companies. As a consequence, it said, the licensee companies operated at a loss for at least the first three years during which Goldrush incurred the running expenses. This led to tensions between Goldrush and the local PDI shareholders. Attempts to mediate the disputes failed. In 2013, after restructuring, Goldrush became a 40 percent shareholder in all of the licensee companies.

[6] In 2018, the Greater Rustenburg Community Foundation, a Non-Governmental Organisation which was one of the local PDI shareholders in the licensee companies, wished to dispose of its approximately 4 percent shareholdings to a competitor. Goldrush exercised its pre-emptive right under the shareholders' agreements governing the licensee companies and purchased those shares. This resulted in Goldrush holding between 43.45 and 44 percent of the shares. The local PDI requirement was accordingly no longer met since the shareholding of local PDIs fell below the specified 60 percent.

[7] Goldrush informed the Board of these acquisitions on 10 September 2018. This prompted a response from the Board pointing out that the sale had resulted in a contravention of the local PDI requirement. It accordingly invited Goldrush to

‘revisit your stance’. The attorneys for Goldrush responded, asserting that the local PDI requirement was ‘invalid and unenforceable’. They elaborated:

‘The requirements and conditions imposed in these provisions go well beyond what is provided for in the legislation governing Broad-Based Black Economic Empowerment and the Codes of Good Practice on Broad-Based Black Economic Empowerment published on 11 October 2013. The Board does not have the authority to apply higher black ownership targets than those set out in the B-BBEE Codes or impose criteria requiring shareholders to reside in a particular province or locality.

Goldrush accordingly respectfully declines your invitation to revisit its transaction. We request you reconsider your position to the acquisition taking into consideration what we have said above.’

The Board reminded Goldrush that, in the RFA, the licensee companies had committed to ensure that 60 percent of their shareholdings would be made up of local PDIs and that since then their licence conditions had echoed that requirement. It demanded that Goldrush ensure that the licensee companies comply. Thus were the battle lines drawn.

[8] An internal review of that decision was launched under s 90 of the Act. After the Board failed to comply with the requisite time limits, it emerged that the management of the Board, and not the Board itself, had taken the decision. That decision therefore did not meet the criteria for an internal review. When this became clear, the internal review was not persisted in.

[9] The licences were due to expire on 31 March 2019. The licensee companies applied to renew their licences. In the annual renewal process, the Board proposed the reimposition of the local PDI requirement. Goldrush objected. At its meeting of 28 March 2019, the Board decided not to renew their licences. The reason given was that they had ‘contravened [the local PDI requirement] and the RFA’ when the

local PDI shareholding fell below 60 percent. The decision was conveyed to Goldrush on 29 March 2019, two days before the new licensing period commenced. The effect of this was that the licensee companies had to cease operations two days later.

[10] Goldrush caused the licensee companies to approach the High Court for urgent relief. The first part sought to permit them to continue operating pending the finalisation of the second part. The latter involved a review of the decision of the Board refusing to renew the licences. This second part would have had to be preceded by an internal review by the Tribunal before being determined by the court. Instead of finalising that application, agreement was reached that:

- a) the Board would renew the licences.
- b) the licensee companies would comply with the local PDI requirement by complying with the 60 percent local PDI requirement within 60 days, failing which the licences would be cancelled. This was embodied in a consent order of 18 April 2019;
- c) the High Court could be approached directly.

[11] There was no consensus in the papers as to what was envisaged by this last provision. Goldrush contended that the High Court could be approached for a declarator as to whether the local PDI requirement could lawfully be imposed by the Board. On the other hand, the Board understood that it meant only that the licensee companies could approach the High Court to review the decision of the Board without first complying with the internal review procedure. What was common cause is that neither the licensee companies nor the Board would have accepted any adverse decision of the Tribunal. As such, following the procedure for internal review would simply have delayed the inevitable determination by the High Court.

[12] Goldrush then approached the North West Division of the High Court, Mahikeng (the high court), for the following order:

‘1. It is declared that the imposition by the First Respondent of conditions on licences issued in terms of the North West Gambling Act 2 of 2000 requiring the licensee to ensure that all times during the subsistence of the licence, at least 60 percent equity ownership in the licensed entity is held by Previously Disadvantaged Individuals who reside in the North West Province is unlawful and invalid.

2. The First Respondent and Second Respondent are directed to pay the costs of the application.’

The application was opposed by the first and seventh respondents and was dismissed with costs by Snyman AJ. This appeal is with her leave.

[13] The Board opposed the application on a number of grounds. These included that:

a) Goldrush had no *locus standi* to seek the relief in question. Any application should have been brought by the licensee companies.

b) There was a fatal non-joinder of other companies holding licences.

c) The application for a declarator was inappropriate in the circumstances. A review application should have been brought.

d) There was an unreasonable delay in bringing the application since the local PDI requirement had formed part of the 2009 RFA and had been embodied in the licences in 2009 and in all the following years.

e) There was no basis for the contention of Goldrush that the local PDI requirement could not lawfully be imposed by the Board in the light of the B-BBEE legislation.

[14] The issue of *locus standi* is generally decided without reference to the merits. As Hoexter and Penfold put it:

‘In common with the doctrines of ripeness and mootness, the question of standing is traditionally a liminal enquiry divorced from the substance of the case.’¹

This is because, as explained in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*,² quoting with approval what was said in *Wade Administrative Law*:³

‘The truth of the matter is that the Court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances.’⁴

The Constitutional Court has fashioned an exception to the separation of standing from the merits of a matter in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others*:⁵

‘[T]he interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest.’⁶

[15] How this enquiry is to be approached lacks clarity as explained by Hoexter and Penfold, in their treating of *Giant Concerts*:

‘Later in the judgment the court added as an apparent afterthought that when a party has no standing, “it is not necessary to consider the merits, unless there is at least a strong indication of fraud or other gross irregularity in the conduct of a public body”.’⁷

¹ Hoexter and Penfold *Administrative Law in South Africa* 3 ed (2021) at 676.

² *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; 2004 (6) SA 222 (SCA); [2004] 3 All SA 1 (SCA).

³ *Wade Administrative Law* 7th ed (by H W R Wade and Christopher Forsyth) at 342-4.

⁴ *Oudekraal Estates* para 28.

⁵ *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* [2012] ZACC 28; 2013 (3) BCLR 251 (CC).

⁶ *Ibid* para 34.

⁷ Hoexter and Penfold at 677. Their emphasis, quoting from *Giant Concerts* para 58.

As they point out, the Constitutional Court itself seems to have adopted divergent approaches to these dicta.⁸ In *Tulip Diamonds FZE v Minister for Justice and Constitutional Development*,⁹ Van der Westhuizen J understood the exception as limiting the *locus standi* enquiry to whether fraud or gross irregularity had been shown once he concluded that own-interest standing was lacking. And in *Areva NP Incorporated in France v Eskom Holdings SOC Ltd*,¹⁰ Zondo J, for the majority, said that a court ‘should only enter the merits in exceptional cases or where the public interest really cries out for that’.¹¹ On the other hand, the minority in *Areva* saw it as in the public interest to look into the lawfulness of conduct of a state-owned entity where vast sums of money would result from the award of a tender. It seems to me that *Tulip Diamonds* and the majority view in *Areva* binds this Court. As such, if own-interest standing is lacking, that will determine the present matter without entering the merits. This is because there is no averment, let alone any indication, that fraud or gross irregularity attends on the conduct of the Board.

[16] Before us, counsel for Goldrush simply submitted that, because it was a shareholder whose ability to deal with its shareholding was circumscribed by the local PDI requirement, it had standing. The submission in its heads of argument was likewise terse in the extreme:

‘Goldrush is a shareholder in each of the licensee companies. It plainly has a direct and substantial interest in determining the legality of the continued imposition of a requirement that limits that shareholding to 40 percent and that imposes criteria prescribing the identity of its fellow shareholders. Its interests or potential interests are accordingly directly affected by the unlawfulness sought to be impugned.’

⁸ Ibid at 677-9.

⁹ *Tulip Diamonds FZE v Minister for Justice and Constitutional Development* [2013] ZACC 19; 2013 (10) BCLR 1180 (CC); 2013 (2) SACR 443 (CC).

¹⁰ *Areva NP Incorporated in France v Eskom Holdings SOC Ltd and Others* [2016] ZACC 51; 2017 (6) SA 621 (CC); 2017 (6) BCLR 675 (CC).

¹¹ Ibid para 41.

Counsel for Goldrush was invited to provide authority for the contention that, in circumstances such as this, being a shareholder in the licensee companies clothed it with the requisite *locus standi*. He was unable to provide any. In the heads of argument, reliance was placed on the matter of *Giant Concerts*.

[17] In that matter, Giant Concerts CC (Giant) had got wind of the intention of a municipality to sell immovable property by private treaty to Rinaldo Investments (Pty) Ltd (Rinaldo). Giant approached the municipality, saying that it wished to purchase the property. The municipality met with Giant who claimed that it would use the property for the same purpose and pay a higher price but refused to name its price or reveal to the municipality its plans for utilising the property. Not satisfied with this, the municipality concluded the envisaged agreement with Rinaldo. Aggrieved by this decision, Giant approached the High Court to set aside the sale. It succeeded but that decision was reversed on appeal by this Court on the basis that Giant lacked *locus standi*.

[18] The Constitutional Court held that this was an own-interest application as envisaged under s 38(a) of the Constitution which provides:

‘Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

(a) anyone acting in their own interest.’

The question, accordingly, was whether Giant had standing on that basis.

[19] The Constitutional Court accepted the correctness of the approach of this Court in *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*,¹² saying:

“[A]dversely affects” in the definition of administrative action was probably intended to convey that administrative action is action that has the capacity to affect legal rights, and that impacts directly and immediately on individuals. The effect of this is that Giant, as an own-interest litigant, had to show that the decisions it seeks to attack had the capacity to affect its own legal rights or its interests.¹³

It was clear that Giant’s sole interest was commercial. The Constitutional Court held:

‘[Where] a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. Something more must be shown.’¹⁴

After reviewing the relevant case law, the Constitutional Court summarised the approach to be taken to own-interest standing in constitutional matters:

‘[C]onstitutional own-interest standing is broader than the traditional common law standing, but . . . a litigant must nevertheless show that his or her rights or interests are directly affected by the challenged law or conduct. The authorities show:

- (a) To establish own-interest standing under the Constitution a litigant need not show the same “sufficient, personal and direct interest” that the common law requires, but must still show that a contested law or decision directly affects his or her rights or interests, or potential rights or interests.
- (b) This requirement must be generously and broadly interpreted to accord with constitutional goals.
- (c) The interest must, however, be real and not hypothetical or academic.
- (d) Even under the requirements for common law standing, the interest need not be capable of monetary valuation, but in a challenge to legislation purely financial self-interest may not be enough - the interests of justice must also favour affording standing.

¹² *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* [2005] ZASCA 43; 2005 (6) SA 313 (SCA); [2005] 3 All SA 33 (SCA) para 23.

¹³ *Giant Concerts* para 30.

¹⁴ *Ibid* para 35.

(e) Standing is not a technical or strictly-defined concept. And there is no magical formula for conferring it. It is a tool a court employs to determine whether a litigant is entitled to claim its time, and to put the opposing litigant to trouble.

(f) Each case depends on its own facts. There can be no general rule covering all cases. In each case, an applicant must show that he or she has the necessary interest in an infringement or a threatened infringement. And here a measure of pragmatism is needed.¹⁵

The Constitutional Court concluded that Giant lacked standing, even given the broad approach articulated above.

[20] The approach to a consideration of own-interest standing is that the challenge made by Goldrush must be accepted as being justified.¹⁶ It is clear that, at best for Goldrush, its interest is purely financial. It seems to me that, as a result, part of item (d) of the summary of the Constitutional Court in *Giant Concerts* predominates in the present matter:

‘[P]urely financial self-interest may not be enough - the interests of justice must also favour affording standing.’

Even accepting, therefore, that the financial interest asserted by Goldrush might be ‘directly affected by the unlawfulness sought to be impugned’, it is necessary for the interests of justice to tip the scales in favour of Goldrush for it to have *locus standi*.

[21] It was necessary for Goldrush to establish that it had the requisite standing. Despite this, and having relied on *Giant Concerts*, it neither provided focussed evidence or made any submissions concerning the interests of justice. Not only that, but, tellingly, the seventh respondent opposed the application. In its answering affidavit it claimed that the application was ‘launched *mala fide* in an attempt to

¹⁵ Ibid para 41. References omitted.

¹⁶ *Giant Concerts* para 32; *Ritz Hotel Ltd v Charles of the Ritz and Another* 1988 (3) SA 290 (a) at 307H-I; *Jacobs en ‘n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 536A-B.

serve [Goldrush's] own interest.' This assertion was met with a deafening silence, despite the replying affidavit employing four paragraphs to address the averments in the relevant paragraph of the answering affidavit embodying that claim. This was a clear invitation to Goldrush to advance any other interests which the application sought to promote. The invitation to do so was unfortunately declined.

[22] If something other than financial self-interest is required, the result of a complete lack of averments or argument dealing with the broader interests of justice has the result that Goldrush failed to make out a case for its standing. But leaving aside the lack of direct evidence or submissions, on a conspectus of the papers themselves, I take the view that no such case emerges. There are a number of reasons for this conclusion.

[23] Firstly, there is no explanation in the papers why, after the urgent application by the licensee companies resulted in the agreement, it was not they who pursued the present application. In fact, it seems that Goldrush considered that it represented the licensee companies in bringing the application. I say this because at least two passages in the founding papers suggest a conflation of the identities of Goldrush and the licensee companies:

- 'a) As per the agreement with the Board, Goldrush and the licensee companies do not seek the internal review of the decision of 29 March 2019, but have rather agreed that the High Court be approached directly to seek a declarator as to the lawfulness of the local PDI requirement.
- b) There is a live dispute between Goldrush, the licensee companies and the Board as regards the legality of the local PDI shareholding requirement.'

The irony of these submissions is that the licensee companies nowhere indicated any support for the present application or the contention that the local PDI requirement is unlawful and not binding on them. On the contrary, at least the

seventh respondent, a local PDI shareholder, opposed it. Far from citing them as co-applicants, Goldrush joined the licensee companies and the local PDI shareholders as respondents.

[24] Secondly, it was conceded by counsel for Goldrush that the licensee companies would have had *locus standi* to seek the relief. This concession was correctly made. After all, it is they who are subject to the local PDI requirement and whose licence renewals were put at risk by Goldrush for non-compliance. The scheme of the Act makes it clear that the relationship created by the grant of a licence is one between the Board and the licensee. There is no legal relationship between a shareholder of a company holding a licence and the Board. Goldrush seems to have appreciated this at the time in citing the licensee companies as the applicants in the urgent application and not itself participating as a party.

[25] Thirdly, the relief sought will affect all licence holders in the province. One has no idea of the attitude of any licence holders other than the licensee companies. It is so, however, that, as the Board submitted, the effect of Goldrush succeeding would, as it were, meddle in the legal relationship between the Board and all of the licensees. I am minded that this primarily bears on the question of joinder, on which I express no view. However, it is also a factor which has a bearing on whether the interests of justice would be served in according standing to Goldrush in this matter.

[26] A final consideration is that Goldrush asserted that it had accepted the provisions in the RFA concerning local PDIs 'on the assumption that the local persons/entities it would partner with would work closely with Goldrush to build the business and would fairly meet their commitments as shareholders to contribute

financially and to the productivity of the operations of the companies. Unfortunately, this did not materialise, as explained hereunder.’ But, as was pointed out by counsel for the Board, Goldrush had a right to invoke the provisions of s 163 of the Companies Act 71 of 2008 if it felt that the majority shareholders were engaging in oppressive conduct.

[27] This Court has recognised the standing of shareholders in certain matters. Although not drawn to our attention, in *Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd and Others*,¹⁷ the principle has been established that a shareholder is entitled to accurate information from the board of a company concerning a proposal to be put to shareholders at a general meeting of the company. As a result, shareholders were held by this Court to have *locus standi* to apply for an interdict preventing a meeting from proceeding when the information to be placed before that meeting in support of a resolution to ratify an agreement concluded by the company was inaccurate and misleading. As will be appreciated, however, this clearly does not provide authority for the contention of Goldrush in the present matter.

[28] All of this means that Goldrush is left with an attempt to found standing on the fact that it has a purely financial interest in the relief sought. There is no basis on which to find that this is one of those exceptional cases where the public interest cries out for a court to enter into the merits of the matter. The result is that the substantive issues aired in the application do not arise for consideration. Despite the high court having dealt with the matter differently, the order granted by it

¹⁷ *Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd and Others* [2008] ZASCA 158; 2009 (4) SA 89 (SCA); [2009] 2 All SA 449 (SCA).

cannot be assailed. The appeal must be dismissed and that order must stand. The costs should follow the result.

[29] In the result, the appeal is dismissed with costs.

T R GORVEN
JUDGE OF APPEAL

Appearances

For appellant: B Roux SC (with him I B Currie)
Instructed by: Cliffe Dekker Hofmeyr Incorporated, Johannesburg
Noordmans Attorneys, Bloemfontein

For first respondent: M P Van der Merwe SC
Instructed by: M E Tlou Attorneys and Associates, Mahikeng
Bezuidenhouts Incorporated, Bloemfontein