THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 470/06
NOT REPORTABLE

In the matter between:

KWAZULU CMS MONITORING SYSTEMS (PTY) LTD APPELLANT

v

KWAZULU-NATAL GAMBLING BOARD FIRST RESPONDENT
PROFESSOR S V NZIMANDE SECOND RESPONDENT
THE PREMIER OF KWAZULU-NATAL THIRD RESPONDENT
THE NATIONAL GAMBLING BOARD
OF SOUTH AFRICA FOURTH RESPONDENT
THE MINISTER OF TRADE AND INDUSTRY FIFTH RESPONDENT

Coram: Navsa, Jafta, Cachalia JJA, Malan et Mhlantla AJJA

Heard: 20 September 2007

Delivered: 28 September 2007

Summary: Regulation 156(8), PN 1087 PG, 7 November 2003, promulgated under s 87 of the Kwazulu-Natal Gambling Act 10 of 1996 provides for a single central electronic monitoring system for the Province – the Provincial Gambling Board had authority to contract for the procurement of the system.

Neutral citation: This judgment may be referred to as *KwaZulu CMS Monitoring Systems v KZN Gambling Board* [2007] SCA 131 (RSA).

JUDGMENT

CACHALIA JA

[1] Pursuant to a public tender process the appellant concluded a contract with the first respondent, hereafter referred to as the Board, for the provision of a central electronic monitoring system (CEMS) designed to receive and send data to and from gaming machines. Its function was to monitor the operation of some 5 000 gaming machines that were to be located at sites throughout the KwaZulu-Natal Province. Shortly after the contract's conclusion in March 2004 the Board allegedly repudiated it. This caused the appellant to institute a damages claim against the Board and the second respondent in the Pietermaritzburg High Court. When the matter came before Levinsohn DJP he separated one issue for determination in terms of rule 33(4) of the Uniform Rules of Court. This was whether the Board had the statutory authority to conclude the contract. He decided not, but granted leave to this court.

[2] The dispute concerns the proper interpretation of reg 156(8), PN 1087, 2003 of the regulations promulgated under s 87 of the Kwazulu-Natal Gambling Act 10 of 1996 (the Act). At the time of the contract's conclusion it read as follows:

'The electronic monitoring system referred to in this regulation shall be a single one operated by the Province or entity contracted by the Province which shall have no other interest in respect of gaming in the Province.'

The crisp question is whether the regulation's reference to the words 'the Province or entity contracted by the Province' denotes the Province's executive, as the respondents contend, or a significant entity within the 'Province of Kwazulu-Natal', which is the appellant's case. If the former interpretation is correct, it means that only the provincial executive was authorised to contract for the provision of a CEMS. If, however, the latter interpretation prevails it would accord with the appellant's contention that the authority to conclude the

contract vested in the Board. To better understand the parties' contentions it is necessary to examine reg 156(8) in its statutory context and against the background of its promulgation.

[3] The Act's long title states its purpose as inter alia 'to provide for restrictions on gambling, the establishment of a Provincial Gambling Board, the licensing of persons conducting casinos and bingo games and of gaming machine operators . . . .' The Board has two objects. First, to 'ensure that all gambling authorised under this Act is conducted in a manner which promotes the integrity of the gambling industry and does not cause harm to the public interest (s 6(1)(a)). The second object is to promote the Board's objectives in relation to the Province's gambling industry. In order to give effect to this object the Board must within six months of its first meeting refer to the Premier a macro-plan for the licensing of route and site operators, which inter alia, will specify the number of gaming machines to be operated in the Province, the types of premises on which they should be permitted and any other matter which the Premier directs the Board to take into account (s 6(2)).[1]

[4] The 'Minister', defined in s 1 of the Act as the Member of the Executive Council or the Premier, is responsible for the administration of the gambling portfolio in the Province. It will be convenient hereafter to refer only to 'the Premier'. Section 5 of the Act establishes the Board whose members the Premier appoints, in consultation with the cabinet and after consulting the Provincial Legislature's Portfolio Committee (see s 8). To be eligible for appointment to the Board, persons must comply with strict criteria (s 8). Board members hold positions of public trust and the Board's 'independence and integrity' is of paramount importance (s 17(1)). The Act disqualifies from appointment public servants, political office bearers and persons who have a

[1]Brand H *The Gambling Laws of South Africa* p 5-7.

financial interest in any gambling activity (s 9(1)). The Board's powers and functions derive from s 7 of the Act. They are extensive and include licensing, regulating and controlling gambling activities in the Province (s 7(1)(bA)). It also has the responsibility 'to determine norms and standards for . . . gaming machines' whenever there are no national norms and standards (s 7(1)(o). The Board exercises its powers and performs its functions independently.

[5] Chapter 5 of the Act deals with gaming machines. It provides that no person is entitled to maintain premises where gaming machines are operated unless in possession of a licence. There are three categories of licences appropriate to gaming machines. First, gaming machines in casinos, second, those in bingo halls and third, those which 'route operators' supply and maintain on premises outside casinos and bingo halls operated by 'site operators' (s 51).[2] This matter concerns gaming machines, in the third category, which are referred to as limited payout machines (LPM's).

[6] Section 54 requires that 'every gaming machine that is authorised by the Board for use on licensed premises shall be connected to the prescribed electronic monitoring system'. This includes the LPM's we are concerned with. The Act does not specify who or which entity is responsible for the CEMS's establishment. But s 87(1)(k) gives the Premier the power to make regulations regarding 'any matter applicable to the electronic monitoring system'.

[7] The regulations prescribing the operation of the CEMS were initially promulgated as part of the 'gambling regulations', PN 274, 1998, PG 5301, 23 September 1998. Casinos, bingo halls and site operated LPM's were dealt with respectively in regs 58, 210 and 156. The three regulations were, with the

[2]Section 1 defines a 'route operator' as 'a person who is licensed in terms of this Act to provide gaming machines to site operators and to conduct any other prescribed activities'; a 'site operator' is defined as 'a person who is authorised to keep gaming machines on his or her premises in terms of a licence issued in accordance with this Act'.

necessary changes as the context requires, exactly the same in their terms. Regulation 156(1) provided that the CEMS that s 54 contemplates shall be any monitoring and control system which –

‘(a) communicates directly, without using hard wires, with the motherboard of every limited payout machine connected to such system;

(b) is able to communicate with the Board’s monitoring and control system through a protocol determined by the Board; and

(c) is certified by the South African Bureau of Standards as complying with the standard referred to as South African Bureau of Standards 1718-3: 1996 Gaming Equipment Part 3: Monitoring and Control systems for gaming equipment and which the Board approves for use in the Province’ (My emphasis).

[8] Regulations 156(2) and (3) prescribed, in detail, the nature of the data and information that the CEMS was required to provide to the Board, including information on certain revenue transactions, ‘significant events’

and any other information that the Board may have required.[3] Regulation 156(4) imposed an obligation on route operators to store the information specified in sub-regulation (3) for a period of five years in addition to other information which the Board may have required. Regulation 156(5) imposed upon the Board an obligation to 'prescribe a common protocol to facilitate communication between the Board and the route operator's monitoring and control system . . . .' The route operator was required, in terms of reg 156(6), to connect all LPM's to his or her monitoring and control system (which the Board had approved). Regulation 156(7) made it an offence for any person to 'modify or alter' the CEMS without the Board's approval.

[9] In promulgating the regulations dealing with the licensing of route and site operators, including reg 156, the Premier gave effect to the Board's 'Macro-Plan for the Licensing of Route and Site Operators', mentioned earlier, which he had published in PN 33, PG 5227, on 15 September 1997. Clause 36 of the plan envisaged that operators would be permitted a system of their choice subject to its ability to communicate with the Board's 'monitoring and control system', which could only have meant the CEMS. The system was to have

---

[3] '156 (2) The monitoring and control system contemplated in subregulation (1) of this regulation shall provide either –

(a) on-line, real-time monitoring and data acquisition capability in the format and media approved by the Board;

(b) dial-up monitoring and data acquisition capability in the format and media approved by the Board; or

(c) such other monitoring and data acquisition capability as the Board may determine in the conditions of licence.

(3) The monitoring system referred to in subregulation (1) of this regulation shall be designed and operated to perform and report functions relating to gaming machine meters and other functions in such a manner that it –

(a) records the number and total value of tokens or coins placed in each gaming machine for the purpose of activating play;

(b) records the number and total value of tokens or coins deposited in the drop box of each gaming machine;

(c) records the number and total value of tokens or coins automatically paid out by each gaming machine;

(d) records the number and total value of tokens or coins to be paid manually;

(e) identifies any machine taken off-line or placed on-line of the computer monitor system, including the date, time and machine identification number;

(f) is capable of reporting any revenue transactions not directly monitored by token or coin meter, such as but not limited to tokens and coins placed in the machine as a result of a hopper fill;

(g) identifies any significant events, which the Board may require from time to time, and as may be defined in the South African Bureau of Standards standard referred to in subregulation (1) of this regulation; and

(h) records any other information as the Board may, from time to time, require.'

operated as a single integrated one which, according to Mr Mafayela who testified for the appellant in the High Court, would have been able to transmit information from each LPM to a central site, linked to the Board.

[10] In its analysis of reg 156 the court below observed that

'Regulation 156(1)(b) speaks of the electronic monitoring system contemplated by section 54 of the Act being able to "communicate with the Board's monitoring control system through a protocol determined by the Board". That connotes in my view a relationship between the first-mentioned system and the (Board's)'.

The court then made reference to sub-regulations 2, 3 and 6, and accepted that there were two systems, the CEMS and the Board's, and that the Board's role was confined to determining 'standards and criteria' for the CEMS; it was not authorised to contract for the CEMS.

[11] As I have mentioned, the CEMS was envisaged as a single, integrated system, which had to comply with the standards and criteria that the Board determined. The Board's role was clearly not limited only to setting standards and criteria for the CEMS. It is apparent that reg 156, at least before its amendment by the addition of reg 156(8), envisaged that the CEMS would provide a wide range of data and information to the Board to enable it to monitor each LPM. There is no suggestion in regs 156(1) to 156(7) that the Premier had any such function. Thus, as the recipient of the data and information from the CEMS, it was the Board's responsibility, not the Premier's, to approve the operation of the CEMS (s 156(1)(c)). The Premier's responsibility was limited to prescribing by regulation its operation. Furthermore, if the Premier was responsible for establishing and operating the CEMS, reg 156(7) would have made alteration or modification of the system

without the *Premier's* approval (not 'the Board's' as the regulation read) an offence. It is therefore, at the very least, implicit in the Act, read with regs 156(1) to 156(7) that the Board was authorised to procure the CEMS.

[12] Before I deal with reg 156(8), which the respondents contend conferred on the provincial executive the authority to procure the CEMS, it is necessary to examine reg 58(8), which amended reg 58. This will place the interpretation of reg 156(8) in its proper historical context.

[13] Regulation 58 (which dealt with gaming machines in casinos) was amended in PN 38, 11 February 2000, by the addition of reg 58(8). The amendment was introduced in the context of a jurisdictional dispute over whether the Board had the power to establish its own provincial CEMS, or whether the National Gambling Board should establish a single national CEMS to which all provincial monitoring and control systems would be linked. The dispute reached the Constitutional Court[4] where the National Board sought a declaration that there may only be a single national CEMS. It also sought an interdict to restrain the Premier and the Board from establishing a provincial CEMS. The Minister of Trade and Industry, who is responsible for the administration of the National Gambling Act, was also cited as a respondent, but he filed an affidavit supporting the relief claimed. The court dismissed the application, without considering the merits of the dispute.

[14] Regulation 58(8) asserted emphatically that the Province had the authority to establish the CEMS.[5] It did not deal with who or which provincial

[4] *National Gambling Board v Premier, KwaZulu-Natal* 2002 (2) SA 715 (CC) paras 5-10.
[5] Id para 34.

entity was authorised to contract for the CEMS, and was not intended to. The reason is obvious; the Premier assumed that the Board had the authority. It is clear from the Constitutional Court judgment that he acknowledged this, and the matter was argued on this basis.[6] Likewise it must be accepted that by amending reg 156 with the addition of reg 156(8) on 7 November 2003,[7] when the jurisdictional dispute had as yet not been resolved, the Premier intended to assert, as he had done when he amended reg 58(8), that there would be a *single* CEMS for site operated LPM's in the *Province*.[8]

[15] The fact that the April 2004 elections changed the provincial executive's political composition is, I think, also germane to understanding reg 156(8)'s genesis. The provincial executive now fell under the political control of the same party that controlled the national government. Shortly after the elections the Board repudiated the contract. Later, the newly elected Premier amended the regulations yet again, to achieve the opposite result his predecessor had; he made unequivocal provision for a national CEMS to be established by the National Board. Regulation 156 was substituted with a new regulation and now reads as follows:

'The electronic monitoring system for limited payout machines contemplated by section 54 of the Act shall be the national central electronic monitoring system established and monitored by the National Gambling Board in terms of section 27 of the National Gambling Act 7 of 2004'.[9]

---

[6]Id para 25.
[7]PN 1087, 2003.
[8] When first promulgated on 23 September 1998 reg 58 dealt with the CEMS in casinos, reg 209 with bingo equipment, reg 210 with LPM's inside bingo halls and reg 156 with LPM's outside bingo halls and casinos. Regulation 58(8) was then amended on 11 February 2000, but not regs 209, 210 and 156. This was apparently an oversight because it left the other LPM's out of the loop. On 7 November 2003 reg 58(8) was amended to read as follows:
'(8) The electronic monitoring system referred to in this regulation and regulations 209 and 210 shall be a single one operated by the Province or entity contracted by the Province which shall have no other interest in respect of gaming in the Province'.
Regulation 156 was similarly amended by the addition of reg 156 (8).
[9] PN 1241, 2005.

Regulation 210 (which deals with gaming machines in bingo halls) was similarly amended. What is significant about the latest amendment is that the Premier again accepted, albeit more explicitly, that the authority to establish a CEMS lay with an *independent board*, not with a political authority.

[16] It is in this context and against this background that reg 156(8) must be interpreted. The court below concluded that the regulation conferred on the provincial executive the power to operate the CEMS. In arriving at this conclusion he reasoned that

'. . . (t)he Minister . . . expressly legislates that the electronic monitoring system which is referred to in regulation 156(1) to 156(7) inclusive will be operated by "the province" or "entity" contracted by the province. In my view the intention was clear. Throughout regulation 156 "the Board" is referred to. Now by amendment it is the province alternatively an entity contracted by it which operates the electronic monitoring system. The Minister, if he intended to could quite easily have used the word "Board" instead of "province".'

[17] I respectfully disagree with the learned judge's interpretation. The word 'Province' is defined in s 1 of the Act to mean the 'Province of Kwazulu-Natal'. There is, in my view, no cogent reason to depart from this meaning when interpreting the regulation. On the contrary, there is every reason not to. Indeed if it was intended to depart from this meaning, words indicating this departure would specifically have been used. In any event the learned judge's interpretation is, with respect, inconsistent with the scheme of the Act, which, for good reason, places the responsibility for gambling in the hands of an independent board, not a politician.

[18] Properly construed, I think, reg 156(8) meant that the *Province* of KwaZulu-Natal would have had its own CEMS, operated by the Board or any

significant entity in the Province contracted by the Board. The reference to the word ‘single’ in the regulation indicates, as I have mentioned, that the regulation was concerned with having a single CEMS for the Province, not two (national and provincial). This is the mischief that the regulation sought to address. It did not, and indeed could not, confer any power on the provincial executive which the Act did not give it. It follows that the appeal must succeed.

The following order is made. The appeal is upheld with costs including the costs consequent on the employment of two counsel.

The order of the court below is replaced with the following order:

‘It is declared that the Board was authorised to conclude the contract.’

A CACHALIA
JUDGE OF APPEAL

CONCUR:

NAVSA JA
JAFTA JA
MALAN AJA
MHLANTLA AJA