REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION (FUNCTIONING AS GAUTENG DIVISION,
PRETORIA – MBOMBELA CIRCUIT COURT)

CASE NO: 544/19

1. REPORTABLE: YES/ NO	
2. OF INTEREST TO OTHER JUDGES: YES/NO	
3. REVISED.	
.....	.....
DATE	SIGNATURE

In the matter between:

TSOGO SUN CASINO (PTY) LTD Applicant

(Registration no: 1995/012674/07)

and

THE APPEAL AUTHORITY OF MBOMBELA LOCAL MUNICIPALITY First Respondent

MBOMBELA LOCAL MUNICIPALITY Second Respondent

TARENTAAL CENTRE INVESTMENTS (PTY) LTD Third Respondent

(Registration no: 2005/000028/07)

VIVA BENCO MIDDELBURG (PTY) LTD Fourth Respondent

(Registration no: 2002/020177/07)

JUDGMENT

Roelofse AJ:

[1] The applicant (Tsogo) is the holder of a casino licence that entitles it to operate the Emnotweni Casino in Mbombela. The fourth respondent (VIVA), is the holder of a Bingo Operator Licence. This licence permits the fourth respondent to play the game of Bingo at a premises in Ermelo, Mpumalanga. VIVA made application to relocate the licence from Ermelo the Tarentaal Centre in Mbombela. The centre is owned by the third respondent (Tarentaal)

[2] During 2015, an application was made through VIVA by Tarentaal to the second respondent (MLM) for "special consent" for a "place of amusement" on the property in terms of the Nelspruit Town Planning Scheme. On 18 July 2018, MLM granted the special consent to Tarentaal in respect of Shops 11 and 14A at the Tarentaal Centre (*"the decision"*).

[3] Tsogo is aggrieved by MLM's decision. Tsogo lodged an appeal to the first respondent (the Authority). On 28 January 2019, the Authority dismissed Tsogo's appeal (*"the Authority's decision"*).

[4] On 19 February 2019, Tsogo launched an urgent application (*"the first application"*). The relief sought in the first application consisted of two parts - an urgent part (Part A) and a part to be prosecuted in the normal course (Part B). In Part A, Tsogo sought an interim interdict, operating with immediate effect, that would prevent VIVA from operating the bingo facility at the Tarentaal Centre pending finalization of Part B of the application (*"the interdict"*). Part B of the application is a review of the Authority's decision on grounds that are pertinently relevant for purposes of adjudicating Part B and which I deem it unnecessary to consider in this application.

[5] Part B of the Notice of Motion in the first application was to proceed as a usual Rule 53 review application. It required the Authority to submit to the registrar within fifteen days of service of the notice of the first application *inter alia,* the record that gave rise to the Authority's decision and the reasons therefore.

[6] All of the respondents received notice of the first application on 19 February 2019 and all of them delivered notices of intention to oppose same. The first, third and fourth respondents delivered answering affidavits.

[7] The first application was set down for hearing on 26 March 2019. The following order was made by His Lordship Mr Justice Strydom AJ (*"the order"*) on that day:

> *"By agreement by the parties the following orders are made:*
>
> *1. The relief sought in Part A is postponed sine die, subject to 2, 3 and 4 hereafter.*
>
> *2. The Part B relief will proceed as follows:*
>
> *2.1 The second respondent will file the record in the appeal proceedings by no later 1 April 2019;*
>
> *2.2 The applicant will supplement his founding affidavit by no later than 9 April 2019;*
>
> *2.3 The respondents will file their answering affidavits to the Part B relief by no later than 19 April 2019;*
>
> *2.4 The applicant will file its replying affidavit by no later than 1 May 2019;*
>
> *2.5 The applicant and the Respondents to file their heads of argument by no later than 6 May 2019; and*
>
> *2.6 The parties will jointly approach the Deputy Judge President for a special allocation of the hearing of the review, and will use their best efforts to ensure that the review is heard during the period 13 to 17 May 2019.*
>
> *3. Costs in the Part A relief will be reserved.*
>
> *4. The Third and Fourth Respondents undertake that they will not, pending*

the final determination of the review, commence with the operation of a Bingo facility at Portion 56 of the Farm Besters Last No. 311, registration division et, Mpumalanga Province."

[8] On 28 March 2019 and on 1 April 2019, MLM, in ostensive compliance with paragraph 2.1 of the order, delivered bundles of documents to Tsogo.

[9] 1 April 2019, Tsogo's attorneys informed the Authority's and MLM's attorneys, Messrs Mohulatsi Attorneys Inc. (Mohulatsi) that certain pages in the record were either omitted or that the record contained a numbering error (Annexure "AS2"). Nither the parties nor the record show any response to this letter.

[10] On 9 April 2019, at 12:00, Tsogo's attorneys transmitted a letter to Mohulatsi. In the letter, Tsogo informed the Authority that the documents delivered "*....falls short of what a record should comprise...*" and raise various issues over the manner in which the bundles were compiled, the irrelevance some documents included and the absence of some vital documents. In its letter, Tsogo also recorded "*....what was delivered on 28 March 2019 and 1 April 2019 does not comply with the legal requirements insofar as a record is concerned.*" (Paragraph 9 of Tsogo's attorneys' letter dated 9 August 2019 – Annexure "A1"). Tsogo sought an undertaking by 17:00 on 9 April 2019 that it would be provided with a fresh record rectifying the defects, *"....as a matter of urgency"*. This letter was transmitted to MLM's and the Authority's attorneys at 12:00.

[11] This application was served on the respondents at 16:35 on 9 April 2019 (i.e, later the same day the undertaking was sought and before the time afforded for the undertaking has arrived). I shall refer to this application as *"the main application"* where the need arises. In the main application, Tsogo seeks orders directing the Authority and MLM to supplement the record of proceedings previously filed including orders directing them to deliver certain specified documents and records. Tsogo also seeks the extension the periods agreed to and provided for in paragraphs 2.1 to 2.6 of the order. Tsogo seeks costs against the Authority and MLM on attorney and client scale.

[12] VIVA and Tarentaal launched a counter-application. They pray that the counter-application be heard on an urgent basis. In addition, they pray for the following orders:

> *"a* …….
>
> *b.* …….
>
> *c. A declaratory order that the order granted on the 26th March 2019 has lapsed.*
>
> *d. Alternatively that the Order dated the 26th March 2019 be set aside.*
>
> *e. Costs in the event that the relief sought is opposed.*
>
> *f.* ……."

[13] At the commencement of the proceedings in this application, counsel appearing for the Authority and MLM, presented a draft order to court. The draft order provided for an order that the Authority and MLM supplement the record delivered to include the documents referred to in paragraphs 2.1 to 2.10 of the Notice of Motion in this application, an extension of the periods provided for in paragraphs 2.1 to 2.6 of the order and that Tsogo could approach the court on the same papers, supplemented if necessary, for relief if the Authority and MLM fails to comply with the aforesaid draft orders. The counter-application and the issue of costs remained in contention.

[14] I exercised my discretion, having regard to the proper functioning of this court, and having regard to the effective ultimate resolution of the main dispute between the parties, to hear the main application and counter application on an urgent basis. The challenge raised by the applicant's counsel with regards to the urgency of the counter application has no force as the applicant required an urgent hearing for its relief and the issues in the counter application and the main application directly relate. Also, I find the Authority's and MLM's protestations over urgency to be without merit.

[15] In its founding papers, Tsogo alleges that the Authority and MLM have failed to comply with the order because they delivered a record that was "… *a compendium*

of irrelevant documents". Tsogo further alleges that: the matter is extremely urgent because of VIVA and Tarentaal's undertaking; it would be extremely prejudicial to VIVA and Tarentaal should the review not be finalised as soon as possible; and all the other processes and affidavits to be filed in the review application were dependent upon the Authority and MLM filing a complete record; that time is of the essence in order to expedite a hearing of the review since VIVA and Tarentaal may not commence with the operation of a Bingo facility at the property pending the review; if this application was brought in a normal course, it would not have been adjudicated by the time the parties "*... intend to have the review heard by this Court"*; and, Tsogo will be prejudiced if it is not able to supplement its founding papers as a result of the failure by the Authority and MLM to file the record.

[16] In their answering affidavit (deposed to by Mohalutsi), the Authority and MLM confirm that the parties agreed to the order. Mr. Mohlutsi explains the circumstances of the delivery of the record and the reasons why it is not complete. Nowhere do the Authority and MLM dispute that the record was incomplete. The Authority and MLM take issue with Tsogo's delay in waiting until 9 April 2019, the day upon which the applicant had to deliver its supplementary affidavit in terms of the order, to address the issues it did regarding the record. The Authority and MLM say that Tsogo's urgency was self-created.

[17] In opposition to the relief sought by Tsogo and in support of the relief sought by VIVA and Tarentaal in the counter application, they allege that the order has lapsed on the basis that it was subject to an *"... expedited appeal being heard ..."*, alternatively, that the order be set aside on the basis of either *justis error* or good cause, further alternatively, that the time periods suggested by Tsogo are not suitable.

[18] It is not in dispute that: the order came about through an agreement that was reached by the parties all of whom were represented before Strydom AJ; the parties requested that their agreement be made an order of court; the parties envisaged and wanted to accomplish an expedited hearing of the review; there was non-compliance with the provisions of paragraph 2.1 of the order; VIVA and Tarentaal is licenced to operate the bingo facility; after 1 June 2019 VIVA and Tarentaal are prejudiced by a delay in the finalization of the review while the interim interdict remains operative

(Paragraph 4 of the order);

[19] If the order has lapsed as VIA and Tarentaal contends, their first alternative defence becomes academic from their perspective as the interim interdict would no longer operate. In addition, and in the presence of the draft order that provides for a proper record to be furnished together with periods within which that must happen, the only issue that remains to be determined is whether or not the order has lapsed because of the Authority and MLM's failure to comply with paragraph 2.1 of the order.

[20] In order to answer the aforesaid query, the order must be interpreted. How this must be done was confirmed in **S.O.S Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (SOC) Limited and Others [2018] ZACC 37** where Kathree-Setiloane AJ, writing the unanimous judgment of the full court, at para. 52, said:

> *"Court orders are intended to provide effective relief and must be capable of achieving their intended purpose. That must be the starting point in interpreting a court order. The well-established principles governing the interpretation of a court order were expounded in Firestone and more recently endorsed in Eke: "The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention."* (Footnotes omitted)

[21] In **Eke v Parsons [2015] ZACC 30** at para. 30, MADLANGA J (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Molemela AJ and Tshiqi AJ concurring), said as follows:

> *"This is equally true of court orders following on settlement agreements, of course with a slant that is specific to orders of this nature:*

> *"The Court order in this case records an agreement of settlement and the basic principles of the interpretation of contracts need therefore be applied to ascertain the meaning of the agreement. . . .*
>
> *The intention of the parties is ascertained from the language used read in its contextual setting and in the light of admissible evidence. There are three classes of admissible evidence. Evidence of background facts is always admissible. These facts, matters probably present in the mind of the parties when they contracted, are part of the context and explain the 'genesis of the transaction' or its 'factual matrix'. Its aim is to put the Court 'in the armchair of the author(s)' of the document. Evidence of 'surrounding circumstances' is admissible only if a contextual interpretation fails to clear up an ambiguity or uncertainty. Evidence of what passed between the parties during the negotiations that preceded the conclusion of the agreement is admissible only in the case where evidence of the surrounding circumstances does not provide 'sufficient certainty'."* (Footnotes omitted.)

[22] I proceed to interpret the order by applying the aforesaid principles. In order to ascertain the meaning of the order, I read and consider the order as a whole. I accord a purposeful meaning to each word, paragraph and the entire order.

[23] Paragraph 1 of the order includes a specific reference to paragraphs 2 to 4 of the order. The reference to paragraphs 2 to 4 is preceded by the words "*....subject to…*". The only interpretation of the words "*subject to*", is that it is an adverb of the word "*postponed*". An adverb is a word or phrase that modifies or qualifies a verb, or adverb or a word group, expressing a relation of place, time, circumstance, manner, cause or degree. As an adverb, the words "…subject to…" means "…*Dependent or conditional upon…" (See: Oxford Living Dictionaries at: https://en.oxforddictionaries.com/definition/subject)* or "*….dependent on something else to happen or be true…" (See: The Mirriam-Webster Dictionary at: https://www.merriam-webster.com/dictionary/subject%20to).*

[24] In my view that only interpretation of the order is that this: The *lis,* constituted by the interdict (Part A), was temporarily settled between the parties through the agreement and the consequent order; the complete *lis* constituted in Part A includes VIVA and Tarentaal's right to operate the bingo facility at the premises and Tsogo's rights pending that challenge through the right of review; VIVA and Tarentaal relinquished their right to operate the bingo facility pending the review; and Part A

was settled dependent upon or conditional upon the speedy prosecution of the review facilitated through the orders in paragraphs 2.1 to 2.6.

[25] This interpretation is fortified by background facts which are not in dispute. Amongst these facts include: VIVA and Tarentaal voluntarily gave the undertaking with 1 June 2019 in mind; the undertaking prevents VIVA and Tarentaal from operating the bingo facility at the property; VIVA and Tarentaal's prejudice post 1 June 2019 when VIVA would have completed the preparation of the bingo premises; the urgency that exists to prosecute and finalize the review by virtue of the undertaking in paragraph 4 of the order; the review cannot be disposed of without the record; and, the agreement was reached and the order made in order to secure an expeditious hearing of the review.

[26] In my mind there is no ambiguity or uncertainty as to the meaning of the order. Therefore, I need not venture into the surrounding circumstances of the conclusion of the agreement.

[27] Paragraphs 2.1 to 2.6 and 4 imposes obligations upon each of the parties. The provisions of paragraph 2.1 of the order obliged the Authority and MLM to furnish the record by 1 April 2019. In light of the draft order proposed by the Authority and MLM's counsel together with the Authority's and MLM's denial of Tsogo's criticism to the record, I find that the Authority and MLM have failed to comply with paragraph 2.1 of the order.

[28] The effect of the Authority's and MLM's non-compliance with paragraph 2.1 of the order must be considered. I am mindful that: *"…. an expedited end to litigation may not only be in the parties' interest, it may also serve the interests of the administration of justice. This finds support at common law. Le Grange quotes Huber with approval:*

> *"A compromise once lawfully struck is very powerfully supported by the law, since nothing is more salutary than the settlement of lawsuits." (Footnotes omitted)* – See: **Elke**, para. 22

However, the agreement and order must be given effect to in accordance with its meaning. The purpose of the agreement and the order was clearly to settle Part A and to provide for an expeditious hearing of the review while safeguarding Tsogo's alleged interests in the interim through the undertaking subject to paragraphs 2.1 to 2.6 being complied with. Paragraph 2.1 was not complied with. The effect is that Part A is resurrected. With Part A resurrected, paragraph 4 cannot remain because that would be contrary to the parties' intention.

[29] In light of the aforesaid finding, it is not necessary to consider VIVA's and Tarentaal's *alternative* causes of action in the counter application. The time periods proposed in the draft order effectively extends the prosecution of the review with little more than a month. This is not substantial or unreasonable if the added advantage that Tsogo, through the proposed order, will be furnished with all the record it requires. It will serve no purpose to tie the parties down to too stringent time limits for the further prosecution of the review. This may be counterproductive as the effect of the order has demonstrated.

[30] Tsogo seeks costs on an attorney and client scale. VIVA and Tarentaal seeks costs if the relief in the counter application is opposed. Much is to be said over Tsogo's delay in properly and timeously challenging the record and its consequent delay in launching this application. Tsogo's demand for a hasted response leaves much to be desired. In my view, Tsogo is not entitled to costs. VIVA and Tarentaal must obviously have been acutely aware that the timeous furnishing of the record was pivotal to the parties complying with paragraphs 2.2 to 2.6 of the order. Yet they did nothing to enquire into or challenge the Authority's and MLM's remiss. For this I am going to deprive them of their costs in the main application. The Authority and MLM has, despite the service of the review application already on 19 February 2019, only attempted at furnishing the record in terms of the order. They are not entitled to any costs. VIVA and Tarentaal are substantially successful in the counter application. They are entitled to their costs.

[31] In the premises, I make the following order:

1. It is hereby declared that paragraphs 1 and 4 of the order of 26 March 2019

have lapsed and have no further effect.

2. Paragraphs 2 to 3.6 of the draft order attached hereto, marked "A", is hereby granted.
3. Each party shall pay their own costs in the main application.
4. The applicant, first- and second respondents are ordered to pay the third and fourth respondents' costs in the counter application jointly and severally, the one paying, the other to be absolved.

JH Roelofse AJ
Acting Judge of the High Court

APPEARANCES

FOR THE APPLICANT:	Adv Liversage SC, Instructed by Murray van Rensburg Incorporated
FOR THE FIRST AND SECOND RESPONDENTS:	Adv Manana, instructed by Mohulatsi Attorneys Inc.
FOR THE THIRD AND FORTH RESPONDENTS:	Adv Smit, instructed by Richard Spoor Attorneys
DATE OF HEARING:	12 April 2019
DAE OF JUDGMENT:	15 April 2019