IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 4426/2011P

In the matters between:

ALAN GRAY LIMITED	**First Applicant**
ALAN GRAY UNIT TRUST MANAGEMENT LIMITED	**Second Applicant**
ALAN GRAY LIFE LIMITED	**Third Applicant**
ALAN GRAY SOUTH AFRICA (PTY) LIMITED	**Fourth Applicant**

And

THE CHAIRPERSON OF THE KWAZULU-NATAL GAMBLING BOARD	**First Respondent**
KWAZULU-NATAL GAMBLING BOARD	**Second Respondent**
THE PREMIER, KWAZULU-NATAL PROVINCIAL GOVERNMENT	**Third Respondent**
AKANI MSUNDUZI (PTY) LIMITED	**Fourth Respondent**
CASINOS AUSTRIA INTERNATIONAL	**Fifth Respondent**
GOLD REEF RESORTS LIMITED	**Sixth Respondent**

JUDGEMENT

VAN ZYL, J.:-

[1] This application for review and declaratory orders concerns the disposal by the fifth respondent Casinos Austria International (Casinos Austria) of its shareholding in the sixth respondent Gold Reef Resorts Limited (GRR) and whether such disposal was within the ambit of and brought into operation the provisions of section 50 of the KwaZulu-Natal Gambling Act 10 of 1996 (the 1996 Act). The applicants contend that the disposal was not affected by section 50, while the first, second and third respondents contend that it was.

[2] Section 50 of the 1996 Act provided that:

> 50. Financial and controlling interests
>
> (1) A licensee shall not, without the consent of the Board, permit any other person to acquire a controlling interest or a financial interest of five percent (5%) or more in the business to which the licence relates.
>
> (2) When a licensee applies to the Board for its consent as contemplated in subsection (1), the provisions of sections 28 to 34 shall apply *mutatis mutandis* to the person who proposes to acquire a controlling interest or a financial interest of five percent (5%) or more in the business concerned.

[3] The 1996 Act did not define a "controlling interest" or a "financial interest", but a person was defined in section 1 as:

> "person" means a natural or juristic person or group of such persons unless the context shows a contrary intention;

[4] Sections 28 to 34 of the 1996 Act concerned the process and substance of applications, including the grounds upon which a person could be disqualified from being granted or holding a gambling licence, the nature and extent of investigations which the second respondent (the Board) was obliged or entitled to make in determining whether any manager of the business of a licensee, or any person who

has or seeks to acquire a controlling interest, or an interest of five percent (5%) or more in the business of the licensee, satisfies the relevant criteria. Also included were the procedures involved in the hearings of applications, the summoning of witnesses and the obligation of the Chief Executive Officer of the Board to provide reasons for decisions taken.

[5] Relevant to section 50 of the 1996 Act were Regulations 47 to 49 of the KwaZulu-Natal Gambling Regulations promulgated in terms of s87 of the 1996 Act. Regulation 47(1) cast upon the licensee the duty, upon becoming aware of the fact that a person or entity had directly or indirectly procured an interest as contemplated in section 50, immediately to fully inform the Board thereof. In addition, Regulation 47(2) required any person who directly or indirectly procured such an interest in a licensee, to apply to the Board for its consent in the prescribed form within fourteen (14) days.

[6] Regulation 48 and 49 provided, as follows:

> 48. Determination of suitability or unsuitability of an applicant
>
> (1) The Board may grant an application contemplated in regulation 47(3) subject to any condition or it may refuse an application.
>
> (2) Whenever the Board finds an applicant to be unsuitable to hold an interest in the business of a licensee, it shall refuse the application, in which event the applicant shall dispose of his or her interest in the licensee in the manner contemplated in regulation 49 of these regulations.
>
> (3) The Board may, at any time after having found an applicant suitable to hold an interest in the business of a licensee and after having given such owner the opportunity to be heard, find that he or she is no longer suitable to continue owning such an interest, in which event such owner shall dispose of his or her interest in the licensee in the manner contemplated in Regulation 49 of these regulations.
>
> (4) With effect from the date on which the Board serves notice on a person who has been found unsuitable in terms of sub-regulations (2) and (3) of this regulation, such person shall cease to exercise, directly or through any trustee or nominee, any voting right conferred by the ownership of his or her interest in the licensee.

> 49. Disposal of interest when applicant found unsuitable
>
> Whenever the Board finds an applicant unsuitable, it may –
>
> (a) Declare the agreement for the procurement of the relevant interest to be null and void;
>
> (b) Order the applicant to, within three months of the date of the Board's finding or such longer period as it may determine, dispose of the relevant interest for no more than the applicant paid for such interest, or such greater amount approved by the Board.

[7] The 1996 Act was repealed by section 150 read with Schedule 1 of the KwaZulu-Natal Gaming and Betting Act 8 of 2010 (the 2010 Act), which came into force with effect from 1 April 2011. However, s148 provided that the Board, as constituted in terms of the 1996 Act, would continue in existence until a date determined by the relevant Member of the Provincial Executive Council, whereafter it would be replaced by the new Board appointed in terms of the 2010 Act. Likewise, s150(a) of the 2010 Act provided that the Regulations in terms of the 1996 Act would continue in force until amended, repealed or revoked.

[8] There are, in certain respects, significant similarities between the 1996 and 2010 Acts. Thus section 54 of the 2010 Act was essentially similar to section 50 of the 1996 Act and provided that:

> 54. Financial and controlling interests
>
> (1) A licensee A licensee may not, without the consent of the Board, permit any other person to acquire a controlling interest or a financial interest of five percent or more in the business to which the licence relates.
>
> (2) When a licensee applies to the Board for its consent as contemplated in subsection (1), the provisions of sections 32, 33, 34, 35, 36, 37 and 38 apply, with the necessary changes, to the person who proposes to acquire a controlling interest or a financial interest of five percent or more in the business concerned.

[9] Sections 32 to 37 of the 2010 Act were also broadly similar to Sections 28 to 34 of the 1996 Act. However, the 2010 Act contained a definition of “Financial interest” corresponding with that of the National Gambling Act 7 of 2004, as follows:

> "financial interest" means –
>
> (a) a right or entitlement to share in profits or revenue;
>
> (b) a real right in respect of property of a company, corporation or business;
>
> (c) a real or personal right in property used by a company, corporation or business; or
>
> (d) a direct or indirect interest in the voting shares, or voting rights attached to shares, of a company or an interest in a close corporation;

[10] Against this background it becomes convenient to turn to the facts and events giving rise to the voluminous application papers in this matter. As indicated at the inception hereof, the predominant issue is whether the disposal by Casinos Austria of its twenty-comma six percent (20,6%) shares in GRR brought into operation the provisions of section 50 of the 1996 Act.

[11] It is common cause that the relevant licensee in this matter is Akani Msunduzi (Pty) limited (Akani), the fourth respondent in these proceedings. In the founding affidavit of the applicants and deposed to by Mr R W Dower in his capacity as the Chief Operating Officer of the first applicant Alan Gray Ltd (AG), it was explained that GRR holds various gaming licences throughout the Republic, one of which related to the Golden Horse Casino in Pietermaritzburg, KZN which is in the name of Akani, a wholly owned subsidiary of GRR.

[12] When the fact of the sale of Casinos Austria’s shares in GRR came to the notice of the Board, it raised the question of which person or persons, impliedly as defined in section1 of the 1996 Act, had acquired the shareholding in issue.

[13] Preliminary information available to the Board indicated that AG, or possibly one or more members of its group of entities, had purchased the shares from Casinos Austria. As a result thereof the Board sought to obtain clarity. Ultimately it appears that it took the view that section 50 of the 1996 Act found application and

unsuccessfully sought to compel compliance by demanding that an application for its consent be brought.

[14] Whilst the deliberations of the Board appear to have suffered from a degree of confusion, the real question remaining is whether, in law, the acquisition of the shareholding of Casinos Austria in GRR is hit by the provisions of section 50 of the 1996 Act.

[15] The applicants contend that the provisions of section 50(1) were not triggered. They asserted that on or about 21 May 2009 AG negotiated the purchase of twenty comma six (20,6%) percent of the issued share capital of GRR from Casinos Austria amounting to a total of 60,226,988 shares. It was explained that the Alan Gray Unit Trust (AGUT) the second applicant, Alan Gray Life (AG Life) the third applicant and Alan Gray South Africa Ltd (AGSA) the fourth Applicant had outsourced their investment management functions to AG.

[16] In paragraph 2 of a letter dated 21 October 2010 by AG to the Board and attached as annexure RD22 to the founding affidavit, the transaction was described as an opportunity to acquire the shares cheaper off market, presumably a reference to the Johannesburg Stock Exchange, due to the volume of shares involved. It was claimed to be a market related transaction between two parties, namely Casinos Austria as seller and AG acting on behalf of its clients as “purchasers”.

[17] The shares so acquired were then allocated to different entities within the AG group, such as AGUT, AG Life and AGSA, who in turn allocated shares to different clients or investors associated with those entities. In the result, so the applicants contend, neither AG, nor any of its associated entities, or indeed their individual clients or investors, acquired a holding of more than five percent (5%) of the shares in GRR.

[18] The applicants argued that none of the applicants, by virtue of acting as agents for their clients, acquired any shares of or a financial interest within the contemplation of section 50(1) of the 1996 Act in GRR, or its subsidiary Akani. In this regard emphasis was placed upon the fact that a financial interest was not defined in

the 1996 Act and insofar as it was defined in the 2010 Act, their involvement in the transaction did not fall within the definition of a financial interest in section 1 of the 2010 Act.

[19] The first three respondents, but effectively the Board as the second respondent and as applicant in the counter application, contend that the provisions of section 50 of the 1996 Act were triggered because the subject of the share transaction exceeded the five percent threshold of the shares of RCC, the holding company of Akani, the licensee. Furthermore, that the conclusion is to be drawn that AG acquired the shares in the first instance and that it is irrelevant for present purposes upon whom the individual shares thereafter devolved and who effected payment therefor.

[20] The primary object of the 1996 Act, as with the 2010 Act, as well as the National Gambling Act, is to regulate and control the gambling and gaming industries, in the case of the Board within the Province of KwaZulu-Natal. In order to do so a system of licences are involved and applicants for licences are to be vetted for suitability. Hence the Board was obliged and empowered in applicable instances to investigate and consider formal applications for authority to operate gambling or gaming licences. In addition to the suitability of a licensee to receive a licence, the Board also had oversight of existing licences and any change in the control, or a change of five percent or more in the shareholding of a licensee.

[21] The question then arises whether the Board was justified in adopting the attitude that a change in control of the holding company of a licensee company is the equivalent of a change in the control, or a change of five percent or more in the shareholding of a licensee itself. This issue is essentially a matter of law, so that the view adopted by the Board in this regard is of secondary relevance.

[22] There is no suggestion in the present matter that a shareholding of twenty comma six percent of the issued shares in RCC would amount to a controlling interest in it. However, it would appear that a shareholding of five percent or more in a licensee is considered sufficiently significant to influence the conduct of the

licensee, hence the requirement for a formal application to the Board for authority to acquire and hold such an interest.

[23] Section 50(1) of the 1996 Act refers to a "financial interest of five percent or more in the business to which the licence relates". Clearly the phrase was not intended to be limited to bodies corporate, but was intended for wider application. In this regard the definition of a person in section 1 of the 1996 Act refers to a natural or juristic person, or group of such persons, depending upon the context.

[24] Generally a financial interest may be considered to be an interest in the nature of the expectation of a monetary profit, gain, or benefit, to be derived by a party from providing services, participating in dealings, or acquiring ownership of an asset. If reference were to be had to the definition of a financial interest in the 2010 Act, then the acquisition of shares in a company would arguably fall at least within the right or entitlement to share in its profits or revenue, as well as a direct or indirect interest in the voting rights attached to its shares.

[25] In the present matter it can be inferred that the acquisition of the shares in GRR was motivated by their investment and income potential and to profit thereby. In my judgment the acquisition of the shares in GRR clearly represented a financial interest of more than five percent. The question then arises whether the transaction represented an interest in the business to which Akani's licence related.

[26] Since GRR, at all material times held all the issued shares of Akani, it was in absolute control of Akani and its casino business. It is not without significance that Mr Dower, the deponent to the applicants' founding affidavit, stated that GRR held various gaming licences throughout the Republic, one of which related to the Golden Horse Casino, which was held in the name of Akani. The suggestion is that the effective licensee of the Golden Horse Casino was in fact GRR and that Akani was merely the instrument through which it controlled the business.

[27] It is in my view a position akin to a situation where the so called corporate veil could be lifted, thus to disclose the real or substantial licensee as GRR, while Akani is merely nominally the licensee under its absolute control. Effectively, therefore, a

change of ownership in five percent or more of RCC's shareholding would, in my judgment, be the equivalent of such a change also in the shareholding of Akani and the provisions of section 50(1) of the 1996 Act would, as a matter of law, be triggered, irrespective of whatever opinion the Board may have formed in the circumstances.

[28] The next issue then arising is whether AG, in concluding the transaction for the acquisition of Casinos Austria's shares in GRR, acquired a financial interest in GRR, considering its assertion that it acted as an agent for its clients. In the context of the applicants' explanation of the nature of the transaction, the immediate clients of AG were AGUT, AG Life and AGSA, who in turn represented their individual clients or investors to whom they in turn devolved the RCC shares thus acquired and allocated to them.

[29] That gives rise to the question as to the nature of AG's agency at the time of concluding the transaction with Casinos Austria. There is no suggestion that, in the manner and in the circumstances that the transaction was concluded, AG would have disclosed to Casinos Austria the identities of its clients, namely AGUT, AG Life and AGSA, or indeed their individual clients or investors, who they in turn represented. The most probable conclusion to be drawn is that AG acted as an agent for undisclosed principals.

[30] In Botha vs Giyose trading as Paragon Fisheries (2007) SCA 73 (RSA), Combrinck JA at para 8 explained the position as follows:

> It would appear that the doctrine of the undisclosed principal was not fully understood. The rights of the agent as against the third party are succinctly summarised by Joubert, LAWSA 2ed paras 228 and 231 as follows:
>
> Par 228: 'In a standard situation of representation the representative acquires no rights and incurs no liabilities from the contract concluded by him or her on behalf of his or her principal. The rights and obligations come into being between the principal and the third person. In an undisclosed principal situation the intermediary and the third person create *vincula iuris* between themselves by the contract

> concluded in their own names, but also so it is said, alternative *vincula iuris* between the undisclosed principal and the third person.'
>
> Par 231: 'The contract is concluded between the third person and the intermediary acting in his or her own name. The third person is in terms of the contract liable to the intermediary. He or she cannot avoid liability to the intermediary on the ground that he or she is liable to the undisclosed principal, unless and until the undisclosed principal elects to hold him or her liable.'

[31] It follows that AG, as agent for undisclosed principals, would have been the party which acquired the shares in RCC from Casinos Austria. To whom it thereafter passed on the shares in terms of its agency obligations and who paid Casinos Austria for them would not affect the fact of the contract for the acquisition of the shares that was concluded as between AG and Casinos Austria.

[32] The important point, however, is that for purposes of the application of section 50(1) of the 1996 Act AG acquired, in so contracting, at the very least at an apparent or *prima facie* level, a financial interest in the business of the Golden Horse Casino, which GRR held through its subsidiary licensee Akani.

[33] That, in my judgment triggered the provisions of section 50(1) of the 1996 Act and required the licensee, whether GRR itself or through its subsidiary Akani, to have applied to the Board for its consent and in terms of the provisions of section 50(2) AG and its clients or principals would then have become the subject of investigation as contemplated in the 1996 Act. It is during the course of that application and concomitant investigation that the issues raised by the applicants in the present application would be clarified. It follows that there is no justification for this Court to hear oral evidence, or make final findings, upon any of these factual issues. That would be to usurp the functions of the Board.

[34] In the light of the conclusions to which I have come above it remains to consider the various issues raised by the parties during the course of these proceedings.

[35] The applicants, in the first instance, sought to review and set aside the decisions of the Board requiring AG and/or one or more of the other applicants, to make an application to it for its consent to the acquisition of the shares in GRR from Casinos Austria.

[36] In this regard Regulation 47(2) of the Regulations under the 1996 Act provided that any person who directly or indirectly procured an interest of five percent or more in the business of a licensee would be required, within fourteen days, to apply to the board for its consent thereto. In view of the subsequent repeal of these Regulations, the applicants did not pursue their claim to declaring Regulations 47 to 49 *ultra vires*, but contend that this remains relevant to the issue of costs only.

[37] When regard is had to the provisions of section 50(2) of the 1996 Act, it rendered the application provisions of sections 28 to 34 of the 1996 Act also applicable the person which proposed to acquire the interest in the business to which the licence related. Effectively such a person would become a party and thus a co-applicant for such consent. In those circumstances I am not persuaded that that the Regulations were *ultra vires.* However, since the challenge to the validity of the Regulations were not pursued, I need not make any formal finding in this regard.

[38] However, in view of my conclusion that, in terms of the provisions of section 50(1) of the 1996 Act, the Board's consent to the acquisition of Casinos Austria's shareholding by AG in GRR was required, the claim for the setting aside of the Board's decisions relevant to requiring an application to be made to it cannot succeed.

[39] Since an application for consent needs to be made to the Board, or more correctly, now to the new Board constituted in terms of the 2010 Act, any findings regarding the suitability, or otherwise, effectively becomes moot and falls away.

[40] The prayer to declare Regulations 47 to 49 was, as already indicated, not pursued and effectively also falls away.

[41] The further orders sought (in paragraphs B4 and B5 of the notice of motion) declaring that the applicants did not acquire a financial interest, as contemplated in section 50(1) of the 1996 Act, or as defined in the 2010 Act or the National Gambling Act, in the business of Akani are, for the reasons discussed, without merit.

[42] Likewise the declaratory relief sought in paragraph B6 of the notice of motion cannot succeed, also for the reasons already discussed.

[43] The issue of costs will be addressed separately below and the matter of the joinder of Casinos Austria and GRR was resolved by their earlier formal joinder in these proceedings.

[44] I turn now to the counter application, said to be by the Board as second respondent. The strange situation came about where the original Board, as constituted in terms of the 1996 Act, ceased to exist prior to the appointment of the members of the new Board constituted in terms of the 2010 Act.

[45] During this interim period the actions and administrative functions of the original Board were alleged to have been performed by its Acting Chief Executive Officer in terms of powers delegated to him by the original Board. He, in turn, purported to authorize Ms Stretch, the Board's Legal Manager, to depose to its answering affidavit and make its counter application for relief.

[46] Subsequently and after the new Board was constituted in terms of the 2010 Act, it assumed the functions of its predecessor and by resolution adopted on 25 June 2012 resolved as per annexure R.1 at page 516 of the application papers, *inter alia*, to oppose the application, adopt and ratify the actions of its predecessor and its officials taken during the intervening period prior to the appointment of the new Board and to pursue the relief sought in the counter application.

[47] The applicants opposed the counter application and contended that the attempted ratification of the actions of the officials purporting to act on behalf of the Board was without force or effect. On behalf of the Board counsel submitted that

though the Board did not exist during the hiatus, the subsequent ratification was valid and of full force.

[48] In this regard reliance was placed upon the decision in Lynn NO v Coreejes 2011 (6) SA 507 (SCA) at paras 14 and15 where Majiedt, JA held that the launching of legal proceedings was a procedural step and where the actor expressed the intention to act, not on her or his own behalf but on behalf of another, it was a general rule of the law of agency that such an act of an "unauthorised agent" could be ratified with retrospective effect.

[49] Also in Nampak Products Ltd t/a Nampak Flexible Packaging v Sweetcor (Pty) Ltd 1981 (4) SA 919 (T), Ackermann J held that 924D that in appropriate circumstances a Court would allow a ratifying resolution or authorisation to be filed when no authority existed previously to institute or to defend an action.

[50] In the circumstances I am of the view that the adoption and ratification by the new Board of the actions taken by or on behalf of its predecessor is valid and that it is permissible for it to pursue the relief sought in terms of the counter application.

[51] In the counter application (at page 234, paragraph 18) the Board seeks the following order, namely:

> 18.1 An order declaring that section 50 of the KwaZulu-Natal Gambling Act No.10 of 1996 applied and applies to the acquisition of the shares held by Casinos Austria International Holdings GmbH in Gold Reef Resorts Limited by one or the other of the Applicants.
>
> 18.2 An order declaring the transaction referred to in the abovementioned order to be illegal and of no force and effect without the consent of Second Respondent in terms of Section 50 of the said Act.
>
> There is no order sought with regard to costs.

[52] In view of the conclusions to which I have come and as set out above, the relief sought in paragraph 18.1 is competent, save that it should reflect the acquisition of the shareholding by AG only.

[53] The 1996 Act is in my view clear in its requirement that an affected interest in the business of a licensee requires the Board's consent in order to become effective. Were it to be otherwise the essential objects of the Act to control the gaming and gambling industry and to investigate and evaluate parties who participate therein, would be defeated.

[54] It follows that the relief sought in paragraph 18.2 is likewise competent and that the counter application should succeed.

[55] There remains the issue of costs. In my view the papers have been unduly voluminous and time and space devoted to either frivolous or unnecessary side issues, instead of focussing upon the essential issue at stake, namely whether in the circumstances of the transaction to acquire the shares of Casinos Austria and the objects of the 1996 Act, the provisions of section 50(1) of the Act became applicable.

[56] The conduct of the Board acting under the 1996 Act, was at times confusing and open to criticism. On the other hand the determined and persistent conduct of the respondents in resisting having to make an application as contemplated in Section 50(2) of the 1996 Act does not reflect well upon them either.

[57] Having given serious consideration to the issue of costs and despite the effective failure of the application relief sought by the applicants and the success of the belated counter application by the Board, I have come to the conclusion that, in the exercise of my discretion, I should make no order as to costs in favour of any of the parties to the litigation.

[58] In the result the flowing order will issue, namely that:

a. The application by the applicants is dismissed.

b. The counter application by the second respondent succeeds; and

i. It is declared that section 50(1) of the KwaZulu-Natal Gambling Act No.10 of 1996 applied and applies to the acquisition of the shares held by Casinos Austria International Holdings GmbH in Gold Reef Resorts Limited by the First Applicant.

ii. It is further declared that the transaction referred to in sub-paragraph (i) above is illegal and of no force and effect without the consent of Second Respondent in terms of Section 50(1) of the said Act.

c. There will be no order as to costs, including any costs previously reserved.

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VAN ZYL, J.

Appearances

Judgment reserved: 12 December 2012

Judgment delivered: 25 April 2025

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