IN THE HIGH COURT OF SWAZILAND

CASE NO.3684/05

HELD AT MBABANE In the

matter between:

PATRICK MASINGA **APPLICANT**

and

AFRILOTTO (PTY) LIMITED **RESPONDENT**

CORAM	:	Q.M. MABUZA -AJ
FOR APPLICANT	:	MR. P.R. DUNSEITH
FOR RESPONDENT	:	MRS. L. KHUMALO-MATSE

JUDGMENT 16/2/06

This matter came before me on application on the 10th February 2006.

Mrs. Khumalo-Matse for the applicant who had raised points in ***limine*** proceeded to argue them.

She submitted that the Minister of Tourism, Environment and Telecommunications (for convenience hereinafter referred to as the Minister) as well as the Gaming Board being the Minister's representative should have been joined in these proceedings.

In her submission Mrs. L. Khumalo-Matse revealed that the government of Swaziland entered into a licensing agreement with the respondent which agreement set out how the lottery was to be governed. It was because of the agreement that she submitted that the Minister should have been cited and enjoined. Mrs. L. Khumalo-Matse also revealed that the Minister had nominated the Gaming Board to supervise the lottery activities. Her submission was that joining the Minister and the Gaming Board would be convenient.

According to the authorities the court has at common law a discretion to allow joinder on the basis of convenience. The Concise Oxford dictionary defines convenient as "fitting in well with a persons needs, activities and plans." Mrs. Khumalo-Matse has not indicated how joining these two persons would "fit well with the needs activities or plans of the applicant nor vice versa in order to satisfy the ground of convenience for me to' exercise the courts discretion.

Furthermore in order for the court* to exercise its discretion, the respondent should show that the party sought to be joined is a necessary party in the sense that such party is directly and substantially interested in the issues raised in the proceedings before court and that his rights may be affected by the judgment of the court. (See page 168) Herbstein and van Winsen: The Civil practice of the Superior Courts in South Africa (3rd Edition).

In the present case other than the submission on behalf of the respondent that the government has a supervisory role, it has not been shown how the government may be directly and substantially interested in any order that the court might make or if such an order cannot be sustained or carried into effect without prejudicing the government. Otherwise the court would be duty bound to safeguard the governments right to be heard.

A "direct and substantial interest" has been held to be "an interest" in the right which is the subject matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation. It is "a legal interest in the subject matter of the litigation excluding an indirect

commercial interest only." See Herbstein and van Winsen." The Civil Practice of the Supreme Court of South Africa" (at page 172 4th edition).

Section 22 of the Lotteries Act No..4.0/1963 provides: "The *Government shall not be liable at the suit of any person in respect of anything done or omitted to be done in relation to the conduct or promotion of a public lottery.*"

Clause 7 of the Licensing agreement states: "*as provided in Section 22 of the (Lotteries) Act the government shall not be liable at the suit of any person in respect of anything done or omitted to be done in relation to the conduct or promotion of the Public Lottery*" *(My brackets)*

In view of the above provisions it is my view that the supervisory role that the Gaming Board plays on behalf of the government cannot be said to amount to "a legal interest." Furthermore if the government or the Gaming Board are not liable at the suit of the applicant what could possibly be their interest in the matter?

The court rejects this submission and holds that it is not necessary for the applicant to join the Minister nor the Gaming Board.

On the issue of there being a dispute of fact it is difficult for me to agree with the respondent's attorney because there are no answering affidavits to assist the court to establish this fact. In particular paragraph 2.2 of the notice to raise points of law should be the subject matter of an affidavit and not *in limine* as submitted by Mr. Dunseith.

Another issue which arose is the issue of the filing of answering affidavits. It is established practice that a respondent should generally file his/her affidavits on the merits at the same time as he/she takes a preliminary objection.

In **Standard Bank of South Africa Ltd v RTS Techniques and Planning (Pty) Ltd and others (1992 (1) SA 432)** the court held that "*apart from the fact that the procedure was prescribed in Rule 6 (5) (d) of the Uniform Rules of Court (-this rule is similar to our Rule 6 (12-) (c)) it was established practice that a respondent should file affidavits on the merits, irrespective of whether a preliminary point was to be argued and-should not rely on his preliminary point only.*

I am indebted to Mr. Dunseith for providing this authority.

In the present case I got the impression that the reason that answering affidavits could not be filed earlier was because the deponents were not available. The application was served on the respondents on the 13 October 2005.

The application was initially to be heard on the 28th October 2005. It was removed from the roll. It was again set down for hearing on the 18th November 2005 on which date it was postponed by consent to 25th November 2005 for the respondent's attorney to file the respondent's answering affidavits. This was not done instead a notice to raise points of law was filed on the 25th November 2005.

There has been ample time to file the answering affidavits since the application was first launched and served on the respondents.

I am of the view that the failure of the respondent to file their answering affidavit is a delaying tactic not only to gain time but to frustrate satisfaction of any judgment that the applicant may obtain against the respondent.

I accordingly dismiss the applicant's points in limine and order as follows:-

1. Judgment is entered against the respondent for the payment of the sum of E l , 154,008.00
2. Interest thereon from 22nd January 2005 to date of payment at 9% per annum.
3. Costs.

Q.M. MABUZA

ACTING JUDGE