

**IN THE HIGH COURT OF ESWATINI**

HELD AT MBABANE

CASE NO. 808/2019

**In the matter between**

**IONNIS KIRIAKOS CALIVITIS**

1<sup>st</sup> Applicant

**DELPOR WILLEM JOSEPH**

2<sup>nd</sup> Applicant

**Q's SWAZILAND (PTY) LTD**

3<sup>rd</sup> Applicant

And

**JACQUES VAN DE HEEVER**

1<sup>st</sup> Respondent

**THE GAMING BOARD OF CONTROL**

2<sup>nd</sup> Respondent

**THE MINISTRY OF TOURISM AND  
ENVIRONMENTAL AFFAIRS**

3<sup>rd</sup> Respondent

**THE NATIONAL COMMISSIONER OF  
POLICE ESWATINI**

4<sup>th</sup> Respondent

**THE ATTORNEY GENERAL**

5<sup>th</sup> Respondent

In re:

**IONNIS CALIVITIS**

1<sup>st</sup> Applicant

**NIKOLAU ANDREAS**

2<sup>nd</sup> Applicant

<b>DELPORW WILLEM JOSEPH</b>	3rd Applicant
And	
<b>Q's SWAZILAND (PTY) LTD</b>	1 <sup>st</sup> Respondent
<b>JACQUES VAN DE HEEVER</b>	2 <sup>nd</sup> Respondent
<b>MASTER OF THE HIGH COURT</b>	3 <sup>rd</sup> Respondent
<b>ATTORNEY GENERAL</b>	4 <sup>th</sup> Respondent

**Neutral Citation:** *Ionnis Kiriakos Calivitis And 2 Others V Jacques Van De Heever And 4 Others (808/2019) [2020] SZHC 228 (03 November 2020)*

**Coram** : MAMBA J.

**Heard** : 30 OCTOBER 2020

**Delivered** : 03 NOVEMBER 2020

[1] *Civil law- trading licence for a public lottery licence- licensee must be person of integrity and have the financial resources for such operation- qualification of employees and managers of licensee- Sections 13 (1) and 25 of the Lotteries Act 40 of 1963 (as amended).*

[2] *Civil law- trading licence in terms of Section 13 (1) of the Lotteries Act 40 of 1963. Company managers not vetted by minister during licence application. Such managers not qualified to run or conduct public lottery business.*

[3] *Civil law- company law- sale of shares and management of company- one director and shareholder independently conducting business for his own account in the name of the company whose other shares are supposedly held by other 2 independent directors and shareholders. One company licence. Sale of shares and existence of one company too artificial and impracticable. In reality company split into two independent companies. Arrangement contrary to licensing law. Shareholders not without blame and not entitled to any costs of the application.*

## JUDGMENT

[1] In the Founding affidavit, the 1<sup>st</sup> Applicant describes the parties as follows:

‘1.

I am an adult male of the Republic of South Africa and one of the Directors of the 3<sup>rd</sup> Applicant. I am duly authorised to depose this affidavit by virtue of my capacity as such. I am the Director responsible for the management of the Gaming Shops in Swaziland and the other directors are responsible for the shops in the Republic of South Africa. The facts deposed to herein are within my personal knowledge and belief and I know them to be correct save to the extent where a contrary indication may appear.

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3.

The 2<sup>nd</sup> Applicant is **DELPOR WILLEM JOSEPH**, also a South African male and we are both Directors and shareholders of Q'S Swaziland (Pty) Ltd, being the 3<sup>rd</sup> Applicant.

4.

The 3<sup>rd</sup> Applicant is **Q'S SWAZILAND (PTY) LTD**, a private company duly registered and incorporated in terms of the company laws of Eswatini operating different Gaming shops within the Kingdom.

5.

The 1<sup>st</sup> Respondent is **JACQUIES VAN DE HEEVER**, an adult South African currently operating gaming shops in different areas of the Kingdom of Eswatini, under Q's Swaziland (Pty) Ltd, a company duly registered in terms of the laws of the Kingdom of Eswatini.

The 2<sup>nd</sup> Respondent is **THE GAMING BOARD OF CONTROL**, duly established in terms of Section 6 of the Casino Act of 1963, under the Ministry of Tourism and Environmental Affairs, Mhlambanyatsi Road, Mbabane under the district of Hhohho.

## 5.2

The 3<sup>rd</sup> Respondent is **THE MINISTRY OF TOURISM AND ENVIRONMENTAL AFFAIRS**, cited herein as the ministry responsible for issuing and regulating all casino and gaming licences within the Kingdom.

## 6.

The 4<sup>th</sup> respondent is the **NATIONAL COMMISSIONER OF POLICE ESWATINI**, cited herein in his capacity as the person responsible for the action of police officers within the Kingdom and against whom an order is also being sought situated at the Police Headquarters, Mhlambanyatsi Road, Mbabane under the district of Hhohho.

## 7.

The [5<sup>th</sup>] Respondent is **THE ATTORNEY GENERAL**, cited herein as the legal representative for all government departments in the Kingdom of Eswatini, having its principal place of business at the New Justice Building, Mbabane along Mhlambanyatsi Road, under the district of Hhohho’.

- [2] The shareholders of the 3<sup>rd</sup> applicant privately reached an agreement or arrangement amongst themselves whereby the 1<sup>st</sup> and 2<sup>nd</sup> applicant bought shares in the 3<sup>rd</sup> applicant and became shareholders with the 1<sup>st</sup> respondent. Thus the three (3) of them became the only shareholders and directors of the company. This agreement was concluded on 3<sup>rd</sup> March 2015. The 1<sup>st</sup> and 2<sup>nd</sup> applicants each hold 33.5% of the shares whilst 33 % is held or owned by the 1<sup>st</sup> respondent.
- [3] ‘9.2 The company is the owner of different gaming shops across the country. Our arrangement with the 1<sup>st</sup> respondent is that the 1<sup>st</sup> respondent shall be solely responsible for certain shops across the country and that he will enjoy the profits thereof. Likewise, we are also responsible for some of the shops. In particular our shops with

the 2<sup>nd</sup> applicant are situated in Nhlango, Matsapha and Pigg's Peak'.

- [4] It is common cause that all the gaming shops operate using one licence. The current licence was renewed by the relevant minister on 09 July 2020. A copy of this licence is annexed to the 1<sup>st</sup> respondent's opposing affidavit and marked as JV1. It records that it was granted to or in favour of the 3<sup>rd</sup> applicant,

'Herein represented by Jacques Van Heeder in his capacity as Director'. The licence is valid for a period of ten years.

- [5] Following a disagreement amongst the shareholders, the 1<sup>st</sup> respondent, with the help of the 2<sup>nd</sup> and 4<sup>th</sup> respondents, decided to withdraw the use of the licence from or by the shops operated and or run by the 1<sup>st</sup> and 2<sup>nd</sup> applicants. He did this on or about 23 September 2020. As a consequence of this withdrawal of the licence from the said gaming shops, these shops were closed by the Police and the 2<sup>nd</sup> respondent. The closure of the shops has prompted or necessitated this application wherein the applicants seek *inter alia*, the following order:

- ‘2. Declaring the 1<sup>st</sup> to 4<sup>th</sup> respondents’ decision and conduct of closing the applicants’ gaming shops at Piggs Peak, Matsapha and Nhlanguano unlawful and irregular.
3. The 1<sup>st</sup> and 3<sup>rd</sup> respondents or anyone acting on their behest are hereby interdicted and restrained from interfering, tempering and disturbing in whatsoever manner the operations of the applicant’s gaming shops in Nhlanguano, Matsapha and Piggs Peak.
  - 3.1 Ordering and directing that all the applicants’ shops be hereby opened for operation with immediate effect pending finalization of this matter
4. Compelling and directing the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to recognise the 1<sup>st</sup> and 2<sup>nd</sup> applicants as shareholders and directors in as far as the operations and the affairs of the 3<sup>rd</sup> applicant including representation of the 3<sup>rd</sup> applicant to the 3<sup>rd</sup> respondent.
  - 4.1 Declaring that, the Public Lottery licence was granted in favour of the 3<sup>rd</sup> applicant not the 1<sup>st</sup> respondent in his personal capacity.



5. Enforcing the resolutions taken by the shareholders in the shareholders meeting.

5.1 That a *rule nisi* do hereby issued in terms of prayer 3.1 to operate with interim and immediate effect, returnable at a date to be granted by the above Honourable’.

[6] The application was filed as an urgent one and set down for hearing on 29 October 2020; on which date it was postponed to 30 October 2020 to allow the rest of the respondents to file their answering papers, if so minded. The 1<sup>st</sup> respondent filed and served his opposing papers on 28 October 2020. At the end of the day, the other respondents merely filed their notice of intention to oppose. The application was ultimately argued on the said set of papers; the applicants’ finding it unnecessary to file a replying affidavit.

[7] It is common cause that before the closure of the shops that were run or operated by the 1<sup>st</sup> and 2<sup>nd</sup> applicants, the relationship between them on the one hand and the 1<sup>st</sup> respondent on the other, as both directors and shareholders of the company had deteriorated such that they were unable to hold meetings in the presence of each other save, through proxies. As a result of this bad relationship amongst

the 3 shareholders, the 1<sup>st</sup> and 2<sup>nd</sup> applicants had successfully made an application to appear before the 2<sup>nd</sup> respondent in an attempt to either normalise the licence situation by getting themselves to appear and be vetted by the minister as employees of the 3<sup>rd</sup> applicant or just being allowed to trade on their own. This meeting had been scheduled for the 28<sup>th</sup> day of October 2020 at 3pm, but following the filing and serving of this application by the applicants on 27 October 2020, the second respondent cancelled the said meeting. This was by letter dated 27 October 2020. This letter reads in part that

‘4. Since your client has decided to elevate the matter to the Courts, the Board can no longer meet to discuss same since it is now sub- judice.’

[8] In the various documents in this application, the 1<sup>st</sup> respondent is sometimes erroneously referred to as Jacques Van Heeder or Jacques Van Der Heefer. Nothing turns on this errors, however, in this application. He is, however, in error in stating that the Public Lottery licence was granted to him and it is his or that he is the holder thereof. The licence was granted to the company. He was the only duly nominated and vetted employee of the company in the granting of the said licence.

[9] In terms of Section 13 (1) of the Lotteries Act 40 of 1963 (as amended)

‘---the minister may, upon such terms as he deems fit, grant and issue to any person an exclusive licence to promote and conduct Public Lotteries if he is satisfied that such person is a person of integrity, and has adequate financial resources and experience to conduct a public Lottery properly’

These provisions must, I think, be read together with the provisions of Section

25 of the said Act which is in the following terms:

‘25. No person who has been convicted of an offence involving dishonesty or fraud or any offence under this Act or any other law in force immediately prior to the commencement of this Act relating to lotteries shall manage or be employed in connection with a lottery authorised under this Act.’

The vetting of the employees or managers of the prospective licensee is no doubt meant to enable the minister to make an informed decision on the grant or refusal of the application for a Public Lottery licence under the Act. First, the applicant must satisfy the minister that it has adequate financial resources to run the Lottery. Secondly, the applicant or its

manager or representative must be a person of integrity and also have the requisite experience. In the present application, it would appear that only the 1<sup>st</sup> respondent was vetted by the minister. I say so based, *inter alia*, on what is recorded in the licence that the 3<sup>rd</sup> applicant is or was represented by the 1<sup>st</sup> respondent (with his name reflected as Jacques Van Heeder) and also based on the common cause fact that the first two applicants had sought to have themselves also vetted by the minister or 2<sup>nd</sup> respondent as referred to above.

[10] The arrangement entered into by and between the shareholders of the company on how to run or operate it appears to me to be in conflict with the provisions of Section 13 (1) quoted above inasmuch as the 1<sup>st</sup> and 2<sup>nd</sup> applicants were never vetted by the minister in order to satisfy himself whether they were fit and proper persons to run or conduct or manage the business of a Public Lottery as required. The licence herein is exclusive to the company duly represented by the 1<sup>st</sup> respondent. It is incorrect to argue that the licence holder is the latter.

[11] From the above, analysis of the law and the facts, it is clear to me that the first two applicants have failed to show or satisfy this Court


that they are entitled to conduct or manage a Public Lottery business on behalf of the 3<sup>rd</sup> respondent, or even on their own behalf or account; their private shareholding arrangement with the 1<sup>st</sup> respondent, notwithstanding. That call must be made by the minister responsible and not this Court. The issue whether or not they as shareholders have a right to the profits or losses or dividends made by the 3<sup>rd</sup> applicant through the various shops or entities operated by the 1<sup>st</sup> respondent, is another matter, entirely separate and outside the scope of this application.

[12] Consequently, save for prayer 4.1 in the Notice of Motion, the applicants have failed to satisfy this Court that they are entitled to the rest of the reliefs claimed herein. The application is thus dismissed.

[13] The business model or arrangement concluded by the shareholders herein regarding the shares, management and sharing of the profits and losses of the company appears to be rather artificial or even unlawful as being contrary to the spirit or scheme of the Lotteries Act. In reality, the company was split into two; one 100% owned by the 1<sup>st</sup> respondent and the other having the other two shareholders as

its only shareholders. Both companies were separately and distinctly run or managed but shared one trading licence. Neither company was accountable to the other or its shareholders. Infact, they became fierce adversaries, not just business competitors.

[14] When the shareholders entered into the above arrangement, they must have known that it was not in accordance with the applicable licensing legislation. They allowed the first two applicants to conduct a Public Lottery business or operation without having complied with the prescripts of Section 13 (1) of the Act quoted above. This was the arrangement from March 2015 when they purchased their shares, until the shops operated by them were closed in September this year. For these reasons, all three shareholders in this case are not without blame. Consequently, in the exercise of my discretion, I do not think that any of them is entitled to an order for costs in this application and I so order.



**MAMBA J**

**FOR THE APPLICANTS: MR K. Q. MAGAGULA**

**FOR THE 1<sup>ST</sup> RESPONDENT: MR S. DLAMINI**

**FOR THE 2<sup>ND</sup> TO 4<sup>TH</sup> RESPONDENTS: OFFICE OF THE ATTORNEY GENERAL**