IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 37196/2005

DATE: 15/12/2006

reportable

IN THE MATTER BETWEEN:

THE NATIONAL LOTTERIES BOARD APPLICANT

AND

FIRSTRAND BANK LIMITED RESPONDENT

JUDGMENT

SERITI, J

1. INTRODUCTION

This matter came to court by way of motion. In the notice of motion the applicant is applying for an order in the following terms:

1. that it be declared that the competition that is being conducted by the respondent for the purpose of promoting the use of its short term investment product known as "the FNB Million-a-Month account" and in terms of which account holders stand a chance of winning cash prizes in

excess of R1 million every month ("the competition") is unlawful in terms of sections 56(b) and/or 57(1)(b) of the Lotteries Act 57/1997;

2. that the respondent be interdicted and restrained from conducting the competition;

3. that the respondent pays the costs of the application.

2. FOUNDING AFFIDAVIT

Same was attested to by Mr J A Foster, chairperson of the applicant.

He alleges that the applicant is a juristic person with legal capacity having been duly established in terms of section 2 of the Lotteries Act 57 of 1997, with its principal place of business in Pretoria.

The respondent is a company with limited liability, duly registered in terms of the Companies Act 61 of 1973 and is a bank duly registered in terms of the Banks Act 94 of 1990. The respondent with its principal place of business in Johannesburg, trades, *inter alia*, as First National Bank.

The deponent further alleges that the respondent is offering an investment product known as "The FNB Million-a-Month Account" ("the account") to members of the public. The account is a thirty two day notice investment product with a minimum

opening balance requirement of R100,00. The account earns no interest, but key to the account is that it has a monthly competition element linked to it whereby account holders stand a chance of winning cash prizes in excess of R1 million every month. For every R100,00 in his or her account, the account holder acquires one entry into the monthly draw.

The competition contravenes section 57(1) of the Lotteries Act inasmuch as it is not nor has it been authorised by or under the act. It also contravenes section 56(b) of the act inasmuch as it is one in terms of which prizes are distributed by lot or chance, success does not depend, whether to a substantial degree or at all upon skill, it is being promoted by the respondent through the media in connection with its trade and/or its business and/or the sale of its banking products to members of the public and it is not a promotional competition contemplated by section 54 of the act.

He referred to section 10 of the act, and alleges that it empowers and obliges the applicant to:

(a) ensure that the national lottery is conducted with all due propriety and strictly in accordance with the Constitution of the Republic of South Africa of 1996, all other applicable law and the licence for the national lottery together with any agreement pertaining to that licence;

(b) ensure that the interest of every participant in the national lottery is adequately protected;

(c) monitor, regulate and police lotteries and to exempt entertainment, private lotteries, society lotteries and any competition contemplated in section 54 of the act.

He further alleges that according to the website of the respondent, the account is a thirty two day notice account linked to a monthly draw whereby the account holder can win cash prizes in excess of R1 million, optional interest may be earned at the rate of 0.25% per annum, no fees are payable in respect of "the account" (save that a penalty fee may be charged in the event that monies are withdrawn without giving thirty two days notice), that every R100,00 in the account constitutes one entry into the monthly draw, and all that is required in order to open the account (and thereby participate in the competition) is a minimum opening deposit and balance of R100,00 and a valid South African identity document.

The respondent has other investment products, namely a thirty two day Notice Deposit account, a thirty two day Interest Plus account, Call Deposits, a Money Market account and a Money Market Investment account. The interest rate payable to the different investment products differs.

It appears from the website mentioned above that the winners of the monthly draws are announced by the respondent on national television, in national and regional newspapers as well as on the internet. The competition account under discussion is actively promoted by the respondent in the electronic and printed media as "an innovative investment product" that is "taking the South African banking industry by storm".

He further referred to a web page which quotes Mr Robert Keip, CEO of FNB Investment Product House as having said, *inter alia*:

> "For just R100,00 account holders could end up with up to R1 million in prize money. We are aware that many South Africans regularly enter competitions and we are sure that the Million-a-Month account will attract many individuals who will enjoy the excitement of making this investment without the risk of losing their original outlay."

He further referred to other web pages advertising and marketing "the account", and also talking about other advertising campaigns of the account.

He further alleges that being a promotional competition (as defined in section 1 of the act) the competition is by definition a lottery as defined in the act. Monthly prizes are distributed by lot or chance. No degree of skill (whether substantial or at all) has any bearing on the success (or lack thereof) of any participant in the competition.

The opportunity of participating in the competition is the only or the only substantial inducement to a person to use the account. The reasons for the above statement are the following:

1. The payment of interest (at the negligible rate of 0.25% per annum) is, according to the web page mentioned above, optional.

2. The option to participate in the interest rate is not confirmed by the published terms and conditions that constitute the agreement between the parties – according to this document there is no interest payable on the account.

3. The optional interest is, compared to the rates offered by the respondent in respect of its other short term investment products, negligible. This is particularly so because the rate is fixed, irrespective of the amount that is invested in the account. The money that is paid by an account holder for the right to compete in the competition is not the payment of funds into the account, but rather the forfeiture of the interest that would otherwise have been payable to the account holder as a return on the investment. Instead of receiving the interest payment and utilising same to pay for the right to compete in the competition "the account" holder simply forfeits the right in favour of the right to participate in the competition.

Lastly, the deponent submits that the competition is unlawful inasmuch as it contravenes section 56 of the act. He further submits that it is self-evident that the conducting of the competition is a criminal offence as contemplated in sections 57(1)(b) and 57(2)(a) of the act.

3. ANSWERING AFFIDAVIT

Same was deposed to by Mr R N Hulchinson-Keip, an executive of First Rand Bank Limited in whose area of executive responsibility the "Million-a-Month account" falls.

He alleges that the account holder of "the account" in question does not pay for the right to compete. The client deposits funds with the respondent which the client receives back, upon demand, after thirty two days. The client loses nothing. The account holder is in precisely the same financial position as any other client of the respondent who deposits funds into a savings account.

The client does not "forfeit" any interest. It is a feature of the account, which it shares with many other banking products, that low interest rates are applicable (or that no interest is payable where the client chooses that option). Low interest rates are applied to the account holders of "the account" under consideration (or interest is not paid at all) because the respondent does not charge any fees or costs on the account. As a *quid pro quo* for a facility that costs the account holder nothing, the respondent pays low (or no) interest.

The account was developed and introduced in response to the need in this country for cheap banking facilities including a cost effective savings vehicle.

The three main features of the account is that there is no cost to the consumer to deposit his or her cash funds into the account or to withdraw it therefrom (save an early redemption fee if withdrawn within thirty two days), no interest is paid on deposits made into the account and deposits are attracted by the payment of monthly guaranteed prizes. The banking industry does not as a rule pay any interest on small balances in investment type accounts. Products such as money market accounts generally pay zero interest on balances below the R10 000,00 entry level. Call accounts generally do not pay interest below the R1 000,00 entry level.

He further alleges that although 0.25% interest is paid on the account in question, most of the products of different banks will not pay any interest on a R100,00 minimum balance. Capital repayment on the account under consideration is guaranteed – the account holder receives the full capital when the account is closed (unless there is an early redemption when a penalty is levied). No service fees are levied on the account under consideration and there are no monthly management fees, cash deposit fees or withdrawal fees.

With other types of accounts such as savings, transmission, cheque and call accounts, cash deposit fees are levied which effectively decrease the deposit.

There is no implied term in an agreement of loan that interest is payable by the borrower to the lender. Unless specifically agreed to between borrower and lender, no interest is payable. This accords with banking practice. Banks simply do not pay interest on all deposits. Moreover, banks do not pay the same rate of interest on all credit balances.

In South Africa depositors of relatively small amounts, below R1 000,00, do not, as a rule, expect banks to pay interest to them. There is moreover a correlation between interest payable by a bank on a credit balance and the fees chargeable by the bank for the services rendered in respect of collecting, maintaining and paying out the credit balance.

The concept of a prize payable to a depositor who is chosen at random is of mature vintage in South Africa and other comparable countries.

The prize element of the account is not the account's defining feature. The two interrelated factors of no cost and no interest are its defining elements. The prize was designed as an incentive (albeit that it is an integral and permanent part of the account) to attract savings from the unbanked members and unbanked funds of our society.

He further alleges that the account under consideration is not offered to members of the public. It is only offered to persons who are or become clients of the respondent.

A member of the public must first be converted into a client, ie enter into a contractual relationship with the respondent before he or she becomes eligible for a prize.

There is no requirement of R100,00 as a minimum opening balance. An account can be opened without any "opening balance". The contractual relationship between bank and client comes first and thereafter deposits – it is only once deposits reach R100,00 that the relevant account holder becomes eligible for a prize. R100,00 deposit is only required from the respondent's existing clients who utilise the respondent's internet banking, ATM or cell phone banking facilities to open the account. They are required to make an immediate transfer of R100,00 via the respective channel to activate the account. This is as a result of system requirements.

It is incorrect that no interest is earned on the account. The respondent pays interest "by default" but the interest payable is low. Certain clients (such as Muslims) have requested the respondent not to pay interest.

He further alleges that the applicant has no *locus standi* to bring the present application. The application is confusing. 0n the one hand the account in question is dealt with as a promotional competition but on the other it is also contended that it constitutes a lottery. He denies that the account constitutes a promotional competition, but, for purposes of argument, if it is accepted that it may constitute promotional competition, then in terms of section 54(4) the minister may on recommendation of the Board by notice in the *Gazette*, declare the competition to be unlawful.

There is no indication in the founding papers what the minister's views are and the account in question has not been declared to be unlawful in the *Gazette*.

If the applicant's case is simply that the account is an unlawful lottery, then the applicant has also no *locus standi* to bring this application. There is no indication in the act that the legislature intended for the applicant to bring an application such as the present. The applicant's powers are circumscribed in the act and it has no power beyond those delegated to it by parliament.

He further denied that the interest rate offered on the account is negligible.

4. APPLICANT'S REPLYING AFFIDAVIT

Same was deposed to by Mr J A Foster. He alleges that he notes that the respondent has changed its web page on 6 November 2005, that is after he deposed to the founding affidavit. The essential features of the account have not been materially altered – it is common cause that the Multi-a Million account ("the account") operates as follows:

(a) It is necessary for a member of the public to enter into an agreement with the respondent and to open a "Million-a-Month account" with the respondent.

(b) The minimum balance to qualify for a random monthly draw is R100,00.

(c) Each R100,00 of funds deposited into the account represents one entry into the monthly draw.

(d) No matter the balance in the account, the maximum interest earned on the account is 0.25% per annum. A customer may, for any reason, elect not to earn interest.

(e) No fees are payable in respect of the account save that a penalty fee may be charged by the respondent in the event that moneys are withdrawn without giving the required thirty two day notice to the respondent.

(f) There is a monthly draw pursuant to which, should a customer's account number be drawn on a random basis, that customer is entitled to win various prizes on offer every month, up to R1 million.

(g) The winning account numbers are chosen by lot or chance.

The mere fact that "the account" is now referred to as a "savings account" rather than "investment account" as previously, is irrelevant to the nature of these proceedings.

The respondent at the beginning of the account touted it as an investment account. However, it was only pursuant to a determination from the Advertising Standards Authority, which determination was handed down by the Advertising Standards Authority directorate on 24 June 2005, that the respondent changed its approach and now refers to the account as a "savings" account. There is no limit to the amounts that a customer of the respondent can deposit into his or her account, but, irrespective of the amount that is deposited into the said account (save the minimum of R100,00) the interest payable on the account remains fixed at 0.25% per annum, and no fees are charged.

The person depositing funds into "the account" forfeits the interest to which he or she would otherwise have been entitled to, were the said funds deposited into the respondent's other ordinary thirty two day interest plus account.

The payment of the subscription is the differential between the "normal" interest that would be payable by a bank in respect of similar nature accounts and the interest rate actually being paid (if at all) by the respondent.

The respondent invests the money itself and earns an income – the respondent in its answering affidavit indicated that there is a total of R156 million in "the account" under consideration. The respondent invests this vast sum of money which would adequately cover all expenses of "the account" including prizes and a substantial sum of money would be left over. This clearly indicates that "the account" is nothing more than a fund raising operation.

The only interest (or substantial interest) that any customer would have for placing any funds into this type of account would be the opportunity to win a million rand.

The only other banking accounts that levy an interest of 0.25% on minimal balances is the Mzanzi account offered by all banks. Even the Mzanzi account, however, offers an escalating interest. The Mzanzi account, however, is limited to an amount of R15 000,00. 0nce the balance held in the Mzanzi account exceeds R15 000,00, one is no longer eligible to operate the said Mzanzi account.

No ordinary investor (in the true sense of that word) would, except perhaps on religious grounds, elect to invest moneys with a no interest return. Without the prospects of winning a prize no individual would place excess funds into "the account".

It is interesting to note that according to the respondent's answering affidavit and data only 38.03% of funds deposited into "the account" is in the form of cash. Most of the money deposited into this account does, therefore, emanate from other bank accounts. This can only mean that the "investors" are prepared to forfeit such interest as they might otherwise have been entitled to in order to stand a chance of winning or receiving prizes offered by the respondent to "the account" holders.

The defining feature of "the account" is the hope of winning R1 million or one or another of the other prizes offered.

5. APPLICABLE LEGISLATION

The applicable legislation is the Lotteries Act 57 of 1997.

In the definition clause, subscription is defined as "the payment, or delivery of any money, goods, article, matter or thing, including any ticket, coupon or entry form, for the right to compete in a lottery".

Section 10, which deals with the functions of the board provides that the board shall, applying the principles of openness and transparency and in addition to its other functions in terms of this act

> "(d) monitor, regulate and police lotteries incidental to exempt entertainment, private lotteries, society lotteries and any competition contemplated in section 54."

Section 56(b) provides that unless authorised by or under this act or any other law, no person shall conduct through any newspaper, broadcasting service or any other electronic device, or in connection with any trade or business or the sale of any article to the public, any competition other than a promotional competition contemplated in section 54 in

which success does not depend to a substantial degree on skill. Section 54 stipulates promotional competitions which are not unlawful.

Section 57(1)(b) criminalises certain behaviour which is contrary to the provisions of the act.

Section 63 provides that nothing in this act shall apply in relation to any lottery, sports pool or competition in respect of which there is no subscription.

6. DISCUSSION OF THE FACTS AND FINDINGS

In his heads of argument the respondent's counsel submitted that the applicant is a creature of statute and its functions and powers are contained in the act and regulations promulgated thereunder.

He further submitted that the applicant has express powers to regulate all lawful lotteries, but has no express power over "unlawful lotteries" nor the power to approach the court for the reliefs it sought as contained in the notice of motion.

0n the other hand, in his heads of argument the applicant's counsel submitted that on a proper construction of section 10(b) of the act, the applicant clearly has the express authority to institute these proceedings. If not, then at the very least, such power is by necessary implication conferred upon the applicant. The applicant performs a civic duty in enforcing the provisions of the act. It has the principal duty and therefore also the

obligation to monitor, regulate, police and enforce the provisions of the act, and also to approach the court for necessary relief.

In *Johannesburg City Council v Knoetze and Sons* 1969 2 SA 148 (WLD) at 154A TROLLIP J said the following:

> "The purpose of the interdict is, of course, to restrain future or continuing breaches of sec 4(1) whereas the statutory remedy of prosecuting and punishing the offender under sec 4(2) relates to past breaches of sec 4(1) … For while the statutory remedies might be adequate to deal with past breaches, the civil remedy of interdict might be the only effective means of coping with future or continuing breaches. Hence it is not to be initially inferred that the lawgiver intended to exclude such a remedy. Indeed, the presumption is the other way, the very converse of the initial approach in considering the first problem: the civil remedy of interdict is presumed to be available unless the statute excludes it expressly or by necessary implication."

In *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718 at 725 SOLOMON JA said the following:

> "To exclude the right of a Court to interfere by way of interdict, where special remedies are provided by Statute, might in many instances result in depriving an injured person of the only really effective remedy that he has, and it would require

> a strong case to justify the conclusion that such was the intention of the Legislature."

In *Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd* 1933 AD 87 at 96 STRATFORD JA said:

> "Where it appears either from a reading of the enactment itself or from that plus a regard to surrounding circumstances that the legislature has prohibited the doing of an act in the interest of any person or a class of persons, the intervention of the court can be sought by any such person to enforce the prohibition without proof of special damage."

See also *Industrial Council for the Building Industry (Western Province) v Leon Pascall & Co (Pty) Ltd* 1951 3 SA 740 CPD at 745A-G.

Applying the principles enunciated in the above quoted cases, my view is that the applicant is entitled to approach the court for the relief it seeks in the notice of motion.

The respondent's counsel did not refer me to any provision of the act nor regulations promulgated thereunder which prohibits the applicant from approaching the court in order to fulfil its mandate. The applicant in my view is entitled to approach the court in order to ensure that the provisions of the act and regulations are adhered to.

If the conduct of the respondent is found to be in contravention of the act, it cannot be justifiably argued that the applicant is not entitled to approach the court for necessary relief. As stated in *United Technical Equipment Co v Johannesburg City Council* 1987 4 SA 343 TPD at 349F-G, failure of the court to grant an interdict to stop an unlawful conduct would amount to the condonation of behaviour which is contrary to the provisions of the legislature. The respondent's counsel's submission that from the provisions of the act, a conclusion can be drawn that the legislature did not intend to grant to the applicant any powers in respect of unlawful lotteries is untenable.

If the applicant has no authority to approach the court for relief, the applicant would be unable to effectively carry out its mandate, particularly the mandate conferred on it by section 10(d) of the act.

Submissions made by the respondent's counsel on the question of *locus standi* cannot be sustained.

The next question which the court must consider is whether the competition conducted by the respondent is a lottery or not.

The respondent's counsel submitted *inter alia* that the competition is not unlawful because there is no subscription which is paid by their clients. In the answering affidavit the following is stated:

> "… Ma MA client does not pay for the right to compete, The client deposits funds with the respondent which the client receives back, upon demand after thirty two days. The client loses nothing. Every cent that he or she deposits with the respondent is paid back to him or her. The Ma MA client is in precisely the same financial position as any other of the respondent's clients who deposit funds into a savings account."

Furthermore, the respondent states the following:

> "… the client does not forfeit any interest. It is a feature of the Ma MA … a feature it shares with many other banking products … that low interest rates are applicable (or that no interest is payable where the client chooses this). Low interest rates are applied to Ma MA clients (or interest is not paid on the Ma MA account) because the respondent does not charge any fees or costs to its clients on the Ma MA. As a *quid pro quo* for a facility that costs the Ma MA nothing, the respondent pays low (or no) interest."

During oral submissions the respondent's counsel submitted that only subscription requirement is in issue in this case.

0n the other hand the applicant's counsel submitted that the delivery of money to compete in the competition is subscription.

I think at this stage I should mention that at the beginning or when "the account" was introduced, it was described as an "investment" account. Certain consumers complained to the Advertising Standards Authority of South Africa. In its ruling dated 24 June 2005 the Advertising Standards Authority summarises the complaints it received as follows:

> "In essence, the complainants are of the view that the advertisement is misleading the public with the use of the word 'investment' as the money does not earn any interest if deposited in the advertised account."

In its ruling, the Advertising Standards Authority concluded that the commercial is misleading as the word "investment" is used in a misleading fashion.

After the above ruling, the respondent then termed the account a savings account.

It is common cause between the parties that a customer acquires a chance of winning a prize after opening "the account" with the respondent. A customer who has not opened the specific account is not entitled to participate in the competition. A deposit into "the account" of an amount of R100,00 entitles the customer one entry into the monthly draw. Deposits are attracted by the fact that depositors enter the monthly draws and the possibility of winning a prize.

In *Rex v Ellis Brown Limited* 1938 AD 98 the accused was selling tea and coffee in sealed tins. In order to encourage sales, the accused enclosed in some tins coupons

entitling the purchaser of the particular tin to a certain prize in money. The scheme was advertised and that led to the increase of sales. At p100 WATERMEYER JA said the following:

> "The meaning of the word 'lottery' has recently been considered by this court in the case of *Rex v Lew Hol and 0thers* (1937 AD 215), and it is unnecessary to do more than point that the word is sometimes used in the wide sense of any distribution of prizes by chance or lot and sometimes in the narrower sense of a scheme whereunder the participants subscribe or contribute something in consideration of the right to receive a prize on the occurrence of a chance event. In the present case it is contended that the word is used in the narrower sense because the statutes referred to deal with the subject of gambling. For the purpose of this case we can assume that this contention is well founded and the question then is whether the gambling element, the element of subscription or payment for the right to participate in the chance of winning a prize is present in this scheme. To that question it seems to that there is only one answer. It is only by the purchase of a tin of tea or coffee that a chance of receiving a prize is acquired. The chance of a prize is inseparable from the tin of tea or coffee and it is bought with it so that the purchasers pay for their chance in the price which they pay for the tin of tea or coffee."

In *Minister of Mineral and Energy Affairs v Lucky Horseshoe (Pty) Ltd* 1994 2 SA 46 (AD) the respondent was operating a scheme whereby it supplied tickets to *inter alia*

filling station operators. The latter bought tickets from the respondent. In turn they distributed the tickets free of charge to members of the public. Such a ticket entitled the recipient to participate in a monthly draw which determined prize winners by chance. The main reason for the scheme was that having secured a ticket a customer would regularly return to the same outlet to obtain more tickets by making further purchases.

After analysing certain cases, including the *Ellis Brown* case mentioned above, VAN HEERDEN JA said the following:

> "In the light of these decisions it seems clear that if under the Lucky Horseshoe scheme a customer becomes entitled to a ticket when making a purchase from a partaking retailer – or when purchasing a particular commodity or for more than a stipulated minimum prize – the customer in fact pays a subscription when so purchasing."

In this case, the customers of the respondent are entitled to partake in the draw if they open an account in question.

The right to participate in the draw is linked or is inseparable to the opening of the account. Without opening the specific account, a customer cannot participate in the draw.

Applying the principles enunciated in the above quoted cases, my view is that a customer who opens the account under consideration, is paying a subscription to participate in the draw. 0n the issue of subscription, the facts of this case are not distinguishable from the facts of *Ellis Brown* and *Horseshoe* cases mentioned above. Furthermore, the customers are prepared to accept low interest rate (or no interest) in exchange of a chance to win a prize. By sacrificing a relatively higher interest rate for the chance of winning a prize, they are paying, by depositing money into the said account, a subscription to participate in the draw.

7. CONCLUSION

The applicant has made out a case for the prayers contained in its notice of motion.

The court therefore makes the following order:

7.1 The competition that is being conducted by the respondent for the purpose of promoting the use of its short term investment product known as "the FNB Million-a-Month account" and in terms of which account holders stand a chance of winning cash prizes in excess of R1 million every month ("the competition") is unlawful in terms of section 56(b) and 57(1)(b) of the Lotteries Act 57 of 1992.

7.2 The respondent is interdicted and restrained from conducting the competition mentioned in 7.1 above.

7.3 The respondent is ordered to pay the costs of the applicant on a party and party scale which costs will include costs occasioned by the employment of two counsel.

W L SERITI
JUDGE OF THE HIGH COURT

37196-2005

HEARD ON: 8/12/2006
FOR THE APPLICANT: L BOWMAN SC AND W LUDERITZ
INSTRUCTED BY: SPOOR & FISHER, C/O VAN ZYL LE ROUX & HURTER, PTA
FOR THE RESPONDENT: P F LOUW SC AND J A BABAMIA
INSTRUCTED BY: DENEYS REITZ INC, PTA