IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN) **CASE NO: 606/10**

In the matter between:

VUKANI GAMING EASTERN CAPE (PTY) LTD **FIRST APPLICANT**

64 OTHERS AS LISTED IN ANNEXURE "A"

TO THE NOTICE OF MOTION **SECOND APPLICANT**

and

EASTERN CAPE GAMBLING AND BETTING

BOARD **RESPONDENT**

JUDGMENT

***Makaula J*:**

[1] The applicants brought an application by way of urgency seeking the following order:

> "1. That this application be heard as a matter of urgency in terms of rule 6 (12) (a), and that the applicant's failure to comply with the time limits and forms of

service be condoned.

2 An order:

2.1 Declaring that the second to sixty-sixth applicants ("the affected licence holders") are entitled in terms of their existing gaming machine site licences, with immediate effect, to operate limited gambling machines (LGMs) in association with the first applicant (as holder of a route operator licence in the Eastern Cape Province) as envisaged in section 49 (1) (b) of the Eastern Cape Gambling and Betting Act, Act 5 of 1997;

2.2 Directing the respondent to do all things necessary and within its power to allow the exercise of such rights.

3. Alternatively to 2 above, an order approving the applications submitted by the affected licence holders to the respondent on 2 January 2010 with regard to the standard site agreements ("SSAs") concluded with the first applicant on that date; *alternatively* directing the respondent to approve the aforementioned applications forthwith.

4. In the further alternative to 2 and 3 above, an order directing the respondent to consider and decide upon each of the affected licence holders' applications for the approval of the SSAs concluded with the first applicant on 2 January 2010, and submitted to the respondent on that date, within two (2) weeks from the date of this order, *alternatively* a date determined by this Honourable court.

5. Directing the respondent to pay the applicants' costs of this application.

6. Granting the applicants such further and/or alternative relief as this Honourable court deems fit."

[2] The application is opposed by the respondent on various grounds which I shall deal with later in this judgment.

[3] The first applicant is Vukani Gaming Eastern Cape (Pty) Ltd, a private company with limited liability, duly incorporated in accordance with the

company laws of the Republic of South Africa which carries on business as a limited gambling machine route operator throughout the Eastern Cape Province.

[4] The second to sixty-fourth applicants are site operators who operate Limited Gambling Machines (LGMs) in different sites in the Eastern Cape.

[5] The respondent is the Eastern Cape Gambling and Betting Board, a juristic person established in terms of section 3 of the Eastern Cape Gambling and Betting Act 5 of 1997 ("the Act"). It is the controlling and regulatory body of gambling in the Eastern Cape, and is responsible for the implementation, oversight and administration of the provisions of the Act and the Regulations promulgated thereunder. It regulates the gambling industry in the Eastern Cape and every route operator and site operator must be licensed by the board.

[6] The Act and the regulations promulgated thereto govern the gambling industry in the Eastern Cape. Section 49 of the Act provides amongst other things that *"no gambling machine shall be operated without a route operator licence and an associated gambling machine site licence"*.[1] The route operator is allowed to authorise a site operator to operate not more than five (5) limited gambling machines ("LGMs") also known as slot machines on the licensed premises.[2] The holder of the gambling machine site operator licence (site operator) shall only operate his LGMs under a route operator.[3] Site

1 Section 49 (1) (b)
2 Section 50 (2) (b)
3 Section 50 (3)

operators shall only receive slot machines from a route operator. A route operator is required to enter into a standard site agreement (SSA) with a site operator subject to special circumstances and conditions as may be prescribed by the board. The SSAs are in standard form issued and prescribed by the board. A route operator shall provide the LGM's and the necessary administrative infrastructure while the venue is provided by a site operator. A route operator is further responsible for the installation of the site Date Logger which connects the site operator to the Central Electronical Monitoring System (CEMs). The CEMs monitors and reports to a route operator every gaming activity relating to a specific machine.

[7] Prior to December 2009, the Eastern Cape had two route operators. The first applicant was and still is one of those route operators. The other route operator whose licence expired on 31 December 2009 was Luck At It Eastern Cape (Pty) Ltd (Luck). Luck was liquidated on 9 February 2010. Their licences were issued in October 2004 and are due to expire in the year 2011. The first applicant is permitted to have 1000 LGMs under it but it currently exposes for play 596 LGMs. The second to the sixty fourth applicants (the other applicants) were operating under Luck. The other applicants remain out of operation due to the fact that they are not affiliated to any route operator as is required by the regulations. Their licences are due to expire in the year 2011.

Applicants' case

[8] When Luck realised in October 2009 that it was going under due to

financial problems it approached the respondent with a view to abandon its route operator's licence with effect from 31 December 2009. Luck further requested the respondent to allow the first applicant to sign SSAs with the applicants. This suggestion was made in a meeting held between **Mr Yarzil Bux** who was the Director of Lucks, the acting Chief Executive Officer of the respondent, **Mr Mxolisi Tokota** and **Mr Willem Jacobus Bodenstein** who was the Chief Executive Officer of the parent company of the first applicant. Due to the urgency of the matter and the potential prejudice to be suffered by the applicants, Luck wrote numerous letters to the respondent about its suggestion.

[9] The applicants rely heavily on the sentiments clearly spelt out in the letter of 13 November 2009 by **Bux** to the respondent complaining about the manner in which the matter was handled by the employees of the respondent. I shall liberally refer to excerpts of that letter as referred to by the applicants in the founding affidavit. "Bux complained in his 12 November e-mail that the Board's response was not *"efficient enough in line with the urgency the matter at hand currently requires"*, before adding: *"There are 12 employees and 146 site owners waiting to hear what the future has in store for them. I am sure that the Board is able to appreciate that these people, be they staff or site owners, are reliant on their incomes, even more so that its year end."* Bux also mentioned in his 13 November e-mail that: *"Sadly, it is my firm belief that the matter is not being handled with the desired urgency by the office of the Board and many livelihoods remain at risk as a result. Failure to meet the desired timeframes shall mean a complete shut down of the Company … and will, without doubt, bring embarrassment not only to Luck but to the Board as well. Vukani's willingness to absorb all employees and sites is an amicable solution for all parties."*

The applicant avers that the respondent never replied to the letters written to it except for a letter dated 23 October 2009 which advised Luck that the *"board shall revert in due course".* The applicants state that the respondent did not take action up until Luck's licence expired on the 31st December 2009.

[10] Due to the nonchalant way the respondent was dealing with their plight, the applicants decided on the 2nd January 2010 to sign SSAs with the first applicant for the remaining period of their licences and submitted them on the 4th January 2010 with the necessary licence fees to the respondent. They did so because the first applicant was the only remaining route operator in the Eastern Cape Province. The SSAs they concluded with first applicant are basically the same with those they signed with Luck except for that the first applicant would be substituted for Luck.

[11] The applicants believed at that stage that the approval of the board was necessary before they could operate based on their SSAs. This view changed upon legal advice they obtained in February 2010. They were advised that there was no need for the board to approve their SSAs.

[12] In an effort to show that the respondent did not care about the plight of the applicants, they refer to the letter of response by the respondent to Luck's letter dated 22 October 2009 which came two and half months later and a month after Luck was liquidated. This response was silent as to what the respondent proposed to do with regard to the plight of the erstwhile Luck employees and the applicants.

[13] The applicants' attorneys wrote to the respondent on 22 January 2010 requesting it to approve the SSAs agreements. The first applicant gave respondent two days within which to respond because applicants' understanding was that the board was to have a meeting round about 22 January 2010. The applicants wanted the respondent to table the request at its meeting due to the urgency and the prejudice which the applicants continued to suffer. The respondent's board did not meet on 22 January 2010 but on 27 January 2010 and 8 February 2010. It did not consider the request by the applicants.

[14] On 2 February 2010 the applicants wrote a letter to the respondent asking it to furnish reasons why it was of the view that the applicants needed its approval for the substitution of the first applicant for Luck. The applicants pointed out that if the respondent felt that its approval was necessary, then it should consider the approval within a reasonable time. It further pointed out that a period of a month had elapsed since their letter of 2 January 2010 without a response. The delay therefore was clearly unreasonable.

[15] On 26 January 2010, **Mr Venetia Lopes** who is the General Manager of the applicant met with **Mr Zwane** who is the Chief Executive Officer of the respondent. **Mr Zwane** referred **Mr Lopes** to **Mr Vanda** who is the Complaints Officer of the respondent. **Mr Vanda** requested **Mr Lopes** to furnish him with information pertaining to the number of sites operated by Luck and the first applicant, the total revenue generated by Luck and the first

applicant and a list of all sites permitted to have more than five LGMs which were pending before the respondent. On the 3rd February 2010, **Mr Lopes** furnished him with a spreadsheet which contained the required information.

[16] The respondent did not respond until 2 March 2010. **Mr Vanda** in his reply sought precisely the same information which was furnished earlier on. In addition to that information, he also requested the number of employees who were employed by Luck, the revenue share split, levies, annual fees and registration fees paid by each of the route operators. This request perplexed the first applicant because all the information sought was within the knowledge of the respondent. The first applicant saw this as a delaying tactic under the guise of request for information.

[17] The respondent replied to the applicants' letters on 8 February 2010. It is this reply which prompted the applicants to bring this application. Applicants feel that the reasons furnished by the respondent are without merit.

[18] The respondent in its response denied that the applicants had the right to operate without licences. The respondent could not give an indication as to when it would be in a position to consider the requests of the applicants for the reason that it would *"amongst other things, create the necessary administrative systems for the consideration of the requests in question."* The respondent promised to take a decision as soon as it is reasonably practicable.

[19] **Mr Dickerson SC** who appeared with **Mr Goosen SC** for the applicants, submitted that the reasons furnished by the respondent for refusing to approve the SSA's are unsatisfactory, unjustified and inadequate as required by section 5 (2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), in which event I should find that the decision was taken without good reason in terms of section 5 (3) of PAJA.

Respondents case

[20] The respondent confirms the version of events as stated by the applicants regarding the correspondence it had with Luck. However, the respondent denies that it remained lax and did nothing until the lapse of the licence and the subsequent liquidation of Luck. On or about 21 November 2009, the respondent's representative, **Mr Vanda**, who deposed to the answering affidavit, avers that he made an attempt to meet **Mr Bux** who represented Luck with a view to discussing the issue. **Mr Bux** advised him that he had since resigned from Luck. Before **Mr Vanda** could attend to the request of Luck, he learnt that Luck was provisionally liquidated on 9 December 2009. The liquidators advised the respondent that the licence of Luck would be abandoned by 31 December 2009 and the SSA's entered into with the other applicants would be cancelled. Because of that, the respondent deemed it unnecessary to respond to the proposals as *"it could not thereby run a parallel process to avert the financial collapse of Luck, to that invoked by the court."*

[21] Notwithstanding that **Mr Bux** had resigned, the respondent decided to reply to his letter on 7 January 2010 advising him that in the light of the provisional liquidation, the proposals by Luck were of no consequence and further advised him that it would be guided in its future handling of the matter by the liquidation process. During the liquidation process, offers were made to purchase the issued share capital of Luck. That also caused the respondent not to consider the request by the applicants because Luck could be bought at any time before the final liquidation. The respondent contends that it could not have granted the request in question without disadvantaging a potential buyer of Luck's business which could have been a competitor of the first applicant. It could not table the issue of the request by applicants before its board which sat on 27 January 2010 and 8 February 2010 because neither the committee had concluded its work of gathering the information required from the first applicant nor had the court pronounced on the granting of the final liquidation of Luck.

[22] Respondent disputes that the requests sought by applicants are clerical. The respondent submitted that the request was unprecedented and in order to be better informed of the correct approach to adopt it had to seek legal opinion. It further had to act cautiously in balancing the competing interests so as to ensure that its decision should withstand judicial scrutiny. The respondent had to determine the manner and form in which the request for the report for registration and transfer of the LGM's previously under Luck should take. It had to assess whether the granting of the request would not infringe any of the regulatory requirements. Furthermore, the delay which had

occurred in submitting a report to the committee was occasioned by the fact that the information supplied to the respondent by the applicants was inconsistent. Failure to furnish the correct information made it impossible for the respondent's inspectors to evaluate the request. The respondent denies that it, without reason, refused, neglected and/or failed to process the request.

Issues:

[23] The applicants correctly identified the issues to be determined as follows:

i) whether the applicants were entitled to bring this application by way of urgency;

ii) whether the applicants were entitled to the relief of a declarator in terms of prayer 2 of the notice of motion under the provisions of section 8 (1) (d) of PAJA;

iii) whether this court should make an order in terms of section 8 (1) or 8 (2) of PAJA granting such further approval as may have been required from the board alternatively directing the board in terms of section 8 (2) (a) of PAJA to consider and decide upon a request by applicants for such approval.

Urgency:

[24] The applicants brought this application by way of urgency. The reasons given for doing so vary. The other applicants contend that the respondent insisted that they may not operate the LGMs or otherwise exploit their licences until the respondent has decided to approve their affiliation to the first applicant. The respondent failed to give an indication as to when a decision in that regard may be expected. The other applicants submit that they are deprived by the respondent from deriving any benefit from their licences which by their very nature are of a limited duration. They further submit that they are losing revenue and income which is irrecoverable. The first applicant estimated the loss of income, from the period 4 January 2010 to 4 March 2010 to be approximately **R4 147 200.00** and that of the other applicants for the same period to be **R2 764 800.00**.[4] The applicant and the other applicants contend that the loss shall continue to escalate as the months go by.

[25] The other applicants allege that the failure of the respondent to take a decision and the continued loss of income are prejudicial to them given the fact that they have invested in, and must maintain, the infrastructure in their premises which house the LGM's. They have to maintain the premises in the same state as required by their licences. They have to secure their premises by burglar guards, alarm systems and employ security guards who they pay on a continuous basis. They had to put their staff members on *"short time".* If the issue of their licences is not addressed promptly, they would have to

4 These are gross figures as the first applicant and applicants are required to pay taxes and levies. They make the point that the loss runs to about R10 million per month.

retrench 150 permanent trained staff members. The retrenchment would not only affect the staff members but their families and extended families as well.

[26] The other applicants further make the point that even though there are other businesses run on the same premises, the non-use of LGM's has a big impact on their income. It affects the various fixed costs and ongoing expenses, both of a short term and a long term nature which are paid for through the gambling income and which cannot be subsidised by the applicants' other businesses which are on the same premises. They contend that the LGM's are a major draw card to the businesses which are operated on the same premises. The applicants submitted that the failure to consider the request also affects the other site operators who are contracted to Luck but not party to these proceedings. The applicants submit that if the matter is not dealt with by way of urgency, they will suffer irreparable losses which cannot be recouped or redressed at a hearing in due course.

[27] **Mr Dickerson** submits that unlike in the **Caledon Street Restaurant CC**[5] case, the applicants utilised form 2 (a) of the forms and afforded the respondent a reasonable period of time within which to file its answering papers hence there is no evidence from the respondent that it had been prejudiced by the abridged time limits. He submits further that the requirements of rule 6 (12) (b) have been met. The other applicants have established that they would suffer substantial or real loss and could not get substantial redress if the ordinary procedures are followed. He further submits that the other applicants have demonstrated the prejudice they are

5 1998 JOL 1832 SE.

suffering and will continue to suffer.

[28] The applicants deny that they delayed in bringing the application or created their own urgency. The SSAs which gave rise to this application were concluded on the 2nd January 2010 and submitted to the board on the 4th of January 2010. The board took more than a month to respond, maintaining that it could only decide on the matter in the foreseeable future. Because the applicants are relying on the provisions of PAJA they had to obtain reasons from the board for its decision in terms of section 5 (1) of PAJA hence they asked for the reasons why the respondent was not approving their requests. They only received the reasons on 8 February 2010.

[29] Once the reasons were received, they had to evaluate them and their counsel started to draft the papers. The founding papers had to be signed by all sixty four applicants who are scattered all over the Eastern Cape. The applicants deny that they were dilatory. They submit that the grounds of urgency which have been adduced by them have not been disputed by the respondent in answer. Those grounds therefore stand as unchallenged. **Mr Dickerson** disagreed with the submission that the application stands to be dismissed for want of urgency.

[30] On the issue of urgency the respondent submits that the application stands to be dismissed for want of urgency. **Mr Motau**, counsel for the respondent, submits that the first applicant in its letter dated 22 January 2010 advised the respondent that an application would be brought on an urgent basis if the respondent failed to approve the relevant requests. Despite that

the respondent did not approve the requests, the applicants failed to take action upon the expiry of 5 days. The application was ultimately launched on 4 March 2010. He therefore submits that if it was urgent then it should have been launched on the expiry of the five day period. Furthermore, in order to succeed the applicants would have to prove that they have a clear right. The applicants have no right to require the respondent to approve the SSA's outside the regulatory framework. The board could not have taken a decision because there was outstanding information which it sought from the first applicant. That information was not forthcoming instead the first applicant submitted inconsistent and incomplete information. For that reason the applicants created their own urgency by not supplying the information. The delay is of their own making.

[31] The applicants wrote to the respondent on 2 February 2010 promising to start operating on 8 February 2010 because regulation 59 (7) did not require prior approval from the respondent. The letter further sought the opinion of the respondent regarding the applicants' interpretation of the rule. The respondent replied on 8 February 2010. The respondent stated that the matter was unprecedented and required that, amongst other things, the necessary administrative systems should be created to consider the request. The respondent further expressed the view that the proper interpretation of regulation 59 (7) requires prior approval by the board. The respondent differed with the advice received by the applicants. The respondent categorically informed the applicants that it would be irregular for them to commence operating on 8 February 2010. On 12 February 2010 the

applicants advised the respondent that they would bring an application on an urgent basis which they failed to do.

[32] In reply, the applicants deny that they dragged their feet in bringing this application. They submit that due to the complexity and unprecedented nature of the application, they had to tread carefully. They submit section 8 (1) of PAJA, requires the respondents to furnish reasons for its decision. They received the reasons on 8 February 2010. They started to draft the papers after considering the reasons. The application was launched on 3 March 2010. The applicants contend that the facts which support the events leading to the launching of the application and the reasons for bringing the application on an urgent basis have not been controverted by the respondent.

[33] Rules 6 (12) (a) and (b) which are relevant to the matter at hand provide as follows:

> "(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to it seems meet;
>
> (b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at hearing in due course."

[34] In *Caledon Street Restaurant CC (supra),* **Kroon J** summarised the

rules which pertain to urgent applications as follows:

> "Subject to the provisions of Rule 6 (12) of the Uniform Rules of Court, the provisions of Rule 6 (5) are peremptory. Rule 6 (5) (a) provides that an application must be in a form "as near as may be in accordance with Form 2 (a)." In terms of Rule 6 (5) (b) an applicant is obliged to nominate a day at least five days after service on the respondent, on or before which the respondent must notify the applicant of intended opposition. Rule 6 (5) (d) (ii) provides that within 15 days of such notification, the respondent, who is opposing must file opposing affidavits. Sub-rule 5 (f) provides for the application thereafter to the registrar for a date for the hearing of the matter, the date on which the registrar may be so approached depending on whether or not replying papers are filed by the applicant, which is also to be done within a prescribed time period."

[35] A court may in cases of urgent applications, dispense with the forms and service provided for in the Rules to the extent that it is necessary. Rule 6 (12) (a), enjoins the disposal of urgent applications by procedures *"which shall as far as practicable"* be in terms of the rules and that this duty had of necessity to be reflected in the attitude of the court as to what deviations it would tolerate in a specific case. There would have to be a marked degree of urgency, or circumstances that justify dispensing with prior notice to the respondent, before the non-use of Form 2 (a) would be permitted. When this was not the case Form 2 (a) would have to be used, and the time periods allowed for the filing of a notice to oppose and an answering affidavit could deviate from the rules only in accordance with the degree of urgency. [6]

[36] In *casu,* the applicants abridged the time limits prescribed in the rules

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6 **See:** *Gallagher v Norman's Transport Liners (Pty) Ltd* 1992 (3) SA 500 (W) as referred to in Herberstein & Van Winsen – The Civil Practice of the High Courts of South Africa: Fifth Edition at page 424.

of court. In addition to the background set out above, the applicants on 4 March 2010 at 16H25 served the respondent with the notice of motion. The notice of motion gave notice to the respondent that an application would be brought on an urgent basis against it on the 25th March 2010. No time frames were put regarding the filing of notice to oppose and the answering affidavit. The respondent filed the notice to oppose on 9 March 2010 promising to file its answering affidavit on 18 March 2010 at 16H00. The answering affidavit was, however, served and filed on the on 19 March 2010. On 24 March 2010, the applicants filed their replying affidavit, confirmatory affidavits and heads of argument. The respondent could not file its heads of argument and the matter proceeded on 27 March 2010.

[37] In an application of this nature, an applicant has to satisfy two requirements. Firstly, an applicant has to show that he/she would suffer real loss or damage were he/she to rely solely or substantially on the normal procedure provided for in the Rules of Court. Secondly, whether the deviation from the prescribed time limits would not prejudice the respondent. [7]

[38] The facts of this case are distinguishable from the facts in the ***Caledon*** case in so far as the application concerned the abridgment of the time limits. The principle, however, is the same. In the ***Caledon*** matter, the respondent was brought to court within 24 hours notice. The court felt that the time was so short that the respondent could not even file an answering affidavit. In *casu* the respondent was afforded 9 working days within which to file its

7 See: Caledon Street Restaurant (*supra)*; *Nelson Mandela Metropolitan Municipality v Greyvenocew* CC 2004 (2) SA81 (SE).

answering papers. I agree with the submission by **Mr Dickerson** when he says the respondent has failed to demonstrate that it had been prejudiced by bringing this application by way of urgency. It is further clear from the above facts that the applicants have succinctly demonstrated the loss they and members of their staff were suffering and continuing to suffer. I therefore hold that the applicants satisfied the requirements of rule 6 (12) in bringing this application by way of urgency.

***Reasons for failure to approve the requests*:**

[39] The first reason advanced by the respondent for refusing to consider the requests is that its prior approval is necessary before the applicants could start operating in terms of regulation 59 (7) read with regulation 60 (8). In its letter of 8th February 2010 annexure "P", the respondent gave the reasons as follows:

> "We submit to you that from a close consideration of regulations it is apparent that an agreement between a route operator and site licence holders must be approved by the ECGBB."

[40] As alluded to above, the respondent is responsible for the issuing of licences to both route operators and site operators.[8]

[41] The first applicant makes the point that the requirements of section 49

8 Section 49 (1) (b) provides as follows:

Route operator licence

49(1) No gambling machine shall be operated without –
(a) ….
(b) a route operator licence and an associated gambling machine site licence.

(1) (b) have been complied with in that it signed the SSAs with the other applicants. The applicants deny that they require the approval of the board in order for them to operate. Regulation 59 (7) provides as follows:

> "**Maximum number of limited gambling machines and interest in route operators.**
>
> Apart from the profit sharing between a route operator and site licence holder in terms of the agreement between them approved by the board, no route operator may hold a financial interest in the holder of a gambling machine site licence."

Regulation 60 (8) reads as follows:

> "**Requirements for gambling machine site licence**.
>
> No gambling machine site licence may be held by a route operator or by any entity where such route operator has a financial interest: Provided this shall not apply to the profit split between such route operator and gambling machine site licence holder in terms of an agreement between them which has been approved by the board."

[42] **Mr Dickerson** submits that both the Act and Regulations do not provide that the board should approve the SSAs between the first applicant and the other applicants before they could operate. He submits that all the Act requires is what is provided in section 49 (1) (b) that there should be an association between the route operator and the site operator. He submits that even regulation 59 (7) and regulation 60 (8) which are relied upon by the respondent as requiring that the SSAs between the first applicant and the

other applicants be approved by the board do not say so. He argues that in interpreting regulation 59 (7) of the Act, one has to have regard to its heading and the content of the sub-regulations. The reading of the sub-regulations indicate that regulation 59 (7) concerns the profit sharing between the route and site operators, stipulating further that no route operator may hold financial interest in the holding of a gambling machine licence. He submits therefore that the regulation is not concerned with the approval of SSAs. It prohibits the route operator from deriving any interest or benefit from a site operator other than the profit share which is spelt out and approved by the respondent. It is the profit share which is the subject of the regulation and it is an exclusionary regulation because it is aimed at stipulating that a route operator may not get anything more than a profit share which has been approved by the respondent.

[43] **Mr Dickerson's** argument is that regulation 60 (8) deals with the requirements for gambling machine licences. It requires that no gambling site licence may be held by a route operator or any entity with which such route operator has a financial interest. In other words route operators may not be site operators and it has an exclusionary clause as well which provides that this shall not apply to the profit split between such route operator and gambling machine site licence holder in terms of an agreement between them which has been approved by the board. That is spelt out in the SSA form which was drafted by the respondent. In terms of the policy and the conditions stipulated in the standard form agreement no site operator shall receive less than 40% of profit share. He submitted that the board had made

known its attitude that it permits a 60%, 60/40% profit share. He contends that even the averment made in the founding affidavit to the effect that regulation 59 (7) does not require all the agreements to be individually approved by the board was not controverted by the respondent. In closing he submitted that the respondent has already approved the nature and format of the SSAs and that is what is required under the Act and Regulations.

[44] He submitted that if one reads regulation 59 (7) in conjunction with regulation 60 (8) then one comes to the conclusion that if the agreement has to do with profit sharing, it has to be approved by the board.

[45] **Mr Dickerson** submitted that SSAs have been already approved by the respondent. When the applicants applied to the respondent to approve their licences, the board did all that was required of it in terms of the Act and the Regulations to satisfy that they qualify for the licences hence it approved them. The respondent did the same to determine that Luck qualified to be given the route operators' licence. The respondent therefore on the strength of that approved the SSAs between Luck and the applicants. These SSAs are the same with the SSAs signed between the first applicant and the other applicants except for the variations alluded to above. Therefore, **Mr Dickerson** submits that there is no need for the respondent to go back to the same process because inevitably the same result would be achieved.

[46] **Mr Motau** on the other hand argued that the first applicant, when it entered into the SSAs with its site operators, submitted the SSAs to the

respondent for approval. Indeed, the respondent approved them and it was only then that the first applicant and his site operators started to operate the LGMs. Even Luck and its site operators had to seek the approval of their SSAs by the respondent. It was only after such approval that they started to operate. He submits that the plain literal and grammatical meaning should first be applied in interpreting regulation 59 (7). He submits that the comma which is between the *"board"* and *"no route"* is clearly injunctive. He further submits that the word *"apart"* means that the regulation regulates two things, that is profit sharing and the agreement that is approved by the board. He submits that regulation 59 (7) refers to *"profit sharing"* which is found nowhere other than in the SSAs therefore by implication it means that the SSAs need to be approved by the board.

[47] It is apparent from the reading of regulation 60 (8) and regulation 59 (7) that they both prohibit a financial interest which a route operator might have in a gambling machine site licence outside the profit share approved by the respondent. The heading and the provisions of regulation 59 (7) pertain to profit sharing. The literal interpretation of regulation 59 (7) leads to that conclusion only. Nothing can be read beyond its grammatical meaning. It reads that "a*part from profit sharing…., no route operator may hold a financial interest in the holder of a gambling machine site licence".* With respect to **Mr Motau**, I disagree with him when he says that the plain, literal and grammatical meaning of this regulation requires that the respondent should first approve the SSAs.

[48] Even regulation 60 (8) cannot be interpreted to mean that there should be such approval. As pointed out by **Mr Dickerson,** the heading of the regulation does not refer to the approval of gambling machine site licence except that it deals with the requirements for holding such a licence. The language used in this regulation is clear and unambiguous. It prohibits the holding of a financial interest in the gambling machine licence by a route operator or any entity. The *proviso* which is there excludes the profit split which has already been approved by the board between a route operator and a site operator. There is nothing in the reading of the section which requires that the board should first approve the profit share first. As alluded to, it prohibits the holding of financial interest excluding profit share which is contained in the agreement approved by the respondent. I therefore do not agree with the interpretation given by **Mr Motau**. To me both regulation 59 (7) and regulation 60 (8) of the Act deal with the prohibition of holding a financial interest by a route operator. This interpretation is borne out by the uncontroverted evidence that the share split which is contained in the SSAs and approved by the respondent is 60/40 between a route operator and the site operators respectively. Such split share is contained in the licences of all the site operators which have been approved by the respondent.[9] I therefore, hold that regulation 59 (7) and regulation 60 (8) cannot be interpreted to mean that prior approval by the board of the SSAs is required.[10]

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9 Clause of Annexure C to the founding papers 16 (1) (f) reads *"At least 40% of the profits generated by the site in respect of the licensed gambling board activities shall be paid to the site operator …"*
10 Clause 5.3 of a copy of a site operator licence annexed to the founding papers reads as follows:

"3. The licensee shall not commence with the operation of limited gambling machines on the premises which is the subject of this licence, until the relevant Standard Site Agreement has been fully executed and a copy thereof submitted to the ECGBB."

[49] The second reason contained in the letter of the 8th February 2010 further reads as follows:

> "Furthermore, in terms of the Act, no person may expose a gambling device for play by the public without same being *"separately"* registered by the ECGBB."

[50] The applicants submit that the respondent is aware that the applicants' LGMs have been registered separately by the respondent whilst Luck was still in existence. The applicants' new SSAs also do not introduce new LGMs.

[51] The third reason advanced in the same letter reads:

> The Act further subjects such other activities like transfer, registration and removal of gambling devices to the ECGBB's approval on application in a manner prescribed by the ECGBB."

[52] The applicants contend in the founding affidavit that the applicants' LGMs which they propose to operate, will remain exactly where they were prior to the demise of Luck. Furthermore, most of those LGMs were supplied by the first applicant. All that is needed is to have them reconnected to the CEMs. It was further submitted that the existing link to the CEMs and the site logger will continue to operate as before. The monitoring service provider, **Zonke Monitoring Systems (Pty) Ltd** would just reflect the first applicant as the relevant route operator rather than Luck.

[53] I should hasten to mention that the respondent did not deal with the second and third reasons in their answering affidavit because it felt they

constituted legal argument.

[54] The applicants accuse the respondent of dragging its feet on a matter which is urgent as it affects their livelihood and that of those who are connected in the gambling industry through them. This criticism is based on the response of the respondent regarding the duration it would take in processing the requests. Paragraph 3 of the response referred to reads:

> "Please be advised further that the ECGBB will, in line with its statutory mandate, consider the requests in question and advise your client of its decision as soon as it is reasonably practicable. You would appreciate that in the light of the unprecedented nature of the application in question, the ECGBB will, amongst other things, create the necessary administrative systems for the consideration of the requests in question."

[55] The applicants further refer to paragraph 4 which states that:

> "the consideration of the requests was a board function which must be aligned with the board's calendar of activities."

[56] The attitude of the applicants is that the board is deliberately delaying this matter. The respondent, according to the applicants, has the necessary capacity to deal with this matter as it is a mere clerical exercise which could be dealt with expeditiously as the circumstances require.

[57] **Mr Motau** denied that dealing with the requests was a clerical exercise. Because the requests were unprecedented, the board had to consider them. The respondent ascribes the delay to the applicants who had failed to furnish

the information required from them. The attitude of the respondent is that it cannot create a bad precedent and sacrifice regulatory compliance at the expense of expediency. **Mr Motau** submits that the respondent still stands by its reasons as contained in the letter dated 8 February 2010. He submits that the reasons submitted are adequate in the circumstances and that the application stands to be dismissed with costs.

[58] Section 5 of PAJA deals with reasons for administrative action. The applicants rely on the provisions of section 6 (2) (g) read with section 6 (3) of PAJA in submitting that the reasons furnished by the respondent are inadequate. For that reason the applicants request that the provisions of section 5 (3) be invoked. Section 5 (3) provides that if an administrator fails to furnish adequate reasons for its administrative action, it must be presumed in any proceedings for judicial review that the administrative action was taken without a good reason. Section 5 (3) is subject to the provisions of section 4 which are not applicable herein.

[59] The applicants submit that if I find that the approval of the board was required for the requests, the respondent's failure to determine the applications and its delay constituted an administrative action which may be reviewed and set aside under sections 6 (2) (g) read with 6 (3) of PAJA. The applicants premise their argument on the history of the matter as dealt with above and the inadequacy of the reasons advanced by the respondent for not acceding to the request and the inability to give an indication as to when it would consider the requests. I have already dealt with the said reasons

above and the response of the respondent thereto. I shall be overburdening this judgment if I were to recount them.

[60] **Mr Dickerson** argues that the respondent has been influenced by an error of law and is acting with an ulterior purpose or motive. The latter submission is based on the reasoning of the board that it was considering whether it should refuse the applicants their requests in order to make their sites available to a second route operator. He submitted that that is an impermissible objective and consequently an ulterior motive within the meaning of section 6 (2) (e) (ii) of PAJA. He came to that conclusion because the respondent did not take steps to initiate the process of licensing a second route operator. That process would take a period of more than a year. By that time the term of the applicants would have come to an end. He submitted that the respondent's actions or inaction is not rationally connected to the reasons advanced by the respondents and stand to be reviewed in terms of section 6 (2) (f) (ii) of PAJA. He further argues that the respondent's actions also concern a failure to take a decision as envisaged in section 6 (2) (g) of PAJA. Lastly he argues that the respondent's exercise of its power in attempting to prevent the applicants from utilising their rights in terms of the licenses granted by it, is so unreasonable that no reasonable person could have acted in such a manner. He concludes that the respondent's conduct is reviewable in terms of section 6 (2) (h) of PAJA.

[61] It is clear that any decision or failure to take a decision by the respondent constitutes an administrative action.[11] That it is so means that the

11 Section 1 (b) of PAJA

action or inaction of the respondent is reviewable.[12]

[62] The position as it obtains in this matter is that the other applicants find themselves in a situation which is not of their own making. The demise of Luck cannot be attributed to them. They have suffered and continue to suffer as articulated above. They have paid their dues in respect of their licences to the respondent. The negotiations with the board started in October 2009 till to date. These negotiations did not bear fruit for reasons advanced. It is further clear from the evidence adduced by the respondent that it is not likely to make a decision any time soon if one has regard to the fact that the respondent does not know how it is going to handle the requests of applicants. I repeatedly asked **Mr Motau** during argument as to when does the respondent think it would make a decision regarding the requests. He could not indicate as to when. It is further not clear what action the respondent is to take once all the necessary information is placed before it. That is understandable because the outcome would depend on the information and the report of the committee that is investigating the requests by applicants. The inevitable result is that the respondent would accede to the request. I say so because unprecedented as it is, the other applicants are valid licence holders of LGMs. They have not transgressed the conditions of their licences. Even Luck itself did not transgress the licence approved by the board. The plight of the other applicants is as a result of Luck being liquidated, something which neither the first applicant nor the other applicants can be blamed for. Neither of the parties is the author of this situation. It really eludes my mind as to what it is that the respondent needs to investigate in this matter. I am not in the least

12 Section 6 of PAJA

trying to trivialise this situation. I am aware of the responsibility of the respondent in fulfilling the objectives of the Act, its giving effect to the regulation and specifically its responsibility to prevent any unorthodox manner in its controlling of the gambling industry in the Eastern Cape. Unprecedented as it is, the issue of the requests in my view needs no investigation. What is it that has to be investigated in the backdrop of what has occurred leading to the other applicants, through no fault of their own, finding themselves without a route operator.

[63] The reasons adduced by the respondent for not considering the requests are not sound. The applicants' licences are valid but for the fact that they do not have a route operator. There is nothing therefore to be investigated about them. The LGMs they own and the premises in which they are situated are still intact and have been approved by the respondent. The Site Data Logger and its connection to the Central Electronical Monitoring System which monitors and reports to a route operator (in this instance the first applicant) can be connected at any time through the use of a computer as alleged by the applicants and not denied by the respondent. This also does not need any investigations by the respondent. What crowns it all is that the duration left for the licences of the applicants is less than a year.

[64] The requests of the applicants are *sui generis.* It is so because no wrong or fault can be attributed to them. Even if the SSAs can be approved that would not result in a bad precedent.

[65] The fact that the first applicant's licence permits it to expose 1000 LGMs solves the problem which the respondent would have, had there been no space for affiliation in the remaining route operator. If there was no space for affiliation with the first applicant I would agree with the proposition by the respondent of considering putting the matter to tender. The consideration by the respondent of unfair competition is with respect not applicable in *casu.* The circumstances and the exigency of the matter merit that respondent should have considered the requests on an urgent basis.

[66] I agree with the following reasons of **Kroon J** in *Ekuphumleni Resort (Pty) Ltd & Another v Eastern Cape Gambling and Betting Board & Others.*[13]

> "The board had laid no basis to suggest that a reasonable possibility existed that, upon a balanced consideration, it would make a finding adverse to the first respondent. Accordingly, with the benefit of the input before the board the court was in as good position as the board to reach a decision and the court was moreover faced with the inevitability of the outcome if the board were once again called upon fairly to decide the matter. Equitable considerations favoured the first respondent including cognisance of the delay in the matter (which had in part been caused by the board)."

[67] The respondent has approved the licences of the first applicant and the other applicants. The situation the other applicants find themselves in does not concern their licences. It does not even concern any transgressions of the Act or the regulations. Their licences are valid but for the liquidation and lapsing of the licence of Luck who was their route operator. There is no semblance of evidence suggesting that after the investigations the respondent seeks to conduct, the board would not approve the SSAs they concluded for

13 Unreported Eastern Cape Case No 402/2007 delivered on 18 February 2010

the remainder of their licences which is less than a year. It would be remiss on my part if I were to refer back this matter for the respondent to investigate or open it to tender. That process is indefinite. The respondent is not able to estimate how long it would take to complete the process and decide on the requests. Time is not on the side of the respondent or the applicants. The uniqueness of the requests at hand does not merit that and it is inconceivable and not supported by facts that to substitute the decision of the respondent would lead to setting a bad precedent. It is apparent that if these requests were to appear before the board of the respondent it would approve the requests.[14]

[68] I find the following passage by **Kroon J** in *Ekuphumleni Resort (Pty) Ltd & Another (supra)* apposite in the circumstances of this case:

> "However, the power of a court on review to substitute or vary administrative action or correct a defect arising from such action depend upon a determination that the case is *"exceptional"* as envisaged in s 8 (i) (c) (ii) (a) of PAJA. A case is so exceptional when, upon a proper consideration of all the facts, a court is persuaded that the decision to exercise a power should not be left to the designated functionary. Such a decision is dependent on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair. Thus, remittal will not be ordered if procedural unfairness would be the consequence."[15]

[69] I have found that the facts of this matter are *sui generis.* The time left is very short. The applicants and their employees are suffering financially. A

14 *University of Western Cape v Member of the Executive Committee for Health and Social Services* 1998 (3) SA 124 C at 131

15 (At paragraph 89, *Gauteng Gambling Board v Silverstar Development Ltd & Others* 2005 (4) SA 67 (SCA) para [28] at 75 as cited therein).

further delay in remitting the matter to the respondent would cause unjustifiable prejudice to the applicants. More so if one has regard to the time that has lapsed and the remaining period left before the licences of the applicants expire.[16]

[70] In the light of the above consideration it is my finding that the facts of this matter are exceptional as envisaged in s 8 (1) (cc) (ii) of PAJA and merit the substitution of the administrative inaction of the respondent for its decision.

[71] In all these circumstances, even if I am wrong in my aforementioned finding that prior approval by the board of the SSAs is not required, the applicants are nonetheless entitled to the orders they seek based on the aforementioned provisions of PAJA.

In the result I make the following order:

(a) Declaring that the second to sixty-fourth applicants are entitled in terms of their existing gaming machine site licences, with immediate effect, to operate limited gambling machines in association with the first applicant (as holder of a route operator licence in the Eastern Cape Province) as envisaged in section 49 (1) (b) of the Eastern Cape Gambling and Betting Act, Act 5 of 1997;

16 See: *Reynolds Rubbers Ltd v Chairman, Local Road Transportation Board, Johannesburg* 1985 (2) SA 790 (A) at 805 F-H; *Ruyobeza & Another v Minister of Home Affairs & Others* 2003 (5) SA 51 (CPD) at 65 F-G.

(b) Directing the respondent to do all the things necessary and within its power to allow the exercise of such rights;

(c) Directing the respondent to pay the applicants' costs of this application.

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M MAKAULA

JUDGE OF THE HIGH COURT

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PORT ELIZABETH

Heard on: 25 March 2010

Delivered on: 19 August 2010