IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case No.: CA 147/2019

Date Heard: 21 October 2019

Date delivered: 12 November 2019

In the matter between:

VUKANI GAMING EASTERN CAPE (PTY) LTD	Appellant
and	
THE CHAIRPERSON, EASTERN CAPE GAMBLING AND BETTING BOARD	First Respondent
THE EASTERN CAPE GAMBLING AND BETTING BOARD	
PIONEER SLOTS (PTY) LTD	Second Respondent
MARSHALLS WORLD OF SPORT	Third Respondent
EASTERN CAPE (PTY) LTD	Fourth Respondent
K2017440277(PTY) LTD	Fifth Respondent
GOLDEN PALACE SITE 3 (PTY) LTD	Sixth Respondent
GSLOTS ISO EC (PTY) LTD	Seventh Respondent
GOLDEN PALACE SITE 4 (PTY) LTD	Eight Respondent
K2017425418 (PTY) LTD	Ninth Respondent
SPIN AND WIN ENTERTAINMENT MBIZANA (PTY) LTD	Tenth Respondent
GEC GAMING (PTY) LTD	Eleventh Respondent
K2014000230 (PTY) LTD	Twelfth Respondent

GOLDEN PALACE SITE 1 (PTY) LTD Thirteenth Respondent

JUDGMENT

THE COURT:

Van Zyl DJP, Lowe J and Beyleveld AJ:

INTRODUCTION

[1] On the 31st January 2019 Dawood J dismissed the Appellant's application in terms of which it sought to review and set aside a decision taken by the Second Respondent[1] during 2017 to issue and publish a Request for Proposals[2] in terms of Regulation 17 of the National Regulations on Limited Pay-Out Machines inviting applications for independent site operators[3].

[2] In addition, Vukani also sought orders reviewing and setting aside any award of license made by the Board in terms of the RFP and, insofar as it may be necessary, reviewing and setting aside a so-called Policy Document on Limited Pay-Out Machines adopted by the Board in May 2017.

[3] Subsequent to Vukani's application being dismissed with costs, Dawood J on application granted Vukani leave to appeal to the Full Bench of this division.

[4] Vukani duly noted an appeal and sought an order that the appeal be upheld with costs and that the Court *a quo*'s decision be replaced with an order in terms of

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[1] The Applicant will herein be referred to as "*Vukani*" whilst the Second Respondent will be referred to as the "*Board*".
[2] "*RFP*".
[3] The Regulations on Limit Pay-Out Machines are contained in GNR1425 of the 21st December 2000 as amended by GNR109 of the 6th February 2007. An independent site operator will hereinafter be referred to as "*ISO*".

which the Board's decision relating to the RFP and any awards of licenses made by the Board in terms of the RFP be reviewed and set aside.[4]

FACTUAL AND LEGISLATIVE MATRIX

[5] The **Constitution of the Republic of South Africa**, 1996 provides for concurrent legislative competence between the National and Provincial spheres in relation to the functional areas listed in Schedule 4A of the Constitution which include "*casinos, racing, gambling and waging, excluding lotteries and sports pools*".

[6] As a result of the concurrent legislative competence between National and Provincial Government, the Eastern Cape Legislature promulgated the Gambling and Betting Act, 1997 (Eastern Cape) [5].

[7] Nationally, gambling is dealt with in the National Gambling Act[6].

[8] In the preamble to the National Gambling Act one of the essential purposes of such Act is to ensure that "*society and the economy are protected against over stimulation of the latent demand for gambling*".

[9] National and Provincial Legislation regulates the number and distribution of Limited Pay-Out Machines.[7]

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[4] In such notice of appeal Vukani no longer seeks an order in terms of Paragraph 3 of the amended notice of motion which is an order seeking the review and setting aside of the Policy Document adopted by the Board in 2017. The decision not to seek an order setting aside the Policy Document is no doubt based on the accepted principle that policy documents are what they are and cannot override and amend or be in conflict with any law, including sub-ordinate legislation. *Kwa-Zulu Natal Bookmakers' Society v Phumelela Game and Leisure Ltd* (889/2018) [2019] ZASCA 116 (19 September 2019) at Para 30(f).

[5] No 5 of 1997.

[6] No 7 of 2004.

[7] As a point of departure the public requires adequate protection against exploitation in the gambling industry; hence the need for proper regulation and license – *Casino Enterprises (Pty) Ltd v Gauteng Gambling Board and Others* 2011 (6) SA 614 (SCA) at para 23. As to the inherent dangers of gambling, Pope John XXIII once remarked as follows: "*Italians come to ruin most generally in three ways; women, gambling and farming. My family chose the slowest one*". Similarly, Hunter S Thompson, renowned American author and journalist, quipped: "*Gambling can turn into a dangerous two-way street when you least expect it. Weird things happen suddenly, and your life can go all to pieces*".

[10] All gambling activity by its very nature creates a tension between two disparate objectives, namely the restriction or curbing of the negative socio-economic impact of gambling on the one hand and the economic advances brought about by generation of taxes and other revenue, as well as increase of employment contribution on the other hand.[8]

[11] Limited Pay-Out Machines[9] are gambling machines situated outside of a casino. The stakes and prizes when playing an LPM are limited and prescribed by Regulations made in terms of the National Act.

[12] These machines are usually found in bars, taverns, restaurants, hotels and other similar sites.

[13] In terms of Section 2 of the Act, the maximum number of LPMs in the Republic of South Africa is 50 000 with a maximum allocation to the Eastern Cape Province of 6 000.[10]

[14] This restriction on LPMs in the Eastern Cape is echoed in Regulation 59(1) of the Regulations promulgated under the Provincial Act.

[15] Until the advent of events forming the subject matter of Vukani's review application, the Eastern Cape was limited to 2 000 limited gambling machines.[11]

[16] The Board is established in terms of the Eastern Cape Gambling and Betting Act and its powers and functions generally are to oversee gambling and betting activities in the Province and, in particular, to invite applications for licenses in terms of the Act or accept such applications without invitation.[12]

[17] The Eastern Cape Act provides for two types of LPM licenses, namely licenses issued to route operators and site operators. A route operator contracts

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[8] See National Gambling Policy 2016.
[9] "LPM".
[10] Section 2.
[11] Regulation 59(2).
[12] Section 4(1).

with holders of gambling machine site licenses[13] to operate LPM's at certain sites. On the other hand, there are site operators who are not linked to a route operator and are licensed to own and operate not less than 21 and not more than 40 LPMs on a site.

[18] As indicated above, and in terms of Regulation 59(2) only 2 000 LPMs have been allowed up to recent events. All these licenses were held by two route operators, namely Vukani and Third Respondent[14] who each held 1 000 LPMs.

[19] Vukani launched review proceedings in November 2017 which challenged the decision taken by the Board in terms of Regulation 17 of the National Regulations[15] to issue a RFP inviting applications for additional[16] ISO licenses.

[20] Pursuant to Regulation 17 of the National LPM Regulations, a notice was published in the Eastern Cape Provincial Gazette on the 11th September 2017 and in two newspapers on the 7th September 2017.

[21] The notice recorded that the RFP was available from 5th September 2017 at the Board's offices.

[22] In such publications, it is stated that: "*… the Final RFP will constitute the basis of any evaluation for any proposal for the Independent Site Operator Licenses*".

[23] The Fourth to Thirteenth Respondents are ISO's who have applied and been granted additional ISO licenses in terms of the RFP.[17]

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[13] Site operators.
[14] Hereinafter referred to as "*Pioneer*".
[15] "*17. **Publications of Notice inviting application for license** – When it intends to invite applications, a Provincial licensing authority shall public a notice in the Provincial Gazette and two newspapers circulated in the relevant province informing the public of the availability of the official request for application document in that province*."
[16] In excess of the 2 000 LPMs.
[17] At the hearing, only the Sixth, Eighth and Thirteenth Respondents were represented. It is accepted that the other Respondents rely on the submissions made on behalf of such Sixth, Eighth and Thirteenth Respondents (for the sake of convenience the ISO Respondents will be referred to as "*Golden Palace*").

[24] As alluded to earlier, Regulation 59 of the Eastern Cape Regulations regulates licenses for LPMs. The Board is enjoined to ensure that no further LPMs are licensed if doing so would result in over saturation and also having considered the socio-economic and environmental impact of further LPMs as well as the impact that additional LPMs would have on problem gambling.

[25] In this regard, the relevant portion of Regulation 59 provides:

> "*…the board shall only issue or allow route operator licenses or limited gambling machine site licenses which will allow more than 2 000 limited gambling machines to be operated in the Province if –*
>
> *(a) it is satisfied that this will not lead to an over-saturation of the limited gambling machines in the Province; and*
>
> *(b) it is has considered, both in regard to the existing limited gambling machines and such further machines as may exceed 2 000 –*
>
> *(i) the social impact;*
>
> *(ii) the economic impact;*
>
> *(iii) the environmental impact;*
>
> *(iv) the impact on problem gambling; and*
>
> *(v) any other information it considers relevant and it is of the opinion that the exposure for play of more than 2 000 limited gambling machines would be in the best interests of the Province*."

[26] Having regard to this obligation imposed on the Board, and in 2015, the Board commissioned a Study to determine the socio-economic and environmental impact of LPMs in the gambling sector in the Eastern Cape and to determine whether or not to increase the number of LPMs from 2 000 to 6 000.

[27] A specific objective in such Study was to determine whether at administrative level in the province there were areas of "*over-saturation*".

[28] The Study utilised two models to determine whether there was under or over-saturation.

[29] The first model was a population based equitable distribution model which allocates licenses to operate LPMs based on one machine to 1 000 persons in the local municipality.

[30] The second model used was the GDP[18] which is based on the gross domestic product in a certain area.

[31] Accordingly, the two methods utilised in the study were a population based model and an economic based model.

[32] Utilising the population based model two municipalities were "*over-saturated*".[19]

[33] In respect of the GDP based model both Nelson Mandela Bay and Sarah Baartman were found to be "*over-saturated*".[20]

[34] Notwithstanding the findings in the study relating to the over-saturation of Nelson Mandela Bay and Sarah Baartman utilising both models, the Study asserts that based on the current 2 000 allocation of licenses and based on this model[21], and "*… given its economic muscle the NMB Metropolitan Municipality can still be awarded 60 LPM licenses*".[22]

[35] Pursuant to the Study and in May 2016 the Board released a draft Policy Document on LPMs.

[36] Such Policy included a proposed Allocation Model indicating how additional LPMs would be assigned to different municipalities.

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[18] Gross Domestic Product.
[19] Nelson Mandela Bay Metropolitan Municipality 22% and Sarah Baartman Municipality 3%. They will hereinafter be referred to Nelson Mandela Bay and Sarah Baartman respectively.
[20] 20% in respect of Nelson Mandela Bay and 2.3% in respect of Sarah Baartman. It was also found that the Buffalo City Metropolitan Municipality was over-saturated by 1.1%.
[21] The GDP model.
[22] It is not apparent from the Study what is meant with economic muscle having regard to the economy based GDP model which clearly indicated Nelson Mandela Bay Metropolitan Municipality being considerably over-saturated.

[37] The proposed Allocation Model was based on the calculations of the Study and involved a hybrid of the population based equitable distribution model and the GDP economic model reflecting 70% GDP distribution and 30% population distribution.

[38] On the Board's own model it reflected both Sarah Baartman and Nelson Mandela Bay over-saturated.

[39] In May 2017 the Board released its final Policy Document which also contained a license Allocation Model which once again reflected that both Sarah Baartman and Nelson Mandela Bay were over-saturated.

[40] Shortly after releasing the policy the Board released a draft RFP calling for applications for ISO licenses in various areas. The draft RFP did not call for licenses for Nelson Mandela Bay Metropolitan nor for Sarah Baartman.[23]

[41] After receiving comments on the draft RFP[24] the Board released the final RFP which forms the subject matter of the review in this matter.

[42] Despite over-saturation in Nelson Mandela Bay and Sarah Baartman the final RFP invited applications for licenses in both these municipalities.

[43] The RFP records that the Board commissioned a study in terms of Regulation 59(3) of the Eastern Cape Regulations.

[44] Soon after the publication of the RFP the Board published a briefing note which was to the effect of allocating sites jointly to Nelson Mandela Bay and Sarah Baartman.

[45] The relevant change to the RFP made by the briefing note was therefore that Nelson Mandela Bay and Sarah Baartman had collectively been allocated two

[23] The reason for this as recorded in the draft RFP is that there should be no allocation due to these areas being over-saturated.
[24] None of the comments contained any substantive submissions on the question of over-saturation.

licenses whereas previously Nelson Mandela Bay had been allocated two on its own and Sarah Baartman had been allocated one license.

[46] When Vukani launched the review application in respect of the RFP the period for applications for licenses had yet to close and at that stage no interdict relief was sought.

[47] When applications were made however, Vukani launched urgent interim proceedings to interdict the Board from awarding licenses in terms of the RFP.

[48] The urgent interdictory application came before Smith J who declined to order interim relief on the basis that the requirements for such relief had not been met.

[49] Smith J dismissed Vukani's application as it failed to meet the more exacting requirements imposed by the Constitutional Court in respect of interim interdictory relief against Organs of State.[25]

VUKANI'S ESSENTIAL SUBMISSIONS

[50] Vukani relies on the provisions of the Promotion of Administrative Justice Act[26].

[51] In respect of the Board's anterior decision to issue the RFP[27] it is argued that the issue of the RFP constitutes administrative action as defined in PAJA, more particularly as the decision had the capacity to effect Vukani's right as one of the two operators that lawfully operate LPM's in the Eastern Cape at the time.

[52] It is asserted that when the Board decided to issue the RFP the prejudice to Vukani was inevitable and on that basis it would constitute a reviewable decision in terms of PAJA.

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[25] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) and *International Trade Administration Commission v SCAW (South Africa) Ltd* 2012 (4) SA 618 (CC).
[26] 3 of 2000 ("*PAJA*").
[27] Anterior to the decision to award the licenses.

[53] It is also contended that the RFP had direct external legal effect as absent this decision the Board would not have been able to subsequently award licenses[28]. In this regard Vukani refers to a recent decision where a request for bids or proposals was found to have a direct external legal effect, and accordingly were reviewable in terms of PAJA.[29]

[54] Vukani in any event contends that if PAJA is not applicable, the decisions (and in particular the decision to issue the RFP) is reviewable under the principle of legality.[30]

[55] Besides criticizing flaws in the Study[31] Vukani relies on the RFP decision being reviewable on the grounds that irrelevant considerations were taken into account or relevant considerations not considered and that the decision was not rationally connected to the information available or the purpose of the empowering provision. It is also contended that the decision was unreasonable.

[56] The essence, however, of the contentions on behalf of Vukani was that a mandatory and material procedure or condition prescribed by an empowering provision[32] was not complied with.

[57] It is therefore contended that the RFP did not comply with Regulation 59(3) and was accordingly procedurally and substantively irrational.

[58] It is asserted that there is nothing in the Record which indicates why the Board decided to issue the RFP in its final format.[33]

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[28] A decision to issue the RFP accordingly, as submitted by the Vukani, affected Vukani's rights.
[29] *Imperial Group Limited v Airports Company South Africa SOC Ltd and Others* [2018] 3 All SA 751 (GJ) at [31] and [33].
[30] In this regard Vukani refers, *inter alia*, to *Pharmaceutical Manufacturers Association of South Africa and Another : In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC).
[31] With reference to a assessment prepared by Professor Standish.
[32] Namely Regulation 59(3).
[33] More particularly with reference to allocations to the two over-saturated municipalities Nelson Mandela Bay and Sarah Baartman.

[59] It is further submitted that Regulation 59(3) is to considered at the stage of the issuing of the RFP and not only at the stage when LPM licenses are issued.

[60] Vukani contends that over-saturation on a proper interpretation of Regulation 59(3) cannot be decided having regard to the Province as a whole and by ignoring over-saturation in specific areas such as within municipal boundaries.

[61] Having regard to the Study and what transpired thereafter, Vukani argues that there existed no objective nor reasonable grounds to indicate that the Board was satisfied that allowing for additional licenses for further LPMs would not lead to over-saturation.

[62] In line with this, it is contended that the decision is inconsistent with the information before the Board as there is no reasonable explanation for the Board's *volte face* in granting additional ISO licenses in the two municipalities referred to.

[63] It is said that the decisions were not rationally connected to the information before the Board and that the Board failed to place adequate weight to the important factor of over-saturation.

THE BOARD'S ESSENTIAL SUBMISSIONS

[64] The Board, in its contextual analysis and interpretation of Regulation 59(3) argues that the test whether or not the Board is satisfied is a subjective test.[34]

[65] The reference to over-saturation in Regulation 59(3)(a) is according to the Board, a reference to over-saturation in the Province as a whole and not to under or over-saturation in any particular municipality.

[66] It is conceded that the Board, having regard to over and under-saturation in particular municipalities, adopted an erroneous approach to the understanding of the requirements of the Regulation.

[34] A subjective test whether the Board is satisfied that additional LPMs will not lead to over-saturation.

[67] Support for the argument that the Regulation refers to the Province as a whole and not on any localized basis, reference is made to Regulation 62, more particularly Regulation 62(b) which provides that the Board shall take into consideration[35] "*prevention of over-concentration of limited gambling machines in a particular area*".

[68] On this aspect the Board contends "*… that it has never been seriously in dispute that the province, as opposed to any particular municipality, can absorb more than 2 000 LPMs*".

[69] The Board refers to the fact that Regulation 59 is silent as to the manner in which the Board is supposed to satisfy itself and asserts that the Board is not required to undertake a scientific study as to these matters.[36]

[70] The Board further submits that there has been compliance with Regulation 59(3) as it was satisfied on rational and reasonable grounds that the roll-out of additional LPM's would not lead to over-saturation.

[71] It is also asserted that Regulation 59(3) need not be complied with at the stage when the RFP was issued but only at the stage when the licenses were issued.

[72] It is argued that the words "*or allow*" refers to the granting of a license as opposed to the issuing of such license which happens subsequently. Repeating once again that although the Study and the Policy Documents that followed did not allow for allocations to certain municipalities whilst the final RFP did, it reiterates the submission that this was based on a misapprehension as to the requirements of Regulation 59(3).

[73] It is therefore submitted that the Board acted rationally in taking the decision to adopt the final RFP. On a procedural issue it is contended that the issue of the

[35] In addition to considerations mentioned in Chapter 3 of the Act.
[36] This aligns with the Board's argument that the test is a subjective test.

final RFP did not adversely effect Vukani's rights, more particularly at the stage that the RFP was published and applications for ISO licenses invited.

[74] It is also suggested that the RFP is not reviewable in terms of PAJA as it constitutes executive action as opposed to administrative action.

ESSENTIAL SUBMISSIONS BY GOLDEN PALACE

[75] As did the Board, Golden Palace interprets Regulation 59(3) to require an evaluation as to whether or not there is over or under-saturation only at the time of the actual issue or allowance of the licenses and not prior to that.

[76] It is stated that Regulation 59(3) does not prohibit the Board from inviting or considering applications for LPM licenses without having determined whether there is under or over-saturation.[37]

[77] In essence therefore Golden Palace disputes that there exists a review challenge to the RFP as this occurred at pre-licensing stage.

REGULATION 59 AND WHETHER OR NOT A REVIEW CHALLENGE EXISTS TO THE RFP

[78] The first issue to be decided is at what stage the Board must be satisfied that there has been compliance with Regulation 59(3).

[79] The approach to statutory interpretation is formulated in *Cool Ideas 1186 CC v Hubbard*[38] where the following is stated:

> "*[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do*

[37] It further states that Regulation 59(3) cannot require compliance with its provisions at some arbitrary stages prior to the issuing of license.
[38] 2014 (4) SA 474 (CC) at para 28.

> *so would result in an absurdity. There are three important interrelated riders to this general principle, namely:*
>
> *(a) that statutory provisions should always be interpreted purposively;*
>
> *(b) the relevant statutory provision must be properly contextualised; and*
>
> *(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).*"[39]

[80] As a starting point, one must have regard to the National Gambling Act which has as one of its goals, the protection of society and the economy against over-stimulation.

[81] The National Gambling Act recognises the potential detrimental socio-economic impact of a proliferation of LPMs and enjoins the Minister to Regulate LPMs in accordance with the section.[40]

[82] As indicated previously, the Regulations on Limited Pay-Out Machines under the National Gambling Act stipulated that the maximum number of LPMs which may be licensed in the Eastern Cape is 6 000.

[83] Regulation 59(3)(a) is a jurisdictional requirement which must first be satisfied. It is only once this jurisdictional hurdle has been crossed that there is a duty on the Board to consider the socio-economic, environmental and other impacts and to consider whether it would be in the best interests of the Province.

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[39] Footnotes omitted. See also *Kwa-Zulu Natal Bookmakers' Society v Phumelela Gaming and Leisure Ltd* (889/2018) [2019] ZASCA 116 (19 September 2019).
[40] Section 26(1).

[84] This jurisdictional requirement is in line with the legislative purpose of gambling legislation namely to responsibly regulate licenses and control gambling activities and to guard against over-saturation of LPMs.

[85] Significantly, Regulation 59(3) utilises the words "*issue*" or "*allow*". In other words, the Board must be satisfied prior to issuing or allowing further licenses that this will not lead to an over-saturation.

[86] In the context and having regard to the background and purpose of the Regulation[41] there is a distinction between the ultimate issuing and the allowing of additional licenses.[42]

[87] The word "*allow*" must therefore mean something other than the final issue of the license.

[88] In this context, Regulation 59(3) allows limited gambling machine site licenses when it publishes an RFP calling for applications for licenses.

[89] By issuing the RFP the Board indicates that it will allow additional licenses without guaranteeing that any applicant will be issued with a license.[43]

[90] The recorded purpose of the RFP is to furnish prospective applicants for licenses with an indication of the underlying policies and principles applicable to the licensing of any operations as well as the criteria applicable to the licensing.

[91] The Board itself in the RFP recognises that the Study was part of the process in determining whether there is an under or over-saturation in terms of Regulation 59(3).

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[41] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.
[42] There is the well-known presumption against the inclusion of superfluous words in documents – *Wellworths Bazaars Limited v Chandlers Limited and Another* 1947 (2) SA 37 (A) at 43.
[43] Without a guarantee that an application pursuant to the invitation would be successful.

[92] This accords with a purposive interpretation of Regulation 59(3) which is that any decision of the Board to issue a license must be premised on the Board's anterior decision to issue the RFP calling for applications.

[93] It accordingly follows that the anterior decision[44] must pass the jurisdictional hurdle of Regulation 59(3)(a).

[94] If the jurisdictional consideration in Regulation 59(3)(a) is only to be satisfied at the time when the license is issued, it would lead to the absurd result that extensive analysis would have to be undertaken in the Province on each occasion that an application is being considered.

[95] The Board must first undertake an extensive investigation[45] before inviting applications and considering, and thereafter adjudicating individual applications.[46]

[96] In respect of whether or not over-saturation is to be determined solely at Provincial level or otherwise, an interpretation that the assessment must be the broader assessment of the province only would lead to absurd consequences and anomalies.

[97] The LPMs are all situated at specific and fixed locations and accordingly any assessment of saturation[47] must be localised to be meaningful and to achieve the object of the assessment.

[98] An interpretation that over-saturation is only in respect of the Province as a whole, would mean that a situation could arise where there is a major over-saturation in one municipality in the sense that all LPMs are located in such municipality and nowhere else in the Province. If this meant that the Province as a whole is not over-

[44] The RFP.
[45] Which it does prior to the issuing of the RFP.
[46] The consideration of over-concentration as contemplated in Regulation 62(b) therefore takes place when there is a consideration of an application for either a transfer or the granting of a license and when consideration is given to conditions or requirements which would attach to such license. Over-concentration is not the same as over-saturation and first mentioned is more linked to competition than over-saturation in a certain area.
[47] As indeed an assessment of socio-economic and other impacts.

saturated it should be allowed. That is not in accordance with the purpose of the Regulation.

[99] In addition, the further requirement which relates to the socio-economic and environmental impact of further LPMs are factors best assessed at the level of a more localised area such as a municipal or metropolitan area.

[100] The Board, itself, applied the principle of assessing over-saturation at municipal level but asserts that it erroneously did so.

[101] What is not apparent, however, is if there was an erroneous assessment based on municipal areas, whether in fact, when the RFP was issued the Board rationally considered under or over-saturation at provincial level[48]. The entire import of the RFP was the establishment of under and over-saturation within municipal areas.

[102] We accordingly conclude that the Regulation 59(3)(a) assessment preceded the RFP and that to determine whether or not there has been a rational objective assessment one must have regard to the assessment which eventuated in the issuing of the RFP.

[103] We also conclude that such assessment must, for the reasons set out above, have regard to specific areas within the Province as opposed to the Province as a whole.

[104] Once it is accepted, as we do, that the required assessment in terms of Regulation 59(a) occurred at the stage of issue of the RFP[49] and once it is accepted[50] that over-saturation cannot be determined having regard to the purpose of the legislative framework in the province as a whole, but must out of necessity be directed at specific areas, more particularly municipal areas, then the decision to issue the RFP was irrational and not based on any reasonable grounds.

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[48] Or for that matter at any stage.
[49] Together with the preceding events, including the Study and the Policies.
[50] As we once again do.

[105] We agree with Vukani's counsel who submitted that the question is not whether the Board asserts that it was subjectively satisfied that Regulation 59(3) was fulfilled and accordingly there existed no question of over-saturation, but rather the question is whether it was objectively reasonable for the Board to be satisfied that allowing for and issuing licenses for further LPMs would not lead to over-saturation.[51]

[106] The Board by its own admission misconstrued the statutory provision in terms of which it made the decision that there exists no over-saturation.[52]

[107] On this basis alone and even at common law[53], the assessment in terms of Regulation 59(3) on the Board's version, constituted a wrong performance of its statutory duty.

[108] However, on the basis that the Board in fact correctly interpreted Regulation 59(3) so as to require the Board to determine the municipal areas where there is over and/or under-saturation, the Board's decision in our view is reviewable on the more traditional grounds as set out in Section 6 in PAJA.

[109] There existed no reasonable and/or factual basis for ignoring the findings of over-saturation in both Nelson Mandela Bay and Sarah Baartman.

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[51] In this regard reliance was placed on *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) and *Freemarket Foundation v Minister of Labour* 2016 (4) SA 496 (GP) at para 91. See Geo Quinot *Administrative Law, Cases and Materials* where the development of the test for reasonableness under common law and later under the constitutional dispensation is analysed (at 394 to 410). In particular reference is made to decisions where the development of the reasonable evidence test in South African Administrative Law is developed. See for instance Standard Bank of Bophuthatswana Ltd v Reynolds NO and Others 1995 (3) SA 74 (BG). These issues have, now been codified more particularly in Section 6 of PAJA which deals with administrative action which was taken where the relevant considerations were not taken into account or relevant considerations not considered (Section 6(e)(iii)); where the administrative action is not rationally connected to the information before the administrator or the reasons given by the administrator (Section 6(f)(ii)(cc) and (dd)); the decision was unreasonable (Section 6(2)(h)).

[52] There is no evidence to suggest that the Board objectively and reasonably applied its mind in determining under or over-saturation in the Province as a whole having particular regard to the anterior Study and Policy Documents that it relied upon.

[53] Hira and Another v Booysen and Another 1992 (4) SA 69 (A) at 93.

[110] The throwaway line referred to previously[54] is not supported by any reasonable and acceptable factual material and is in fact contrary to the express findings in the study[55] that Nelson Mandela Bay was over-saturated.

[111] On any version, the Board misdirected itself in respect of Sarah Baartman.

[112] There simply exists no evidence or even a suggestion by anyone, that Sarah Baartman Municipality is not over-saturated.

[113] On that basis alone, the RFP is reviewable.

[114] On the objective facts, there were areas that were over-saturated and it could never be rational, nor lawful, to permit LPMs in those areas.

[115] To invite applications which include those over-saturated areas, would offend the factual existence of over-saturation in those areas and would serve no purpose.

[116] We are aware, and have taken into account judicial deference when enquiring whether administrative agencies acted lawfully.[56]

[117] We also bear in mind that the distinction between an appeal and review should not be blurred.

[118] In *MEC, Environmental Affairs and Development Planning v Clairson's CC*[57] the following was stated:

> "*It bears repeating that review is not concerned with the correctness of a decision made by a functionary but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with a*

[54] The bald statement relating to economic muscle of the municipality.
[55] Upon which the Board relied.
[56] Lawfully in the administrative and constitutional law context. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC); *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA).
[57] 2013 (6) SA 235 (SCA) at para 18.

discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second guess his evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted."

[119] We are satisfied on a conspectus of the evidence that the Board has not performed the function with which it was entrusted.

[120] The decision of the Board to issue the RFP was accordingly fatally flawed as there was no rational basis to conclude that certain municipal areas, and in particular Nelson Mandela Bay and Sarah Baartman, were not over-saturated.[58]

[121] The consideration and award of licenses pursuant to the RFP must, out of necessity, depend on its validity on the question of whether the initial Act[59] was valid or not.

[122] If the decision to invite applications to the RFP is set aside the subsequent act of evaluating and granting licenses particularly in areas which are over-saturated, loses its legal foundation and consequently are of no force and effect.[60]

[123] The granting of the licenses, as indicated, necessarily depends on the validity of the prior issue of the RFP.

[124] Applying the Oudekraal rule, the granting of licenses is valid until such time as the initial act (allowing additional licenses) in requesting applications pursuant to the RFP is set aside.[61]

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[58] As previously indicated, in respect of Sarah Baartman there does not even exist, as in respect of Nelson Mandela Bay, a throwaway line without substance that there exists sufficient muscle to cater for additional licenses.
[59] The invitation pursuant to the RFP.
[60] *Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others* 2008 (4) SA 43 (SCA).
[61] *Oudekraal Etates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA); MEC for *Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 481 (CC); *Magnificent Mile Trading 30 (Pty) Ltd v Charmaine Celliers N.O and Others* [2019] ZACC 36.

[125] As a corollary to the finding that the anterior decision in issuing the RFP is unlawful, it must follow that the granting of the licenses similarly suffer the same fate.

IS THE REVIEW ONE UNDER PAJA OR UNDER THE PRINCIPLE OF LEGALITY

[126] It would seem to us that the decision in issuing the RFP was of an administrative nature and made under an empowering provision[62].

[127] The Board indisputably is an Organ of State who was performing a public power or function.

[128] The decision that there exists no over-saturation and inviting applications to submit applications for additional LPMs, not only had direct external legal effect but potentially adversely effected the rights of Vukani.[63]

[129] The assessment in terms of Regulation 59(3) that there existed no over-saturation[64] opened the door for others to apply for additional licenses to compete, *inter alia*, with Vukani.[65]

[130] Having regard to the central issue in this appeal, namely whether or not there was proper compliance with Regulation 59(3)(a), it is of no material significance whether or not the review application is one under PAJA or one under the principle of legality.

[131] The principles of legality are well-established in our law. [66]

[132] The failure to make an assessment based on reasonable and objective facts as to whether or not there was under or over-saturation, and for the reasons set out

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[62] Regulation 59(3).
[63] And for that matter Pioneer.
[64] The assessment done prior to the issue of the invitation contained in the RFP.
[65] As to what constitutes administrative action see in general Cora Hoexter *Administrative Law in South Africa* 2nd Edition at 171 and further.
[66] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC); *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC); *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC); *Khumalo v MEC for Education, Kwa-Zulu Natal* 2014 (5) SA 579 (CC), *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC). The principle of legality is an incident of the rule of law – *Magnificent Mile Trading 30 (Pty) Ltd supra* at para 50.

above, offend both the principle of legality and also constitute reviewable conduct, pursuant to Section 6 of PAJA.

[133] The Board, in attempting to extricate itself from the objective facts which were before it relating to over-saturation in Nelson Mandela Bay and Sarah Baartman contends that in reaching the final decision that there was no over-saturation, various submissions both oral and written were taken into account.

[134] We do not deem it necessary for the purposes of this Judgment to reflect and analyze each and every submission that was made; suffice it to say that none of the submissions that were made[67] could, remotely have had any bearing on the question of over-saturation in the particular municipal areas.

[135] It also appears from the Study and subsequent documents[68], that the material factor which led to the Board's invitation to accept applications for further LPMs, was the perceived economic benefits which would accrue by virtue of the operation of additional machines.

[136] Ultimately, however, there has been a failure to assess on reasonable grounds, whether there was sufficient capacity in respect of saturation to allow applications to be made for further LPM licenses.

[137] There simply exists no reasonable explanation for the Board at the proverbial 11th hour allowing additional licenses in the areas falling within the municipal jurisdiction of the two municipalities referred to.

[138] The Board failed to place adequate weight to the essential issue as to over-saturation.

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[67] Some clearly for self-interest purposes.
[68] Policies, memoranda and the like.

[139] In effect, this crucial factor was relegated to one of insignificance and economic advantages, were accorded more weight than it should, particularly in the context of Regulation 59(3)(a).[69]

[140] Simply put, the Board failed to comply with the purpose of the provisions of Regulation 59(3)(a).[70]

CONCLUSION

[141] We accordingly conclude that the Court *a quo* erred in finding that the decision to issue the RFP was not in law reviewable.[71]

[142] The decision to issue the RFP and the consequent granting of licenses were clearly unlawful and it is obligatory to declare it unlawful.[72]

[143] Section 172(1)(a) of the Constitution enjoins a court to declare invalid any conduct which is inconsistent with the Constitution.

[144] The RFP decision accordingly falls to be declared invalid as does the subsequent issuing of the licenses.[73]

[145] Under the circumstances, the following order is made:

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[69] *Minister of Health and Another v New Clicks (Pty) Ltd and Others* 2006 (8) BCLLR 872 (CC) at para 530.

[70] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) at para 33.

[71] The Court *a quo*'s finding that it was bound by the interim order of Smith J was not justified. Such Judgment was not a final order and was subject to alteration. See *Freedom Stationery (Pty) Ltd and Others v Hassam and Others* 2019 (4) SA 459 (SCA) at para 16. In any event, for the reasons stated, we differ in respect of the assessment insofar as it relates to Regulation 59(3) with the views expressed by Smith J as well as the views expressed by Beshe J in an unreported Judgment in the matter *Emfuleni Resorts (Pty) Ltd v Chairperson, Eastern Cape Gambling and Betting Board and Others* (Case No. 1036/2018) High Court Grahamstown.

[72] *Buffalo City v Asla supra* at para 66.

[73] In terms of Section 172(1)(b) of the Constitution it would be just and equitable for an order to be made reviewing and setting aside the RFP and subsequent license awards. The Board would then be able to commence afresh and properly apply its mind to the question of establishing whether there exists over-saturation or not.

(a) The Appeal is upheld with costs, such costs to include the costs of two counsel.

(b) The Order of the High Court Grahamstown under case number 5130/2017 is set aside and replaced with the following:

(i) The Second Respondent's (the Board) decision taken during the latter part of 2017 to issue and publish a Request For Proposals (RFP) in terms of Regulation 17 of the National Regulations on Limited Pay-Out Machines, inviting applications for Independent Site Operator (ISO) licenses, is reviewed and set aside.

(ii) Any and all awards of licenses made by the Board in terms of such RFP is reviewed and set aside.

(c) The First, Second, Sixth, Eight and Thirteenth Respondents are directed to pay the Appellant's costs, including the costs of two counsel, jointly and severally, the one paying the other to be absolved.

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D. VAN ZYL

DEPUTY JUDGE PRESIDENT

Lowe J,

I agree.

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M.J. LOWE

JUDGE OF THE HIGH COURT

Beyleveld AJ,

I agree.

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A. BEYLEVELD

ACTING JUDGE OF THE HIGH COURT

Appearances:

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