IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 5130/2017

In the matter between:

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

and

CHAIRPERSON, EASTERN CAPE GAMBLING AND BETTING BOARD	**1ST RESPONDENT**
THE EASTERN CAPE GAMBLING AND BETTING BOARD	**2ND RESPONDENT**
PIONEER SLOTS (PTY) LTD	**3RD RESPONDENT**
MARSHALLS WORLD OF SPORTS EASTERN CAPE (PTY) LTD	**4TH RESPONDENT**
K201744277 (PTY) LTD	**5TH RESPONDENT**
GOLDEN PALACE SITE 3 (PTY) LTD	**6TH RESPONDENT**
GSLOTS ISO EC (PTY) LTD	**7TH RESPONDENT**
GOLDENT PALACE SITE 3 (PTY0 LTD	**8th RESPONDENT**
K201744277 (PTY) LTS	**9th RESPONDENT**
SPIN AND WIN ENTERTAINMENT MBIZANA (PTY) LTD	**10th RESPONDENT**
GEC GAMING (PTY) LTD	**11th RESPONDENT**
K20140002030 (PTY) LTD	**12th RESPONDENT**
GOLDEN PALACE SITE 1 (PTY) LTD	**13th RESPONDENT**

JUDGMENT

DAWOOD J:

1. The Applicant herein sought the following relief in its amended notice of motion:

"a) The reviewing and setting aside of the decision by the Second Respondent 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 Payout Machines, inviting applications for Independent Site Operator (ISO) licenses.

b) Reviewing and setting aside any and all awards of licenses made by the Board in terms of the Request for Proposals.

c) Insofar as may be necessary in order to review and set aside the Request for Proposals, reviewing and setting aside the policy document on limited payout machines, adopted by the Second Respondent in May 2017."

2. The Applicant in its founding affidavit and supplementary affidavit *inter alia* set out the following as the background and basis upon which it sought the relief prayed for in the notice of motion:

i) That the Eastern Cape Gambling and Betting Board (the Second Respondent) took a decision which would likely lead to a drastic increase in the number of limited payout machines (LPM) allowed in the Eastern Cape.

ii) The board decided in terms of Regulation 17 of the National Regulations on Limited Payout Machines (the national LPM Regulations, to issue a request for proposal (RFP) inviting applications for independent site operator licenses (ISO)

iii) The decision to issue the RFP constitutes "administrative action" as defined in the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

iv) In the event that it does not constitute administrative action, the decision certainly **constitutes the exercise of public power** and is **therefore subject to review in terms of the principle of legality, which applies to the exercise of all public power**.

v) The Applicant relies on both PAJA and the principles of legality in these proceedings.

vi) The decision falls to be reviewed and set aside **because it was taken contrary to the Regulations** (the Eastern Cape Regulation published under the Eastern Cape Gambling and Betting Act 5 of 1997 (the Eastern Cape Act)

vii) The Application is brought in terms of Rule 53 of the uniform rules of court.

viii) **Regulation 59 (3)** of the Eastern Cape regulations permit the board to issue or allow more than 2000 LPMs to be operated in the province, upon the satisfaction of certain requirements stipulated in the Regulation.

ix) The Study commissioned by the board is deeply and fundamentally flawed in that:

a) It does not provide a coherent basis to determine whether particular areas of the Eastern Cape are oversaturated.

b) It cannot provide meaningful information about the social and economic impact for the proposed expansion of LPMs above the 2000 threshold.

c) even if it were valid, it directly contradicts that decision to issue the RFP in that:

i) The study itself concluded that certain municipalities were over saturated.

ii) Despite this evidence the Board invited applications for ISO licenses in those municipalities.

iii) The issuing of 400 new licenses **particularly in the 3 municipalities risks over-stimulating the latent demand for gambling in the Eastern Cape which is a serious social risk**.

iv) The board's powers are closely circumscribed precisely to control the risk of excessive gambling for the province.

v) The RFP is inconsistent with both the clear requirements of the regulatory framework and its underlying principle.

vi) Regulation 59 (3) envisages a jurisdictional requirement **that must be satisfied before the board can make a decision to license more than the current 2000 LPMs in the province.**

vii) That board effectively:

a) Granted licenses contrary to its own studies by allocating licenses to areas that were deemed oversaturated in the study and that initially it stated no licenses would be issued in respect of.

b) Accordingly it fell foul of the provisions of Regulation 59 (3) which requires the board to be satisfied that the roll out of more than 2000 LPMs in the province is in the best interest of the province, and shall not lead to oversaturation.

c) The study **does not satisfy the jurisdictional requirement** in respect of the **oversaturated municipalities** – accordingly the necessary jurisdictional requirement established by **Regulation 59 to make more machines available is therefore absent, and this renders the RFP unlawful.**

d) On this basis alone, the Boards decision in respect of the issuing of the ISO licenses is **unlawful, irrational and unreasonable**. The study formed the underlying basis for the issuing of the RFP and yet the RFP envisages the granting of ISO license for the **very areas that the study concludes are oversaturated.**

e) The study itself was criticized in that it inter alia not only ignores the issues of different income categories, the distances to LPM sites, that it takes into account the general population as opposed to persons over the age of 18 years, it is also based on an incorrect number of LPMs, an incorrect distribution of those LPMs across,

local municipalities and incorrect understanding of the different LPM sites.

f) The **meaning of over and unsaturation is** not provided for accordingly it is difficult to objectively assess the subsequent findings to determine whether or not it complied with Regulation 59 (3).

g) Professor Standish provided a report on the flaws in the systems adopted in the report. (This report was not annexed to the Applicants founding or supplementary papers).

h) The Applicant raised its concerns about the unlawfulness of the RFP with the board in the 16th of October 2017 regarding some of the fundamental flaws in the study that were confirmed by Professor Standish and requested the board to withdraw the RFP on the basis of it being unlawful.

i) On 24th October 2017 the Board responded **asserting that it did not solely rely on the study to satisfy itself of the fulfilment of the requirement of regulation 59 (3), and it considered the inputs of interested parties, during consultation engagements with the relevant stakeholders, including the Bidders conference.**

j) The agenda of the Draft Conference shows that comments in respect of the draft RFP were received from four entities.

k) The comments of Pioneer and the Applicant in fact questioned the Board's conclusion that further machines should be released into the market.

l) The board has adopted a position that is not only contrary to the study indicated but also contrary to what the Applicant and Pioneer, the only two existing LPM licenses submitted to it.

m) The decision to issue the RFP is the formal commencement of the process that would ordinarily and likely lead to the award of those licenses. Yet **both the decision and the entire process are unlawful**.

n) The impugned decision is susceptible to be reviewed and set aside on the main grounds:

(i) The study is **inadequate to meet the requirements of Regulation 59 (3).**

(ii) It does not adopt a coherent model to measure oversaturation.

(iii) The decision should be set aside because:

aa) Irrelevant considerations were taken into account or relevant considerations were not considered (section 6 (2) (e) (iii).

bb) The action itself is not rationally connected to the information before the administrator (section 6 (2) (f) (ii) (cc) of the purpose of the empowering provisions section 6 (2) (f) (ii) (bb).

cc) The decision was unreasonable section 6 (2) (h).

dd) The mandatory and material procedures or conditions prescribed in the empowering provision that there not be oversaturation was not complied with section 6 (2) (b).

ee) The board issued the RFP despite the evidence demonstrating that issuing the new ISO's would lead to oversaturation in some municipalities.

ff) Even assuming the study provided a rational basis for the board to Act, the board acted contrary to the study.

gg) Even on the flawed model, the study concludes that the 3 municipalities are oversaturated.

hh) Yet the board issued RFP that would allow new ISO's in those oversaturated areas.

m) These grounds are also accommodated by review on the basis of the principle of legality.

n) The decision of the board is unlawful because the empowering provision requires the Board to be satisfied that the rollout of the LPMs in excess of 2000 in the province **shall not lead to an oversaturation**.

o) This requirement has not been satisfied.

p) **The study that the board relied upon to satisfy itself of the fulfilment of the jurisdictional requirements in Regulation 59 (3) is not only fundamentally flawed, but even if it is accepted, it has shown oversaturation in municipalities in which the board intends to roll out LPMs.**

q) The Applicant provides further flaws in the study namely:

(a) That no definition was provided for over or under – saturation. It is simply taken to mean a divergence from the existing average distribution of machines. It should have defined the term with regard to the relevant literature and international experience.

(b) As Professor Standish points out GDP is not the correct metric to use. This method ignores, *"the facts that LPM punters falls in a specific income band and there is no "average" distribution across income bands; there are important differences in the*

gambling behavior between people in rural and urban areas, and that the propensity to travel is important".

(c) Whether there is an over or under saturation of LPMs depends on where the demand for LPMs.

(d) The study looks at the number of machines, not machine turnover. Looking only at the number does not tell you whether those machines are heavily or lightly used.

(e) A few heavily used machines could result in more gambling than many lightly used machines.

(f) GDP is not a useful measure of gambling demand because it measures total income, not disposable income.

(g) The study was to determine if there were negative social, environmental and economic impacts.

(h) The study on its own terms failed to meet this goal, by saying that it has not yet fully determined the costs of social ills and gambling.

(i) Professor Standish explains this means that "the study acknowledges that its own work is inadequate and does not fulfill the requirements of a social assessment.

(j) The study is littered with errors that undermine its reliability.

(k) The study looks at the number of site licenses to assess the proper distribution of LPMs at a district municipal level, not the number of active machines.

(l) Even applying the flawed average distribution model, the study contains wide ranging errors in **calculation and conclusions about which local municipalities are over and under saturated**

Professor Standish explains that the result is that the recommendations based on these calculations are spurious.

(m) The study is based on the **obviously flawed belief that punters might on average win more than they lose**. This is plainly false. LPM's are designed so that on average and over time, the house always wins.

(n) The study **assumes that a duopoly of the route operators is necessarily negative for consumers**. That is false. It depends on several **factors**. It is possible for a **duopoly to be good for consumers.** No reason to assume the duopoly has negative economic consequences.

(o) The study **overstates potential economic benefits by saying that more machines would bring about positive economic input**. But this does not take into account the fact that the money that would be spent on gambling could be spent at a restaurant and probably jobs at that restaurant as well.

(p) The sampling method is flawed the size of the sample was too small and the sample was biased because it was taken immediately after they played the LPM instead of a while after they had gambled as, best practice requires.

(q) The RFP did not comply with regulation 59 (3) and was both substantially and procedurally **irrational.**

(r) Accordingly, even if the decision does not amount to administrative action as defined in PAJA, it would be susceptible to review on the principle of legality.

(s) The record supports both grounds of review because it makes it clear that there was no other information available to the board on

which it could conclude that the RFP would not lead to an over-saturation of LPM's in the Eastern Cape.

3. **Issues for determination**

A) Whether or not the judgment of Smith J was dispositive of the review application:

i) All the respondents, opposing this application argued that Smith J's judgment in respect of the interdict proceedings was dispositive of this application as he made findings that directly impact on the matter under consideration when he advanced his reasons that the applicants had failed to even make out a prima facie case for the grant of the relief sought, as the Second Respondent's decision was rational.

ii) The Applicant argued that the decision did not consider the grounds for review advanced in respect of compliance or non-compliance with Regulation 59 (3) and accordingly no decision was made in this respect and urged this court not to make the same mistake.

iii) Smith J however, was at all stages aware that he was dealing with the provisions of Regulations 59 (3) and compliance or non-compliance therewith when he considered the interdict proceedings.

iv) He specifically *inter alia* referred to the arguments advanced by the Applicant at different paragraphs of his judgment inter alia stating:

a) At paragraph 55 of his judgment: *"that the essence of the applicant's argument is that the board has failed to establish the jurisdictional facts mentioned in Regulation 59 (3) (b)"*.

b) At paragraph 56 of his judgment: *"that the Applicant submitted that the* ***issue which falls for decision is whether or not the Board has***

complied with the jurisdictional requirements set out in Regulation 59 (3)".(my emphasis)

c) At paragraph 67 of his judgment mentions some of the very requirements set out in Regulation 59 (3) as to what the board needs to consider, that is *"the* ***balancing of the various socio-economic and commercial considerations determining whether the decision would be in the best interest of the province".(my emphasis)***

d) Smith J accordingly in my view did take all the factors as pertains to Regulation 59 (3) into consideration when he made the determination at paragraph 69 of his judgment that "*... the Board's decision was consequently taken after an extensive multi-stage consultative process during which it had regard to representations from various stakeholders and was based on* ***relevant and rational considerations****". (my emphasis)*

e) Smith J has accordingly, in my view, decided the very issue that this court is required to decide and the very same argument pertaining to Regulation 59 (3) was presented to him by the Applicant. The Applicant's contention that he did not decide it on the basis of compliance or non-compliance with Regulation 59 (3) is and not supported by the judgment.

f) It was further argued by Ms Annandale SC for the 'Spin and Win' Respondents with reference to paragraph 67.2 of the Applicant's Heads of Argument, where it was stated: *"The real question in this case is in any event not whether the board had good and sufficient reason for its decision to allow the introduction of additional*

LPMs. The question is whether the Board rationally and reasonably complied with Regulation 59 (3)"

That the Applicant's ***apparent distinction is meaningless****: if the board had* ***good and sufficient reasons*** *for its* ***decision*** *to allow the* ***introduction of additional LPM's****, then the* ***object of section 59 (3)*** *would* ***have been fulfilled****. This is so because the Board's reasons* ***can only be good and sufficient if it is satisfied that the decision will not lead to oversaturation****, if it has considered the factors in section 59 (3) (b); and it is of the opinion that the additional licenses will be in the best interest of the province."(my emphasis)*

v) So even if the Applications contention was correct, Smith J's finding would still have the implied effect that Regulation 59 (3), had been complied with by the Second Respondent.

vi) Ms Annandale S.C. accordingly argued that Smith J has already made a finding and that the review should be dismissed on this ground alone.

vii) Kemp SC also argued that the decision in the Interdict Judgment by Smith J binds the parties and the issues raised and determined therein stand. He argued that that decision was appealable. He relied upon the decision of Mokgothi NO and Another[1] to advance his argument at the level of the "issue estoppel".

viii) He correctly argued that it would be odd if this judgment could be relied upon by third parties as a precedent but not the parties thereto.

ix) It is worth briefly sketching out the general approach to appealability:- Section 20 (1) of the Superior Court Act provides that an appeal lay

[1] Mokgothi N.O. and Another v Tsoga Developers CC and Others, In re; Tsoga Developers CC v Matlapele N.O. and Others (1798/2011) [2014] ZANWHC 9 (8 May 2014)

from a judgment or order" these words were interpreted n Zweni v Min of Law and Order[2]

x) In **Steytler NO** v **Fitzgerald**[3] Innes J held that:

> *"It is sufficient for the purposes of this case to say that when an order incidentally given during the progress of litigation has a direct effect upon the final issue, when it disposes of a definite portion of the suit, then it causes prejudice which cannot be repaired at the final stage, and in essence it is final, through in form it may be interlocutory."*

xi) **In Blaauwbosch Diamonds Ltd v Union Government** (Minister of Finance)[4], Innes CJ, restated and clarified what he had laid down in Steytler NO thus:

> *"It was then laid down that a convenient test was to inquire whether the final word in the suit had been spoken on the point; or, as put in another way, whether the order made was reparable at the final stage."*

xii) It is clear in this case, by finding that the decision was based on **relevant and rational consideration** Smith J, in the interdict proceedings, had spoken the final word on the point that is the subject matter of the review. That decision was accordingly appealable. The Applicant by electing not to appeal the decision is accordingly bound by the finding as is this court and the other parties thereto.

xiii) Kemp SC correctly accordingly argued further that unless the court hearing the review is persuaded that the interdict judgment is clearly wrong it is bound by the decision.

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a) Cipla Agrimed (PTY) LTD v Merck Sharp Dohme Corporation (972/16) ZASCA 134 (29 September 2017) at par 38.

b) Itzikowitz v Absa Bank Ltd (20729/2014) [2016] ZASCA 43 (31 March 2016).

c) Zweni v **Minister of Law and Order** 1993 (1) SA 523 (A); (310/91) [1992] ZASCA 197; [1993] 1 All SA 365 (A) (20 November 1992)

[3] 1911 AD 295 at 313

[4] 1915 AD 599 AT 601

xiv) No persuasive argument was advanced by the Applicant that the decision of Smith J and his findings pertaining to this application were clearly wrong, nor am I able to fault his well-reasoned judgment in this regard.

xv) I am accordingly bound by his decision and I agree that the same is dispositive of this application and accordingly the application falls to be dismissed on this basis.

xvi) The application is dismissed with costs inclusive of the costs of two counsel where applicable.

4. Merits of the Application

i) In the event that I am wrong in finding that Smith J's judgment in the interdict proceedings and his findings are dispositive of this application I shall briefly deal with some aspects of the merits of the application. The pertinent issues on the merits are the following:-

A) PAJA or Principle of legality.

a) The Applicant relied on PAJA and the principle of legality as the bases upon which it pursued the review application.

b) The first respondent alleged that the RFP is not reviewable under PAJA stating inter alia:

(i) That the issuing of the RFP is not an administrative action, it does not invoke a decision of an administrative nature and also does not have a direct external legal effect.

(ii) The issuing of the RFP merely constitutes **an intention** to issue ISO licenses;

(iii) This intention is **provisional**, having regard to the terms of the RFP which inter alia reserves the Board's rights to amend the RFP and not to proceed with the tender process.

(iv) The Applicant's review ground based on PAJA should be dismissed;

(v) Since the fact of the issue of RFP being reviewable is the ground upon which the award of the licenses is being impugned that order should also be dismissed.

c) Ms Annandale S.C. also argued that the RFP does not have a direct external effect and that the decision to issue the RFP falls outside the definition of administrative action under PAJA.

d) The 'Spin and Win' respondents accordingly argued that the review is aimed at the preliminary decision to issue the RFP, which has no direct external, legal effect.

e) They accordingly argued that this is not a review of administrative action under PAJA, but a narrower, rationality based review under the principle of legality.

f) The Applicant in response to this argument stated:

(i) That the decision making power under Regulation 59 (3) is the power to "issue licenses".

(ii) The board **determined** to exercise that power in two stages – first by determining to issue the RFP, and then by determining to award licenses pursuant to the RFP.

(iii) The primary basis for the review is indeed the lawfulness of the decision as a whole.

g) It is accepted that in this case ultimately the RFP was not withdrawn and a licensing process followed in respect of eligible candidates identified from the RFPs.

h) This however does not detract from the fact that there clearly are different criteria for the issuing of RFP and the issuance of licenses.

i) The nature of an RFP is that it can be withdrawn and does not have an external effect on the face of it, and not all persons who submit an RFP would be issued with a license.

j) The issuance of a licence is a distinct process that has to follow certain procedures, including public hearings.

k) The fact that the RFP is a stepping stone to eligibility to being considered for a license does not make it part and parcel of the same process, nor has the Second Respondent stated that it determined to exercise the issuing of the licenses in two stages as alleged by the Applicant. The Applicant has not made any averments to support this "determination" by the Board.

l) An RFP does not automatically render a person eligible for a licence nor does it create an expectation that a licensing process would follow.

m) Nowhere did the Board state that it determined to conduct the licensing in two phases namely the issuing of the RFP and then the issuing of licenses.

n) These were distinct processes and each was accompanied independently by separate processes.

o) I accordingly cannot accept the Applicant's argument in this regard that the issuing of the license is 2 stages encompassing first the issuing of a RFP and then awarding licences pursuant to the RFP. The RFP merely determines eligibility.

p) I accordingly accept that the RFP does not have a direct external effect and that the decision to issue the RFP falls outside the definition of administrative action under PAJA.

q) I accept that the issuing of the licenses did indeed have a direct external effect that is reviewable under PAJA.

r) However in the event of it being found that the RFP complied with the rationality test there would be no independent additional basis to attack the issuance of the licenses, particularly since the documentation pertaining to the issuing of the licenses are not before court to assess whether or not they complied with Regulation 59 (3).

s) The Applicant correctly did not pursue the issuing of the policy document as a basis for review either in its heads or in its argument. This clearly falls outside the scope of administrative action.

t) The decision to review the RFP accordingly falls to be considered on the basis of the principle of legality and the narrower rationality test and is found not to be reviewable under PAJA as correctly argued by the Respondents.

B) The Applicability of Regulation 59 (3) to the issuing of the RFP

(a) The Applicant has firmly stated that its review is based on the first respondent's non-compliance with regulation 59 (3) in the issuing of the RFP and by necessary implication in the granting of the licenses, since they followed from the RFP.

(b) Regulation 59 (3) reads as follows:

*"Subject to sub-regulation (2), the Board **shall only issue or allow route operator licenses** or limited gambling machine **site licenses** which will allow more then 2000 limited gambling machines to be operated in the province if –*

*a) It is satisfied that this will not lead to an over-saturation of limited gambling machines in the **province**; and*
b) It has considered, both in regard to the existing limited gambling machines and such further machines as may exceed 2000-
(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 2000 limited gambling machines will be in the **best interests of the province."(my emphasis)***

(c) The Regulation is clear with regard to when it becomes incumbent upon the Board to comply with its provisions as was correctly argued by Mr Kemp SC, that is, at the stage **when licenses are to be issued.**

(d) It is also clear that it needs to be satisfied on **a provincial** level that there will not be an over saturation of limited gambling machines and that it has considered the socio, economic,

environmental impact and the impact on problem gambling and other relevant information on a provincial level.

(e) That it is then to determine whether or not in its opinion the exposure for play of more than 2000 machines is in the best interest of the **province,** clearly indicating a **subjective determination** to be made by the board.

(f) Mr Kemp S.C. has correctly submitted:

aa) That Regulation 59 does not say that the Board **cannot** invite the public to make application for LPM licenses only if they had complied with Regulation 59 (3) (a) and (b) and the requirements.

bb) Regulation 59 says that the Board m**ay not issue or allow licenses beyond the 2000 mark unless** in compliance with Regulation 59 (3).

cc) Regulation 59 (3) clearly **does not prohibit** the Board from issuing RFP's for considering applications for licenses.

dd) Regulation 59 (3) **does not apply to the stage of RFP**. Regulation 59 (3) becomes applicable when issuing the licenses.

ee) On a reading of the Regulation there is nothing in the regulation which requires compliance with the Regulation 59 (3) requirements in the preceding process.

ff) He also correctly argued that the argument of the Applicant now, that it is the **combined effect of the decision which breach Regulation 59 (3) has not been pleaded and is not the case made in the review application**.

gg) He further correctly argued that in any event the applicant has failed to put up any of the application for licenses that it seeks to set aside nor the RFP's in respect thereof.

hh) Nor has the Applicant measured the granting of the applications against Regulations 59 (3).

g) The Applicant is alleging non-compliance and accordingly it is the Applicant who needs to establish the basis of its entitlement to the relief sought, by making reference to the documentation as to where the Second Respondent has fallen short, which it cannot do if it has not requested the documents, or placed the same before court, or stated how the issuing of the licenses themselves did not comply with Regulation 59 based on the documentation.

h) I accordingly do not need to determine whether or not there was compliance with Regulation 59 (3) at the stage of the issuing of the RFP. In any event even if it was applicable Smith J has found that there has been compliance and that the decision was indeed rational and accordingly satisfied the principal of legalty.

i) Since the Applicant was at pains to state that its review was premised on non-compliance with Regulation 59 (3) and it is due to that non-compliance that the decision is irrational and unreasonable the review falls to be dismissed on this basis as well, with regard to the review of the RFP.

j) This court has no information before it with regard to the grant of the licenses to determine whether their issuance complied with Regulation 59 (3).

k) As pointed out by Mr Kemp in the case of his respondents an expert report was presented to the board addressing the Regulation 59 (3) factors, when the licenses were applied for.

l) A finding can accordingly not be made either that there has or has not been compliance of regulation 59 (3) in respect of the issuance of the licenses.

m) The Applicant has failed to adduce any stand alone factors in respect of the issuing of the licenses to warrant the reviewing and setting aside of the licenses issued.

C) I shall for the sake of completeness deal with a few additional factors raised:-

a) It is evident that all that the Board needed to be satisfied about when issuing further licenses was that the factors listed in Regulation 59 (3) had been considered in respect of the **province as a whole** and that it was thereafter considered to be in the best interest of the province to issue further licenses.

b) The Applicants did not allege that the province as a whole is over-saturated and insofar as cognisance, can be taken of its report which was only put up in reply, neither does its report appear to say so.

c) The fact that the study looked at the individual municipalities does not detract from the fact that its findings demonstrated that as a whole the province was not over-saturated.

d) The study did deal with factors that needed to be considered by the board although by examining individual municipalities within the province. The first respondent as well as the other respondents argued that the Applicant's criticisms of the study and what it actually stated was selective and ignored clear findings which held that additional ISO licenses could still be rolled out in the province and those Municipalities.

e) The study did provide definitions and did deal with the factors set out in Regulation 59 (3). Ms Annandale S.C. argued at paragraph 89 of her heads:

> "*89. In its challenge to the rationality and reasonableness of the Study, Vukani makes four points, which are based on a **selective reading of the Study**:*
>
> *89.1 Firstly, Vukani asserts that the "Study by its own admission did not achieve its objective of determining the social or environmental impacts of the introduction of more LPMs"*[5]
>
> *89.2 This is not a correct reading of the Study at all. The Study **did consider the social and environmental impacts** of the introduction of further LPMs in a specific chapter "The Social and Environmental impacts – LPMs in EC"*[6]*. In this chapter, the Study dealt with two aspects: namely the positive or negative social and environmental impact of the LPM industry, and investigated and*

[5] Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others (CCT13/17) [2018] ZACC 20 (5 July 2018) at para 55.
[6] Study, Chapter 5, p. 144

researched the impact of problem gambling and other relevant information. This portion of the Study was based on a questionnaire, conducted by five teams of field researchers across 13 local towns. The Study records that results were presented to the Board, comments were recognised and considered; further consultation was held with the Technical Committee of the Board and the final report prepared.[7]

The Environmental Impact (positives, negatives as well as a recommendation) were further summarised in the report.

89.3 Secondly, Vukani asserts that the findings in the Study pertaining to the economic impact of LPMs are flawed because they do not take into account "where the expenditure would come from and what other forms of expenditure it would displace[8]*.*

89.4 This is again a selective reading of the Study. The Study ***specifically examines the economic impact of the LMPs at chapter 2***[9]*, and based, on two methodologies (based on both primary and secondary research) finds that there is a net positive economic impact with "much growth" left in the industry*[10]*. It also considers the positive impact on the tax revenue for the province*[11]*, and, by comparing expenditure on LPMs across the provinces, concludes that "it would thus seem to be that as a Province, the [Eastern Cape] is not yet relatively over saturated with LPMs. The Study considers that "the industry is still on a growth and development phase*[12]*. Vukani's contention that the expenditure on LPMs will simply displace other expenditure at restaurants, etc. is conjecture and speculation.*

89.5 Thirdly, Vukani asserts that the Study is flawed because it "does not establish any norm for the determination whether a community is under- or over-saturated with LPMs "because it uses averages.[13]

89.6. The Study explained that ***a population-based equitable distribution model*** *allocates licenses to operate LPMs based on* ***one machine to 1000 persons*** *in the local municipality. It is by comparing the theoretical allocation to the actual allocation that it can be determined if there are too many LPMs (over-saturation) or too few LPMs (under-saturation) in a particular municipality. The Study* ***then used the GDP model as a second model to determine*** *if there is over or under-saturation.*[14]

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[7] Study, Chapter 5.1, p. 144.
[8] Vukani's Heads of Argument
[9] Study, Chaoter 2, p. 123.
[10] Study, Chapter 10, chapter 4, p. 161.
[11] Study, Chapter 2, p. 126
[12] Study, Way Forward, p. 167, para 6.
[13] Vukani's Heads of Argument
[14] Study, p. 132 - 134

89.7 Finally, under this challenge, Vukani asserts that the study is "littered with errors"[15], but does not give any indication that these errors were material to the outcome of the Study."(my emphasis)

f) It was in any event correctly argued that the objection raised was against the means adopted by the board to achieve the outcome. This falls short of the requirements for a rationality challenge.

g) The means adopted can most certainly not be said to be so irrational and unreasonable in the circumstances having regard to the entire process adopted by the board.

h) The Board, was aware of its obligations in terms of Regulation 59 (3) and went beyond the ambit of the Regulations to satisfy itself that the issuing of further licenses for the rolling out of further LPMs in the province was in the best interest of the province by inter alia:

i) Commissioning a study;

ii) Thereafter preparing numerous policy documents and inviting comments;

iii) Holding consultations with relevant role-players;

iv) Amending its policy documents based on representatives made and considerations of inputs;

v) Organising a bidders conference;

vi) Further amending the RFP taking cognisance of further representatives, whether they were self-serving or not. Even the Applicant's representatives were self-serving. The Board

[15] Vukani's Heads of Argument, para 56.

had the necessary experience and expertise to determine whether despite being self-serving there was still merit in what was being stated that had the effect of swaying their opinion in favour of opening up the Sarah Baartman and Nelson Mandela Bay Municipalities.

vii) Thereafter issuing the final RFP in respect of the issuance of a further 400 licenses;

viii) Holding public hearings;

ix) Considering the applications and awarding licenses to the successful candidates;

x) The Board may well have utilised the study as a first step or its foundation but it most certainly did not rely exclusively on the study for its findings or its decision and clearly did not blindly follow it to make its decision.

xi) At the stage of the issuing of the RFP neither the Standish nor the Warrington Report was available.

xii) It is unclear whether reference was made to either reports at the time of the issuing of the licenses.

xiii) Having found that the Principal of legality is applicable, all that is required for the rationality requirement to be satisfied is that the means chosen to achieve a particular purpose must reasonably be capable of accomplishing that purpose, they

need not be the best means or the only means through which the purpose may be attained[16].

xiv) The means adopted by the second respondent was, in my view, sufficient to accomplish the purpose of satisfying Regulation 59 (3). The Board had met these requirements even at the stage of issuing of the RFP and accordingly in my view would have passed the rationality test in respect of compliance of Regulation59 (3) even if it was applicable at the earlier stage of the issuance of the RFP as opposed to the licensing stage.

xv) This is a policy centric decision and is not a matter that warrants interference, accepting as I do that if indeed it warranted interference the court would not have hesitated to intervene[17], but there is no basis for intervention having regard to the exhaustive process adopted by the board prior to the issuance of the RFP from the date of the obtaining of the study almost 2 years prior thereto.

xvi) It is evident that the Applicant took no steps to object to any of the applications which were lodged by the respondents; nor during the public hearings and deliberations on the applications received nor did they request information pertaining to the grant of the licenses.

[16] Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others (CCT13/17) [2018] ZACC 20; 2018 (5) SA 349 (CC); 2018 (9) BCLR 1099 (CC) (5 July 2018)
[17] Electronic Media Network Limited and Others v E.TV (Pty) Limited and Others 2017 (9) BCLR 1108 (CC); Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004)

xvii) I accept the argument that the question as to whether and how many licenses to issue is precisely the kind of highly policy-laden and polycentric decisions which are best suited to be determined by the Board, since it raises a series of overlapping considerations relating to need, desirability, saturation, revenue, employment etc. and which have multiple repercussions. It has not been demonstrated that in this case the exercise of this subjective discretion should be interfered with, although it is accepted that in appropriate cases it can be.

xviii) In any event my brother Smith J has already found that the Second Respondent's decision was based on rational and relevant considerations and I agree completely with his findings for the reasons contained herein.

xix) Accordingly even if the first respondent was to have satisfied Regulation 59 (3) at the earlier stage of the issuing of the RFP as argued by the Applicant, the Board is found to have complied with Regulation 59 (3) and the decision, as found by Smith J, was based on relevant factors and was rational.

i) In all the circumstances and having regard to all the aforegoing the Applicant has failed to make out a case for any of the relief sought.

j) Each of the issues dealt with above individually are dispositive of the application and accordingly no purpose would be served by dealing with any further arguments.

5. **Order**

a) The application is dismissed.

b) The Applicant is directed to pay the costs of all the Respondents who opposed the application and such costs to include costs of two counsel where applicable.

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F. B. A. DAWOOD

JUDGE OF THE HIGH COURT

Matter heard on	:	30 AUGUST 2018
Judgment delivered on	:	31 JANUARY 2019

<u>Appearances</u>:

Counsel for the Applicant	:	Advocate Rosenburg SC
Attorneys for the Applicant	:	Edward Nathan Sonnenbergs **C/O** Whitesides Attorneys 1 North Wharf Square CAPE TOWN Tel: 021 410 2500 Ref: G Barrows
Counsel for the 1st and 2nd Respondents	:	Advocate I Jamie SC
Attorneys for the 1st and 2nd	:	Smith Tabata Attorneys

Respondents	**C/O** Nettleton Attorneys 12 St Helena Building EAST LONDON Ref: My Mnqaba/Gina/10e522022
Counsel for the 5th, 9th, 10th and 12th Respondents :	Advocate A Annandale SC
Attorneys for the 5th, 9th, 10th and 12th Respondents :	Strauss Dally Inc. **C/O** Cloete and Company Ref: M v/d Veen
Counsel for the 6th, 8th and 13th Respondents:	Advocate Kemp SC
Attorneys for the 6th, 8th and 13th Respondents :	Woodhead Bigby Inc. **C/O** Wheeldon Rushmere and Cole 92 Armstrong Avenue DURBAN Tel: 031 360 9700