IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

[redacted]

SIGNATURE DATE: 12 August 2024

Case No. 2019/11734

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL FOR ECONOMIC DEVELOPMENT, ENVIRONMENT, AGRICULTURE AND RURAL DEVELOPMENT (GAUTENG)	First Applicant
GAUTENG GAMBLING BOARD	Second Applicant
and	
PHUMELELA GAMING AND LEISURE LIMITED	First Respondent
PREMIER OF GAUTENG PROVINCE	Second Respondent
4RACING (PTY) LTD	Third Respondent

JUDGMENT

WILSON J:

1 The applicants seek leave to appeal to the Supreme Court of Appeal against my judgment in *Phumelela Gaming and Leisure Limited v Member of*

Executive Council for Economic Development, Environment, Agriculture and Rural Development (Gauteng) (2019/11734) [2024] ZAGPJHC 510 (30 May 2024). In that judgment, I reviewed and set aside an amendment to regulation 276 of Gauteng Gambling Regulations, 1997. The effect of the amendment was to eliminate a subsidy paid to the first respondent, Phumelela. The subsidy amounted to half the proceeds of a levy placed on horseracing bets in Gauteng. The purpose of the subsidy was to enable Phumelela to stage horseraces in Gauteng and to run the totalisator governing bets placed on them.

2 Having found that the regulatory amendment was unlawful, I set it aside, and directed that the money payable to Phumelela, and to the third respondent, 4Racing, under regulation 276 in its pre-amended form, be paid to those entities.

3 The applicants contend that there is a reasonable prospect that a court of appeal will conclude that I was wrong to characterise the amendment as unlawful; that even if I was correct in that respect, I nonetheless erroneously set the amendment aside; and that even if I was correct to set the amendment aside, that I was wrong grant the payment relief. The applicants also contend that I incorrectly dismissed a conditional counter-application brought against regulation 276 in is pre-amended form.

4 Because new counsel were briefed for the application for leave to appeal, and because those counsel raised legal contentions that were not argued before me *a quo*, I sought written submissions on the application and entertained oral argument for half a day. I am grateful to counsel for their considered and

exhaustive treatment of my judgment, and of the new contentions sought to be raised on appeal.

5 Nonetheless, I am not persuaded that the appeal now proposed stands reasonable prospects of success. Nor can I see a compelling reason to send the matter on appeal notwithstanding the absence of prospects on the merits.

The unlawfulness of the amendment

6 At the core of my judgment is a simple proposition: the first applicant, the MEC, was not entitled to withdraw the regulation 276 subsidy without directly engaging with Phumelela. The notice and comment procedure the MEC adopted did not constitute such engagement, and it is common cause that the MEC did not otherwise engage with Phumelela. In the absence of such engagement, the amendment to regulation 276 was neither procedurally fair nor procedurally rational.

7 Exhaustive though they are, the applicants' grounds of appeal do not seriously assail that proposition. It was contended that a meeting between the Gambling Board and Phumelela constituted the direct engagement that I found was absent in my judgment *a quo*. But that cannot be. The Gambling Board and the MEC are separate entities. The decision-maker was the MEC, not the Gambling Board. There can be no suggestion that engagement with the Gambling Board constituted engagement with the MEC.

8 Mr. Snyckers, who appeared for 4Racing in the application for leave to appeal, described the amendment to regulation 276 as a "bill of attainder". I appreciate the quaintness of the metaphor, but it does capture something about the core

of my decision. There was no serious issue taken with the proposition that Phumelela was the only person whose rights stood to be affected by the amendment. A regulatory change that only directly affects one person is not truly legislative in nature. Nor is it a policy-making exercise. It is an administrative decision on which the affected party has a right to be heard. A call for comment issued to the general public is insufficient to give effect to that right, and a failure to give effect to the right vitiates the decision.

9 If I am right that direct engagement was required, then every other ground advanced against my decision on the lawfulness of the amendment falls away. In particular, it does not matter whether I was right to conclude that the MEC failed to apply his mind to the decision (though it seems to me inarguable that he did not). Nor does it matter whether I was right to hold that the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") applies to the exercise of powers to make or amend regulations (a point on which I was in any event bound by two decisions of the Supreme Court of Appeal). 4Racing argued that the procedural irrationality of the MEC's approach meant that the amendment was susceptible to legality review. Given that I found that the amendment was procedurally irrational, I would still have concluded that the MEC's decision was unlawful even if PAJA did not apply. The failure directly to engage Phumelela on the elimination of its subsidy was enough to render the decision unlawful on either basis.

Remedy

10 The applicants contend my judgment *a quo* might reasonably be read to disclose a failure to appreciate that I had a discretion to refuse to set aside the

amendment, its unlawfulness notwithstanding, and a failure to appreciate that I had a discretion not to order the payment relief. My apparent failure to appreciate my discretion, it was argued, could vitiate the remedy I granted, and entitle a court of appeal to interfere with the setting aside and payment relief.

11 However, my judgment is not reasonably open to the interpretation the applicants urge. The contention that I failed to appreciate that I had a discretion depends on focussing only on the last sentence of paragraph 7 and the first sentence of paragraph 35 of my decision, while ignoring everything else in the judgment. It is not realistic to expect an appeal court to squint at my decision in that way. Read as a whole, my judgment discloses that the outcome I reached was, in my view, the only appropriate outcome on the facts and the applicable law. That does not mean that I failed to appreciate that I had a discretion. It means only that I appreciated that discretions are not exercised in the air, but on particular facts and legal principles, which I addressed in my judgment *a quo*. To say that those facts and principles drive me to a particular conclusion is not to say that I have no discretion. It is the only proper way to exercise one.

12 My discretion having been properly exercised, the Constitutional Court's decision in *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited* 2015 (5) SA 245 (CC) at paragraphs 82 to 92 prevents a court of appeal from interfering with the remedy I ordered, even if it would have ordered a different one. The approach taken in *Trencon*,

it seems to me, precludes the prospect that the payment relief will be interfered with on appeal.

13 It was finally suggested that the payment remedy I granted was not reasonably related to the defect I identified in the decision to amend regulation 276. The argument was that since the defect was merely procedural, the proper approach was to suspend any declaration of unlawfulness and allow the MEC to rerun the amendment process. The implication was that payment relief would only have been appropriate if I had correctly identified something substantively unlawful in the regulatory scheme the MEC sought to introduce by way of the amendment.

14 However, if our administrative law ever admitted of two tiers of unlawfulness, it no longer does. The proper approach is not to assess the remedy to be granted in light of the nature of the defect found in an unlawful decision. It is to craft a remedy that will correct the unlawfulness of the decision, whatever its source. In this case, the appropriate corrective was to order the payment of what would have been due had the amendment not been effected.

The counter-application

15 I was not persuaded that the counter-application stands prospects of success on appeal. There was nothing in the arguments raised in the application for leave to appeal that can get around section 22 (1) (b) of the Public Finance Management Act 1 of 1999 ("the PFMA"). As I held in my judgment *a quo*, that provision excludes the proceeds of the gambling levy at issue in this case from the general requirement that "[a]ll money received by a provincial government . . . be paid into the province's Provincial Revenue Fund". It is the

exclusion authorised “by an Act of Parliament” permitted under section 226 (1) of the Constitution, 1996.

16 Such an exclusion must of course be reasonable, but the applicants’ argument is not that section 22 (1) (b) of the PFMA is unreasonable. The argument is that it is not an exclusion at all. I do not think that there is any prospect of that contention surviving contact with the plain text of the provision.

Absence of any other compelling reason to grant leave to appeal

17 Mr. Friedman, who appeared for Phumelela, conceded in his written submissions that this case has “an important feel” about it. That “feel” may arise from the amount of money involved (R500 million by the applicants’ reckoning). It may also arise from the breadth and apparent importance of the legal contentions upon which the applicants intend to rely on appeal. The applicants’ approach was very much that this application is a prelude to further proceedings in the Supreme Court of Appeal, whether to ask for leave that I might refuse, or to argue the appeal with my leave.

18 Of course, there was no disrespect intended in that approach, and I took no offence. The point is rather that the applicants’ submissions were steeped in the sense that a full rehearing of the case before the Supreme Court of Appeal is inevitable, no matter how I dispose of this application.

19 Mr. Friedman submitted, however, that this sense was not justified by anything concrete. I think he was right. Though the applicants’ submissions touch on important issues of constitutional and administrative law, few of the contentions the applicants wish to raise on appeal are in any sense novel, and

those contentions that might fairly be characterised as novel simply do not arise on the facts of this case.

20 Nor is there any great legal controversy to be resolved on appeal, because the facts of this case are so clear. The state cannot expect to promulgate a regulation that only directly affects the interests of a single person, and then fail to engage with that person except through a notice and comment procedure. If it nonetheless does so, and then amends the regulation so as to deprive that person of money to which they would otherwise be entitled, the proper approach in our law is to set the regulation aside and direct that the money be paid back, unless there are good reasons, such as the disruption of critical state services, not grant that relief. In this case, there were no such reasons. It seems to me that this case is no more controversial or complex than that.

Order

21 For all these reasons, the application for leave to appeal is dismissed with costs, including the costs of two counsel where employed.

S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 12 August 2024.

HEARD ON: 8 August 2024

DECIDED ON: 12 August 2024

For the Applicants:	JJ Gauntlett SC F B Pelser O Ben-Zeev X Ngcobo Instructed by Ka-Mbonane Cooper
For the First Respondent	A Friedman Instructed by Fluxmans Inc
For the Third Respondent:	F Snyckers SC A d'Oliveira Instructed by Truter Jones Inc