REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 11097/18

In the intervening application of:

PEERMONT GLOBAL (KZN) (PTY) LTD	Applicant
and	
AFRISUN KZN (PTY) LTD t/a SIBAYA CASINO AND ENTERTAINMENT KINGDOM	First Respondent
THE KWA-ZULU NATAL GAMING AND BETTING BOARD	Second Respondent
PORTIA NONHLANHLA BALOYI	Third Respondent
VITUBYTE (PTY) LTD t/a GOLDRUSH BINGO AND ENTERTAINMENT MALVERN	Fourth Respondent
VANGITRAX (PTY) LTD t/a GOLDRUSH BINGO AND ENTERTAINMENT BALLITO	Fifth Respondent
ZATOPIX (PTY) LTD t/a GOLDRUSH BINGO AND ENTERTAINMENT SCOTTBURGH	Sixth Respondent

ALEXIGENIX (PTY) LTD t/a GOLDRUSH BINGO AND ENTERTAINMENT CHATSWORTH	Seventh Respondent
EMIKAMARK (PTY) LTD t/a GOLDRUSH BINGO AND ENTERTAINMENT RICHARDS BAY	Eighth Respondent
CHESTNUT HILL INVESTMENTS (PTY) LTD t/a GOLDRUSH BINGO AND ENTERTAINENT PHOENIX	Ninth Respondent
POPPY ICE TRADING 18 (PTY) LTD	Tenth Respondent
GALAXY BINGO AMANZIMTOTI (PTY) LTD	Eleventh Respondent
GALAXY BINGO SOUTH COAST (PTY) LTD	Twelfth Respondent
GALAXY BINGO PAVILIION (PTY) LTD	Thirteenth Respondent
GALAXY BINGO GATEWAY (PTY) LTD	Fourteenth Respondent
GALAXY BINGO EMPANGENI (PTY) LTD	Fifteenth Respondent
GALAXY BINGO MIDLANDS (PTY) LTD	Sixteenth Respondent
PREMIER OF KWA-ZULU NATAL	Seventeenth Respondent
MEC FOR FINANCE, KWA-ZULU NATAL	Eighteenth Respondent
MINISTER OF TRADE AND INDUSTRY	Nineteenth Respondent
PEOPLE'S FORUM AGAINST ELECTRONIC BINGO TERMINALS	Twentieth Respondent
NATIONAL GAMBLING BOARD	Twenty-First Respondent
INTERNATIONAL GAMING AND	

TECHNOLOGY – AFRICA (PTY) LTD	Twenty-Second Respondent
WMS GAMING AFRICA (PTY) LTD	Twenty-Third Respondent

In re:

CASE NO: 11097/18P

AFRISUN KZN (PTY) LTD t/a SIBAYA CASINO AND ENTERTAINMENT KINGDOM	Applicant

and

THE KWA-ZULU NATAL GAMING AND BETTING BOARD	First Respondent
PORTIA NONHLANHLA BALOYI	Second Respondent
VITUBYTE (PTY) LTD t/a GOLDRUSH BINGO AND ENTERTAINMENT MALVERN	Third Respondent
VANGITRAX (PTY) LTD t/a GOLDRUSH BINGO AND ENTERTAINMENT BALLITO	Fourth Respondent
ZATOPIX (PTY) LTD t/a GOLDRUSH BINGO AND ENTERTAINMENT SCOTTBURGH	Fifth Respondent
ALEXIGENIX (PTY) LTD t/a GOLDRUSH BINGO AND ENTERTAINMENT CHATSWORTH	Sixth Respondent
EMIKAMARK (PTY) LTD t/a GOLDRUSH BINGO AND ENTERTAINMENT RICHARDS BAY	Seventh Respondent
CHESTNUT HILL INVESTMENTS (PTY) LTD t/a GOLDRUSH BINGO AND ENTERTAINENT PHOENIX	Eighth Respondent
POPPY ICE TRADING 18 (PTY) LTD	Ninth Respondent

GALAXY BINGO AMANZIMTOTI (PTY) LTD	Tenth Respondent
GALAXY BINGO SOUTH COAST (PTY) LTD	Eleventh Respondent
GALAXY BINGO PAVILIION (PTY) LTD	Twelfth Respondent
GALAXY BINGO GATEWAY (PTY) LTD	Thirteenth Respondent
GALAXY BINGO EMPANGENI (PTY) LTD	Fourteenth Respondent
GALAXY BINGO MIDLANDS (PTY) LTD	Fifteenth Respondent
PREMIER OF KWA-ZULU NATAL	Sixteenth Respondent
MEC FOR FINANCE, KWA-ZULU NATAL	Seventeenth Respondent
THE NATIONAL GAMBLING BOARD	Eighteenth Respondent
MINISTER OF TRADE AND INDUSTRY	Nineteenth Respondent
PEOPLE'S FORUM AGAINST ELECTRONIC BINGO TERMINALS	Twentieth Respondent
PEERMONT GLOBAL KZN (PTY) LTD	Twenty-First Respondent
INTERNATIONAL GAMING AND TECHNOLOGY – AFRICA (PTY) LTD	Twenty-Second Respondent
WMS GAMING AFRICA (PTY) LTD	Twenty-Third Respondent

J U D G M E N T

Y.N. MOODLEY AJ:

[1] This is an interlocutory application. It is yet another skirmish in the long line of litigious battles between casino operators and bingo operators. The applicant, Peermont Global KZN (Pty) Ltd ("Peermont") which conducts a casino business in Umfolozi, seeks leave to intervene as a co-applicant in an application brought by Afrisun (Pty) Ltd ("Afrisun") ("the main application"). Peermont was cited as a respondent in the main application by virtue of any interest it might have in its outcome[1]. In its notice of motion in this intervention application, Peermont seeks *inter alia* the following relief:

> "1. Granting Peermont leave to intervene as the second applicant in the main application issued under case number 11097/18 to seek an order, in those proceedings, in the following terms:
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> 1.1 to the extent necessary, exempting Peermont from the requirement that it exhaust internal remedies;
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> 1.2 the reviewing, setting aside and declaring invalid the following conduct of the first main respondent ('the Board"):
>
> 1.2.1 the decisions of March 2018 to renew and simultaneously to amend such bingo licenses as the third to fifteenth main respondents possessed, so as to allow for the use of electronic bingo terminals ("EBTs"), or for the use of an increased number of EBTs, on such respondents' premises;

[1] Afrisun FA, para 54.11 (Afrisun Bundle, Vol.1, p.38)

1.2.2 the decisions of March 2018 to issue renewed bingo licenses with amended conditions to the third to fifth respondents;

1.2.3 the issue of the bingo licenses to the third to fifteenth respondents pursuant to the decisions referred to in 1.2.2 above;

1.3 declaring that the EBTs that the Board has permitted bingo operators to put into operation in bingo halls in Kwa-Zulu Natal, and which are manufactured or distributed by the twenty-second and twenty-third main respondents, do not comply with the definition of bingo and/or the definition of electronic bingo terminals included in the Kwa-Zulu Natal Gaming and Betting Act 8 of 2010 ("The KZN Act") by the Kwa-Zulu Natal Gaming and Betting Amendment Act 4 of 2017, and may not lawfully be offered to the public in terms of a bingo license issued under the KZN Act;

1.4 granting costs, jointly and severally, against all the respondents that oppose the main application;"

[2] The main application is a review of various decisions taken by the Kwa-Zulu Natal Gaming and Betting Board ("the Board"), the effect of which is to permit the third to fifteenth respondents ("the bingo respondents") to operate certain electronic bingo terminals ("EBTs") and to offer them for play in their bingo halls[2].

[3] Afrisun also seeks declaratory relief to the effect, *inter alia*, that the EBTs that the Board has permitted to be put into operation in bingo halls and that are manufactured by the twenty-second and twenty-third respondents namely,

[2] Afrisun NOM, prayer 1 (Afrisun Bundle, Vol.1, pp. 2 -5)

International Gaming Technology – Africa (Pty) Ltd ("IGT") and WMS Gaming Africa (Pty) Ltd ("WMS") respectively do not offer the game of bingo as defined, and that they consequently cannot be provided in bingo halls under a bingo license issued in terms of the Kwa-Zulu Natal Gaming and Betting Act, 8 of 2010 ('the KZN Act") as amended by the Kwa-Zulu Natal Gaming and Betting Amendment Act, 4 of 2017 ("the Amendment Act").[3]

[4] Peermont contends that the EBTs at issue in this matter (which are what it has historically referred to as "conventional EBTs") are materially indistinguishable from casino-style slot machines, do not constitute "bingo", cannot lawfully be made available in bingo halls, and maybe offered only in licensed casinos.

[5] Peermont holds a casino license for Umfolozi Hotel Casino Convention Resort ("Umfolozi"), situated in Empangeni. It asserts that it has a direct and substantial interest in the relief sought in the main application. It contends that its interest is particularly pronounced in relation to the contemplated operations of the eighth respondent, Emikamark (Pty) Ltd t/a Goldrush Bingo and Entertainment Richards Bay ('Goldrush Richards Bay") and the fifteenth respondent, Galaxy Bingo Empangeni (Pty) Ltd ("Galaxy Empangeni"), which are situated 17.4 km and 6.4 km, respectively from Umfolozi[4].

[6] Peermont seeks some (but not all) of the relief that Afrisun has applied for on

[3] Afrisun NOM, prayer 2.2 (Afrisun Bundle, Vol.1, p.5)
[4] Galaxy AA, para 9.2 (Peermont Bundle, Vol.7, p.678; Goldrush AA, para 23 (Peermont Bundle, Vol.8, p.738)

both related and different grounds to those Afrisun advances. Like Afrisun, Peermont contends that the EBTs to be offered by the bingo respondents for play in their bingo halls (i.e. conventional EBTs) do not offer the game of bingo and cannot lawfully be offered to the public in terms of a bingo license. In addition, Peermont contends that the Board, in deciding to amend the relevant bingo licenses so as to allow for the operation of EBTs, failed properly to apply its mind to the authorisation of EBTs and their impact and failed to follow the requisite consultation process.

[7] On these and other grounds, Peermont challenges:

[7.1] the Board's decision to renew and simultaneously to amend the bingo respondents' bingo licenses so as to allow for the use of conventional EBTs, or for the use of an increased number of such EBTs, in the licensees' premises; and

[7.2] the Board's issue of renewed bingo licenses with amended conditions to the bingo respondents[5].

("*the impugned decisions")*

[8] In summary, Peermont contends that such conduct is defective and liable to be set aside because:

[5] Peermont NOM, prayer 1.2 (Peermont Bundle, Vol.1, pp. 4 – 5)

[8.1] the Board misconstrued the impact of the amendments to the KZN Act as automatically authorising EBTs to be operated per gaming position reflected in the existing licenses; and

[8.2] the Board consequently failed to exercise the discretion conferred on it to determine whether to amend the bingo respondents' licenses to permit them to operate EBTs and, if so, how many and on what terms;

[8.3] the Board's process in engaging in the impugned conduct was irregular in that the Board failed to consult with Peermont, or to allow Peermont an opportunity to make representations, prior to authorising a significant number of EBTs to be made available at the bingo respondents' bingo premises – despite the terms of a prior settlement agreement that it required to do so;

[8.4] the impugned bingo licenses are inchoate in that they do not specify the number of EBTs authorised for use in terms of the licenses as required in section 60 (3) of the KZN Act;

[8.5] the KZN Act, as amended, does not permit the EBTs intended to be used at the bingo premises to be offered to the public under a bingo license;

[8.6] the Board failed to consider the social and financial impact of authorising EBTs at the licensed bingo premises, including the impact on Umfolozi and the impugned conduct unreasonably and unfairly impacts on that casino; and

[8.7] the Board failed to take other materially relevant considerations into account, particularly the policy requirements of the National Gambling Policy.

[9] Peermont also seeks a declaratory order that the EBTs that the Board has permitted bingo operators to put into operation in bingo halls in Kwa-Zulu Natal, and which are manufactured or distributed by IGT and WMS, do not comply with the current definitions of "bingo" and "electronic bingo terminal" and may therefore not lawfully be offered in bingo halls[6].

[10] Peermont challenges the impugned conduct, and seeks the declaratory relief, both in its own interest and in the public interest[7].

[11] Peermont contended that it applies for overlapping (but narrower) relief to that sought by Afrisun and its application raises substantially the same questions of fact and law that are at issue in the main application. It is thus appropriately determined together with that application. The consideration of Peermont's

[6] Peermont NOM, prayer 1.3 (Peermont Bundle, Vol.1, p. 5)
[7] Peermont FA, para 14 (Peermont Bundle, Vol.1, p 20)

application with the existing proceedings will avoid different courts being seized with substantially similarly cases and will avoid an unnecessary duplication of costs[8].

[12] Peermont's intervention application is opposed by the fourth to ninth respondents i.e. Vitubyte (Pty) Ltd t/a Goldrush Bingo and Entertainment Malvern, Vangitrax (Pty) Ltd t/a Goldrush Bingo and Entertainment Ballito, Zatopix (Pty) Ltd t/a Goldrush Bingo and Entertainment Scottburgh, Alexigenix (Pty) Ltd t/a Goldrush Bingo and Entertainment Chatsworth, Emikamark (Pty) Ltd t/a Goldrush Bingo and Entertainment Richards Bay, Chestnut Hill Investments (Pty) Ltd t/a Goldrush Bingo and Entertainment Phoenix respectively, which are the Goldrush Bingo Group of Companies ("Goldrush") and the eleventh to sixteenth respondents namely, Galaxy Bingo Amanzimtoti (Pty) Ltd, Galaxy Bingo South Coast (Pty) Ltd, Galaxy Bingo Paviliion (Pty) Ltd, Galaxy Bingo Gateway (Pty) Ltd and Galaxy Bingo Empangeni (Pty) Ltd, Galaxy Bingo Midlands (Pty) Ltd respectively, which are Galaxy Bingo Group of Companies ("Galaxy"). The other respondents cited in the heading do not oppose the application. The primary basis on which Galaxy opposes the intervention application, and the sole basis on which Goldrush does so is the same: they contend that Peermont does not have a standing to seek the requested relief[9].

[8] Peermont FA, para 8 (Peermont Bundle, Vol.1, p 17)
[9] Galaxy AA, para 7(Peermont Bundle, Vol.7, p.674); Goldrush AA, para 7 (Peermont Bundle, Vol.8, p.732)

[13] In addition, Galaxy asserts that:

(i) Peermont's application is *"prima facie time barred"* and

(ii) Peermont has not made out a case for its declaratory relief, has not demonstrated its standing in respect of that relief, and there is no "*live dispute"* in respect of the declarator[10].

[14] It should be pointed out that initially in their opposing papers both Galaxy and Goldrush challenged Peermont's standing to be joined as an applicant in the main application in respect of all of their respective bingo respondents. However, by the time they filed their heads of argument in this matter, both Galaxy and Goldrush made an open tender that Peermont could intervene as an applicant in the main application but only to the extent of permitting it to challenge the decisions pertaining to the seventh main respondent (Goldrush Richards Bay - the eighth respondent herein) and the fourteenth main respondent (Galaxy Empangeni – the fifteenth respondent herein) and for purposes of seeking the declaratory order referred to in prayer 1.3 of Peermont's notice of motion insofar as the electronic bingo terminals contemplated in that prayer have been authorised directly for use in the bingo premises of the seventh and fourteenth main respondents. This open tender was made on the basis of the proximity of the location of Galaxy Empangeni and Goldrush Richards Bay to Umfolozi

[10] Galaxy AA, paras 8 and 22 (Peermont Bundle, Vol.7, pp.674 and 680)

Casino which are a distance of 6.4 km and 17.4 km, respectively[11]. In making the concession Galaxy Empangeni and Goldrush Richards Bay reasoned that by virtue of the fact that they fell within what has been termed as the "catchment area" of Umfolozi, they could affect the commercial interests of Peermont insofar as it related to the business of Umfolozi. On this basis Galaxy Empangeni and Goldrush Richards Bay accepted that Peermont had standing on its own commercial interests to join as a co-applicant in the main application to the limited extent referred to above. The concession had the effect of curtailing a number of issues raised in the papers filed on this aspect of the application. For instance, I do not need to deal with the submissions made under the heading "PEERMONT'S ENHANCED STANDING IN RELATION TO THE GOLDRUSH RICHARDS BAY AND GALAXY EMPANGENI" of counsel for Peermont's heads of argument.

[15] The Galaxy and Goldrush bingo respondents persisted with their challenge to Peermont's standing to join in the main application to claim the relief which it seeks in its notice of motion. The main thrust of the Galaxy and Goldrush respondents' opposition is that the bingo halls where bingo is played by all of the bingo respondents, save for Galaxy Empangeni and Goldrush Richards Bay, are so far removed from the catchment area of Umfolozi that they could not possibly have any adverse commercial impact on Peermont's Umfolozi Casino. In this regard it was pointed out by the Galaxy respondents that Peermont's Umfolozi Casino is 187 km away from the Galaxy Bingo Amanzimtoti's site (eleventh

[11] Galaxy AA, Vol.7, p.678, para 19.2, Qualifying Peermont FA, para 12.3 (Vol.1, p. 19)

respondent), in the Galleria Shopping Centre in Amanzimtoti; 289 km away from Galaxy Bingo South Coast's site (twelfth respondent), in Shelley Beach; 166 km away from the Galaxy Bingo Pavilion site (thirteenth respondent), in the Pavilion Centre, Westville and 147 km away from the Galaxy Bingo Gateway site (fourteenth respondent, in the Gateway Theatre of Shopping in Umhlanga[12]. The Goldrush respondents pointed out that the Umfolozi Casino is 170 km away from the Goldrush Bingo and Entertainment's site (fourth respondent), in Malvern; 119 km away from Goldrush Bingo and Entertainment's site (fifth respondent), in Ballito; 222 km away from Goldrush Bingo and Entertainment's site (sixth respondent), in Scottburgh; 183 km away from Goldrush Bingo and Entertainment's site (seventh respondent), in Chatsworth and 153 km away from Goldrush Bingo and Entertainment's site (ninth respondent), in Phoenix[13].

[16] Notwithstanding the concession referred to above, Peermont persisted with its relief which it seeks in its notice of motion which was resisted by the Goldrush and Galaxy respondents. I shall deal with the arguments advanced by counsel appearing for the parties in the discussion which follows herebelow.

[17] Rule 12 of the Uniform Rules of Court governs applications for intervention. It reads:

"Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action

[12] Galaxy AA, Vol.7, p.677, para 17; Galaxy's Heads of Argument, para 13, p.6
[13] Goldrush AA, Vol.8, para 33, pp. 740 and 741

may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant. The court may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the action as to it may seem meet.'

[18] The rule is equally applicable to applications[14]. It has not overridden or replaced our common law, which remains applicable to interventions[15]. Our courts have held that a party is entitled to intervene as an applicant in an application where:

[18.1] it has a direct and substantial interest in the right that is the subject matter of the application, which could be prejudiced by the judgment of the court[16]. The interest must be such that the intervenor's joinder is either necessary or convenient[17]. But the possibility that a legal interest exists is sufficient, and it is not necessary for the court positively to determine that it exists[18];

[14] Erasmus Superior Court Practice at D 1 - 137
[15] Id
[16] National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at para 85; Bowring NO v Vrededorp Property CC and Another 2007 (5) SA 391 (SCA) at para 21; Gordon v Department of Health, KwaZulu-Natal 2008 (6) SA 522 (SCA); Aquatur (Pty) Ltd v Sacks and Others 1989 (1) SA 56 (A) at 62C; United Watch and Diamond Company (Pty) Ltd and Others v Disa Hotel and Another 1972 (4) SA 409 (C) ("United Watch and Diamond Co") at 415 – 16; and Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O) ("Henri Viljoen") at 167. Our courts have accepted that the principles developed in the context of joinder and non-joinder applications apply to intervention applications.
[17] Smyth v Investec Bank Ltd 2018 (1) SA 494 (SCA) at paras 51 - 52
[18] Abrahamse v Cape City Council 1953 (3) SA 855 (C) at 859, citing Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 659. This case is applicable to non-joinder, for which a "direct and substantial interest is also the decisive criterion.

[18.2] the allegations made by the intervening applicant constitute a *prima face* case or defence.[19] It is, however, not necessary for the intervenor to satisfy the court that it will succeed in its case or defence. It is sufficient for the party seeking to intervene to rely on allegations which if they can be proved in the main application, would entitle it to succeed[20]. In assessing the intervenor's standing, then, the court must assume that the allegations it advances are true and correct[21]; and

[18.3] the application is made seriously and is not frivolous[22].

[19] As explained above, the bingo respondents object to Peermont's intervention on the first ground, i.e. Peermont lacks a direct and substantial interest. They do not contend that Peermont has not made out a *prima facie* case or that the application is not made seriously or is frivolous, save that Galaxy (but not Goldrush) contends that Peermont has not made out a case for the declaratory relief.

[20] It was contended on behalf of Peermont that its standing in relation to the

[19] Shapiro v South African Recording Rights Association Ltd (Galeta intervening) 2008 (4) SA 145 (W) ("Shapiro") at paras 17 – 23; Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others 2004 (2) SA 81 (SE) at paras 9 – 10; and Minister of Local government and Land Tenure and Another v Sizwe Development and Others: in re: Sizwe Development v Flagstaff Municipality 1991 (1) SA 677 (TK) ("Sizwe Development") at 78 - 79

[20] Erasmus Superior Court Practice at D 1 – 137, citing Ex parte Moosa: in re: Hassim v Harrop-Allin 1974 (4) SA 412 (T) at 416; Sizwe Development at 678 – 679; and Ex Parte Sudurharvid (Pty) Ltd: in re: Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd 1993 (2) SA 737 (Nm) at 742. In assessing the intervenor's standing, then, the court must assume that the allegations it advances are true and correct;

[21] Zulu and Others v Ethekwini Municipality and Others 2014 (4) SA 590 (CC) at para 21; Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others 2013 (3) BCLR 251 (CC) at para 32;

[22] See the citations at n 19 above.

authorisation and operation of EBTs across the province arises from the fact that it made extensive financial and socio-economic commitments to the Board to obtain the casino license at Umfolozi, and has invested significant capital to upgrade and operate such casino[23], and it has consistently been concerned with the proliferation of EBTs in the province. In particular, Peermont is concerned with ensuring that its fellow participants in the Kwa-Zulu Natal gambling industry comply with the regulatory framework for gambling in the province which necessitates lawful, reasonable and procedurally fair decision-making in relation to decisions that affect not only industry participants but the broader public. To that end, so it was contended, Peermont has, since 2010, participated in numerous proceedings relating to the rollout of conventional EBTs in Kwa-Zulu Natal[24].

[21] It was submitted that Peermont's standing in respect of all of the bingo respondents is founded on two main bases:

[21.1] *First*: Peermont contends that the bingo licensees, who do not hold casino licenses, are operating gaming machines that are reserved for casino licensees. It relied on two high court cases, namely *Akani* which concluded that the EBTs that form the subject matter of that case were "*none other than a slot machine and may only be used on licensed casino*

[23] Peermont FA, para 12 (Peermont Bundle, Vol.1, p. 19)
[24] Peermont FA, para 12.2 and 44 – 72 (Peermont Bundle, Vol.1, pp. 19 and 36 - 46)

premises"[25] *and Peermont Global North West*[26] where it was stated that the conventional EBT is "*nothing other than a slot machine".* It was submitted that for purposes of assessing its standing, the court must assume that Peermont's allegations in this regard are correct[27]. As a casino licensee in KZN, Peermont has compelling and substantial interest in ensuring that its fellow participants in the KZN gambling industry comply with the applicable regulatory framework. It must, so the argument went, be open to a casino licensee to challenge the unlawful provision of the very type of activity that a casino – and only a casino – is authorised to provide.

[21.2] *Second:* one of the bases on which Peermont seeks to review the impugned decisions is that the Board failed to comply with its obligation to consult with Peermont, and to allow it an opportunity to make representations. This obligation was grounded, amongst others in a settlement agreement concluded in June 2012 between the Board and various other parties, including Peermont ("*the settlement agreement"*[28]). It was submitted that in terms of the settlement agreement, the Board agreed that it would not license or approve EBTs without receipt of an application and that it will not take a decision in respect of such an

[25] Akani Egoli (Pty) Ltd & Others v Chairperson of the Gauteng Gambling Board (Transvaal Provincial Division, Case No. 17891/06, Judgment of 29 January 2008), DLP3, p.14 (Peermont Bundle, Vol.2, p.142)
[26] Peermont Global North West (Pty) Ltd v Chairperson of the North West Gambling Board and Others [2016] ZANHC 66 (13 October 2016) at para 15
[27] Zulu at para 21
[28] Peermont FA, paras 112 - 116 (Peermont Bundle, Vol.1, pp. 60 -61)

application without consultation and representations from all interested parties[29]. Peermont submits that it must have standing, in effect, to enforce compliance with an entitlement conferred upon it in a settlement agreement to which it is a party.

[22] Much reliance was placed by Peermont on the judgment of Koen J in *Poppy Ice*,[30] for its claim to standing. This judgment concerned an unsuccessful attempt by the tenth respondent ("*Poppy Ice")* to compel the Board to implement the Board's decision of 16 January 2015 (*"the 2015 decision")* to grant amended bingo licenses to the bingo respondents so as to allow the operation of EBTs in respect of its proposed bingo premises in Ladysmith. In the course of finding that Peermont had a direct and substantial interest in Poppy Ice's application and that it was therefore entitled to intervene to oppose the relief *Poppy Ice* sought, the learned judge held that:

[22.1] Peermont as an owner of a casino at Empangeni, is "*most directly affected by the question of whether EBTs offer 'bingo', or whether they constitute slot machines, which only casinos are entitled to operate"*[31], and

[29] Peermont FA, para 112 (Peermont Bundle, Vol.1, p. 60; See also Clauses 1.6 and 1.7 of the settlement agreement attached as ATB to Afrisun FA (Afrisun Bundle, Vol.3, p.300)

[30] Poppy Ice Trading 18 (Pty) Ltd t/a Great Bingo v The KwaZulu-Natal Gaming and Betting Board and Others (Case No.4818/16P, 10 October 2018)

[31] At para 14. Koen J went onto state as follows: "On the papers filed they [i.e. Peermont and Afrisun] have expended significant capital on their casinos where extensive gambling, including gambling using slot machines, takes place. Their overhead costs are high. Their contention, stripped to its essentials, is that the EBTs sought to be introduced do not comply with the definition of bingo in the act, effectively are simply slot machines, which if the impugned decision [the decision to authorize the use of EBTs in bingo halls] is implemented, will allow operators such as Poppy Ice to operate these machines in its bingo halls. The rollout of EBTs in bingo halls will adversely affect their business. Bingo halls to the extent that they are permitted to operate EBTs, would have a significant

[22.2] Peermont has "*a direct and substantial interest in any application seeking to give effect to the impugned decision because it will recognise the validity of that decision, which strikes at the very heart of [Peermont's and the other intervening parties] objections*[32]*."*

I will revert to the *Poppy Ice* case later herein.

[23] It follows from the above that Peermont contends that it has a 'direct and substantial interest' in the relief sought for in the main application and seeks to intervene in its 'own interest' and in the 'public interest'.

The extent of Peermont's 'direct and substantial interest', or 'own interest'

[24] As is well-established, a direct and substantial interest under the common law involves a "*legal interest"* in the litigation which may be prejudicially affected by the judgement of the court, and not merely a financial interest (which is only an indirect interest in the litigation), or another form of interest or derivative interest[33]. Examples of persons having a direct and substantial interest are joint

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advantage over casinos because they would be allowed to establish what practically amount to mini casinos without meeting the extensive and expensive license requirements that apply to Peermont… they are further concerned about the proliferation of EBTs in the Province of KwaZulu-Natal, particularly should the operation of EBTs in bingo halls be unlawful and their operation properly confined to casinos."

[32] At para 19

[33] Henri Viljoen, United Watch & Diamond Co. See n.16; Burger v Rand Water Board and Another 2007 (1) SA 30 (SCA) at paras 8 - 9

owners, joint contractors and partners[34]. By contrast, a sub-tenant or another person with a contractual relationship with a tenant does not have a direct and substantial interest but merely a derivative one[35].

[25] In *United Watch & Diamond Co.,* Corbett J (as he then was) at page 416 stated[36] that when it comes to intervention the test of a direct and substantial interest in the subject matter of the action is a decisive criterion and referred to ***Brauer's***[37] case where application was made for the setting aside of the proceedings of a liquor licensing board on the ground that it had failed, in contravention of sec.28 (1) of the Liquor Act, to keep a record of the proceedings in public of a meeting of the board at which the applicant's application for the removal of his bottle liquor licence to other premises was considered and refused, At the hearing of the application one Garb applied for leave to intervene as an additional respondent in opposition to the application. Garb, the licensee of certain hotel premises situated in the area to which the removal was sought, had objected to the removal application before the board and contended that he was entitled to intervene on the ground that he had a substantial financial interest in the proceedings in that, if the application was granted and the board had to reconsider the application for removal, he would be left in a state of uncertainty and would have to incur expense in the protection of his interest by having to

[34] Burger v Rand Water Board at para 7; Kock & Schmidt v Alma Moderhuis (EDMS) Bpk 1959 (3) SA 308 (A) at 318 E -F

[35] Burger v Rand Water Board at paragraph 9; United Watch & Diamond Co. at 417 B – C; Sheshe v Vereeniging Municipality 1951 (3) SA 661 (A) at 666 - 667

[36] United Watch & Diamond Co. at p.416

[37] Brauer v Cape Liquor Licensing Board, 1953 (3) SA 752 (C) at 761

engage counsel to oppose the removal; and that if the board upon reconsideration granted the application, he Garb would be faced with business competition. The court refused the application to intervene, stating (at p.761):

> 'In the present case, Garb has no real interest in the enquiry as to whether the Board kept a proper record; whether it did or not is no legal concern of his. What he is interested in doing is to prevent the possibility of competition if the Board should, in the event of its being ordered to reconsider the removal application, grant it. The interest he alleges [and of which he has given no proof] is, at most, in the words of Horwitz, A.J.P., 'merely a financial interest which is only an indirect interest in the litigation'. That this court might make an order in favour of the applicant in the review proceedings might be 'an unwelcome result', but in my view, is not a ground entitling him to intervene.'

[26] The bingo respondents relied on a judgment by Olsen J in *Premier of Kwa-Zulu Natal v Kwa-Zulu Natal Gaming and Betting Board ("Premier KZN")*[38] – a case which, like this one, concerned *inter alia* a challenge to the standing of a casino operator in Kwa-Zulu Natal (in that case, Afrisun) to impugn licenses or approvals granted to bingo operators. In that judgment Olsen J, applying the Constitutional Court decision in *Giant Concerts CC*, held that Afrisun would only have standing to challenge decisions pertaining to bingo licenses within the catchment area of its Sibaya Casino[39].

[38] Premier of KwaZulu-Natal and Others v KwaZulu-Natal Gaming and Betting Board and Others [2019] 3 ALL SA 916 (KZP) ([2019] ZAKZPHC 44 (4 July 2019)) Afrisun sought leave to appeal against Olsen J's judgment but after being refused leave by Olsen J let the matter rest there. The Premier KZN decision of Olsen J is thus the final one in that case.

[39] Cf., too Prinsloo & Viljoen Eiendomme (Edms) Bpk v Morfu 1993 (1) SA 668 (T) (referred to with approval in JDJ Properties CC and Another v Umgeni Local Municipality and Another 2013 (2) SA 395 (SCA) at para 33) where a property owner was held not to have standing to enforce compliance with a town planning scheme.

[27] As I have mentioned, counsel for Peermont placed considerable reliance on *Poppy Ice* and sought to distinguish the latter case from *Premier KZN* and further submitted that, in the event of my finding that the two cases were not distinguishable, I should follow the decision of Koen J in *Poppy Ice* as the decision by Olsen J in *Premier KZN* was clearly wrong. Counsel for the Galaxy and Goldrush respondents on the other hand relied on the decision of *Premier KZN* and sought to distinguish *Poppy Ice* from it. It is therefore necessary to consider both these judgments in some detail and the arguments put forward by the respective counsel acting for the parties for or against them.

[28] The bingo respondents rely on the following dictum of Olsen J in *Premier KZN* where the learned judge stated:

> "[48] However fanciful claims of potential prejudice are not sufficient to justify a conclusion that a claim to standing is premised on real interest, as opposed to ones which are hypothetical or academic. In this case all of the bingo halls which were beneficiaries of the impugned decisions were cited, and the relief sought by Afrisun covers all of them, even those whose distance from Afrisun's casino is such that they could not reasonably be expected to have any effect on Afrisun's gambling revenues. All of the beneficiaries of the impugned decisions were originally cited in this matter by the Premier and the MEC for Finance, based on their claim of *locus standi* to object to the approvals of any license conditions authorising the use of EBTs in Kwa-Zulu Natal. Afrisun does not approach the court with the same standing as that claimed by the original two applicants. It had

to establish its standing with respect to each of the impugned decisions. In my view, it failed to do so.

[49] In submitting its objections during the course of the process which resulted in the impugned decisions, Afrisun identified five of the bingo operator respondents as being within its 'catchment area', and as likely to cause it the loss of gaming revenue to which I have already referred. They are the eleventh, fourteenth, fifteenth, nineteenth and twentieth respondents. Counsel for the respondents conceded in argument that there is enough on the papers to justify the conclusion that Afrisun has standing to challenge the decisions made in favour of those respondents.

[50] However they argue correctly that all of the other bingo operator respondents fall outside what might be called Afrisun's sphere of interest.

[51] Reverting to paragraph 1.1 of the order made on 28 April 2015, the challenge to Afrisun's standing to intervene to seek relief against the bingo operator respondents other than the eleventh, fourteenth, fifteenth, nineteenth and twentieth respondents, must be upheld."

[29] Counsel for Peermont submitted that it is important to read the above dictum in the context of the judgment as a whole and, in in particular, the bases upon which Afrisun sought standing in that case. This, so it was submitted, emerges from the immediately preceding paragraphs in the judgment where the learned judge stated:

"[45] Whilst counsel for Afrisun ventured the suggestion in argument that, as a participant in the gambling industry, Afrisun had an interest in seeing that all administrative decisions made by the gambling board in connection with the gambling industry are made in compliance wit PAJA, that is not the basis upon which Afrisun sought leave to intervene. In its founding affidavit in the intervention application Afrisun asserted:

(a) that the decisions made in favour of the bingo operators would bring about that Afrisun would suffer a significant loss of 'gross gaming revenue'; and

(b) that it was a party affected by the decision in that 'from the outset [Afrisun] submitted objections to attempts to license EBTs, and also submitted objections to the applications which culminated in the decision of the first respondent which is now sought to be reviewed and set aside.'

It is clear that Afrisun claims the right to approach the court on the basis that it is acting in its own-interest, as contemplated by s 38 (a) of the Constitution.

[46] The fact that Afrisun participated in the hearings which preceded the impugned decisions cannot on its own afford Afrisun standing. As pointed out in Giant Concerts (para 56):

'It is not logical to assert that an own-interest standing qualification arises from participation in a process if the objection remains hypothetical and academic.'

[47] What Afrisun relies upon to render its objection to the decisions made by the

> board, and its interest in intervening in these review proceedings, were real and not academic, is the detrimental effect upon its gaming revenues which it claims will result from the use of EBTs in bingo halls.'

[30] On the basis of what is contained especially in paragraph [45] of Olsen J's judgment, it was submitted on behalf of Peermont that Olsen J's reasoning does not serve to disqualify Peermont from challenging the authorisation of EBTs beyond the catchment area of its casino in the present matter and three reasons were advanced in support of this argument, namely:

[30.1] Peermont, unlike Afrisun in *Premier KZN,* expressly relies on its interest as a participant in the gambling industry in ensuring that lawful decisions are taken in respect of other industry participants. The present proceedings, so the argument went, thus fall within the scenario contemplated in paragraph [45] of Olsen J's judgment. It was emphasised that Koen J held in *Poppy Ice* that a licensed casino is "most directly affected by the question whether EBTs offer 'bingo', or whether they constitute slot machines, which only casinos are entitled to operate[40].

[30.2] Peermont does not rely only upon own-interest standing; it also acts in the public interest. There is therefore a compelling public interest in ensuring that the Board takes lawful decisions, given the social importance of the

[40] Poppy Ice at para 14

proper regulation of gambling[41].

[30.3] Peermont must have standing to assert its rights under the settlement agreement to which it was a party. This issue did not arise in *Premier KZN* because, in contrast to the impugned decisions, the 2015 decision was preceded by a process of public consultation (in terms of the settlement agreement)[42].

[31] I do not think what is stated in paragraph [45] supports the argument advanced on behalf of Peermont. It seems to me that what the learned Judge conveyed in paragraph [45] of his judgment translates to him not being prepared to countenance an argument ventured by counsel acting for Afrisun on an issue not raised by Afrisun in its founding affidavit and nothing more. It cannot be elevated to mean that had Afrisun raised the matter of its interest in seeking that all administrative decisions made by the Board in connection with the gambling industry are made in compliance with PAJA, the learned judge would have found any differently to what he stated in the quoted passages from paragraphs [48] to [51] referred to above. What appears to have weighed heavily with the learned judge with respect to the standing of Afrisun for intervention in the main application were the distances of the sites of the bingo beneficiaries from the Sibaya Casino save for the five bingo beneficiaries who were within the

[41] Peermont RA, para 32 (Peermont Bundle, Vol.8, p. 699). See also s 6(1)(a) of the KZN Act, which records that the objects of the Board include to "ensure that all gambling authorized under this Act is conducted in a manner which promotes the integrity of the gambling industry and does not cause harm to the public interest.'

[42] Peermont FA, paras 53 – 5 and 113 (Peermont Bundle, Vol.1, pp. 40 and 60)

catchment area of the Sibaya Casino so much so, that those bingo beneficiaries whose sites were situated far away from the Sibaya Casino, could not reasonably been expected to have any effect on Afrisun's gambling revenues. In my view, this was a determinative factor in him finding that Afrisun had failed to establish its standing with respect to each of the impugned decisions.

[32] Peermont submits that it should be granted wider standing than that which would have been accorded to Afrisun in *Premier KZN* because of the earlier decision of this court (*per* Koen J) in *Poppy Ice*[43]. I am in agreement with the submissions made by counsel acting for the Galaxy and Goldrush respondents that Peermont's contention in this regard is based on a mischaracterisation of the finding in *Poppy Ice* – a case which was apparently relied upon by Afrisun in *Premier KZN*[44].

[33] By way of overview:

[33.1] *Poppy Ice* concerned an application which was brought in 2016 by Poppy Ice Trading 18 (Pty) Ltd to review the Board's delay in acting upon approval decision(s) of 16 January 2015 and to obtain relief implementing and giving effect to those decision(s). Afrisun, Peermont and a body called the People's Forum Against Electronic Bingo Terminals ("the Forum"), which at that stage were all still seeking to set aside the Board's

[43] See e.g. Peermont's Heads, p.13, para 22
[44] Galaxy, Heads, pp.10 -11, para 27

decision(s) of 16 January 2015 under case no.1366/15, applied for leave to intervene as respondents in Poppy Ice Trading's application in order to oppose the relief they claimed to have a direct and substantial interest in the validity of the Board's decision(s) of 16 January 2015 (i.e. the decision(s) which Poppy Ice Trading was seeking to implement) which were being impugned by them in pending proceedings under case no.1366/15;

[33.2] it bears emphasis that *Poppy Ice* was confined to the question of whether Afrisun, Peermont and the Forum had a "*direct and substantial interest"* in the relief sought in that case. This is apparent, for example, from statements such as the following in Koen J's judgment:

> "Peermont, Afrisun and The Forum have applied for leave to intervene in the main application on the basis of their direct and substantial interest in the validity of the impugned decision and as the review thereof raised substantially the same questions of fact and law as in the MEC's review [under case no.1366/15]. Peermont and Afrisun contend in the MEC's review that the EBTs referred to in the impugned decision cannot lawfully be operated under a bingo license." (Para [11])

and

> "…Afrisun claims a direct and substantial interest in the subject matter of the main application on substantially similar grounds…". (Para [17])

[33.3] Koen J found that Afrisun and Peermont had the requisite personal interest in Poppy Ice Trading's application and the relief that it sought. This was because (as mentioned in paragraph [11] of the judgment Poppy Ice Trading was seeking to require the Board to honour and implement decision(s) which Afrisun and Peermont (and the Forum) were involved in challenging in pending proceedings under case no.1366/15. As Koen J held in this regard (at para [19] of the *Poppy Ice* judgment) :

> "Peermont and Afrisun have a direct and substantial interest in any application seeking to give effect to the impugned decision because it will recognise the validity of that decision, which strikes at the very heart of the intervening parties' objections"

Poppy Ice is thus authority merely for the unsurprising proposition that applicants who are seeking to review and set aside an administrative decision in pending proceedings have a direct interest as one of the beneficiaries of that decision seeking to have the decision recognised and enforced in another application.

[33.4] Koen J did not however, consider the question of whether Afrisun, for example, had standing to challenge each of the Boards' approval which were being impugned in case no.1366/15; or, in other words, analysed the strength of Afrisun's challenge in that pending review. (It sufficed for the

purposes of Koen J's judgment that Poppy Ice Trading sought to have the decision(s) recognised as valid at that time as Afrisun was seeking to impugn under case no.1366/15.) Nor did Koen J's judgment translate into such a finding. Had it done so, the standing question addressed by Olsen J in *Premier KZN* would not have been a live issue and could also not have been decided by Olsen J as he did. It is indeed implicit in Olsen J's finding in *Premier KZN* that, not only had the standing issue not been previously addressed by the court, but the *Poppy Ice* decision (it was relied upon by Afrisun in that case but not mentioned in the judgment) had no bearing on that standing enquiry;

[33.5] The question of whether Afrisun had standing to challenge the Board's approvals of EBTs for bingo operators in Kwa-Zulu Natal was first addressed by Olsen J under case no.1366/15, in *Premier KZN*; and in that case, it was held that Afrisun did not have standing to challenge any decision of the Board which related to a bingo license outside the sphere of interest of Afrisun's Sibaya Casino. The same finding would also logically have had to be made as regards Peermont, had it still persisted with its challenge in that case.

[34] Thus, in summary: Koen J did not hold in *Poppy Ice* that Afrisun had standing to challenge the approval of the Board which were the subject matter of Poppy Ice Trading's application. Nor was that before him. (The court was instead concerned

with a narrower and more straightforward question involving the right of a review applicant to intervene in proceedings which sought to give effect to the decision being impugned in the review.) When that standing issue finally came before this court in 2019 – in the *Premier KZN* matter (which was decided under case no.1366/15) – it was held that Afrisun did not in fact have the requisite standing. In the circumstances, it is the *Premier KZN* decision, and not the *Poppy Ice* decision, which is accordingly the applicable precedent.

[35] To the extent that I may be wrong in having accepted the submissions by counsel acting for the Galaxy and Goldrush respondents in distinguishing *Poppy Ice* from *Premier KZN* in the above overview, I am inclined to follow the reasoning of Olsen J in *Premier KZN.*

[36] Peermont does not satisfy the common-law test for a direct and substantial interest insofar as the relief sought by Afrisun in the main application is concerned. Peermont at best, has a financial interest, or thus an indirect or derivative interest.

[37] Because Peermont is seeking in paragraph 1.2 of its notice of motion to review and set aside administrative decisions, it may however suffice for Peermont to show that it has standing under section 38 of the Constitution[45] to enforce the right to just administrative action (as given effect to in the Promotion of Administration of Justice Act, 3 of 2000 ("PAJA"). This is indeed what Peermont

[45] Constitution of the Republic of South Africa, Act No.108 of 1996

appears to assert in its founding affidavit[46]. It is therefore necessary to consider whether Peermont has constitutional own-interest standing as well.

[38] The leading case on 'own-interest standing' [recognised in section 38 (a) of the Constitution is *Giant Concerts*[47], in which Cameron J (for a unanimous court) held that "constitutional own-interest standing is broader than the traditional common law standing, but … a litigant must nevertheless show that his or her rights or interests are directly affected by the challenged law or conduct.[48]"

[39] In that case, Giant Concerts CC ("Giant") was held (both by the Supreme Court of Appeal and the Constitutional Court) not to have standing to challenge the lawfulness of a contract under which a municipality sold the land to Rinaldo Investments (Pty) Ltd. The following passages of the Constitutional Court's *Giant Concerts judgment* bear emphasis in this regard:

[39.1] to establish own-interest standing under the Constitution a litigant need not show the same "sufficient personal and direct interest" that the common law requires, but must still show that a contested law or decision directly affects his or her rights or interests, or potential rights or interests (para 41(a));

[39.2] although this requirement must be generously and broadly interpreted to

[46] Peermont FA, p. 20, paras 13 – 14
[47] Giant Concerts CC v Rinaldo Investments (Pty) Ltd & Others 2013 (3) BCLR) 251 (CC)
[48] Giant Concerts CC at para [41] (264 D)

accord with constitutional goals, the interest must be real and not hypothetical or academic. (paras 41 (b) and (c));

[39.3] in each case, an applicant must show that he or she has the necessary interest in an infringement or threatened infringement (para 41 (f)). The own-interest litigant must, therefore, demonstrate that his or her interest or potential interest are directly affected by the unlawfulness sought to be impugned (para 43);

[39.4] while constitutional own-interest standing is broad, it is not limitless. *Ferreira v Levin*[49] draws the line at hypothetical and academic interest. (para 50);

[39.5] While a commercial interest in the subject-matter of the transaction will be sufficient to establish own-interest standing to challenge it, *Giant* never demonstrated that it had any serious commercial interest in this site. *Giant* did not show that it has interests that were capable of being directly affected. (para 51);

[39.6] *Giant's* mere participation in the notice and comment process by lodging an objection did not confer standing on it to challenge the transaction. The very point of that process is to identify objections, to afford them expression, and then to evaluate and consider them. It is not logical to assert that an own-interest standing qualification arises from participation

[49] Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC)

in a process if the objection remains hypothetical and academic. (Para 56)

[40] In the present case, Peermont only contends for potential financial prejudice arising from the introduction of EBTs at the sites of Galaxy Empangeni and Goldrush Richards Bay. This is borne out by the fact that the economic impact assessment attached to its founding affidavit as "DP1" is confined to the potential impact of introducing EBTs "in Richards Bay and Empangeni"[50]. Peermont has accordingly merely demonstrated that its interests or potential interest would be directly affected by any alleged unlawfulness in the approvals for Galaxy Empangeni and Goldrush Richards Bay; or put differently that it has "serious commercial interests" in respect of those sites. Peermont consequently only has constitutional 'own-interest standing' to challenge decisions which relate directly to those two bingo operators. This conclusion is supported in *Premier KZN.*

[41] Save for Galaxy Empangeni and Goldrush Richards Bay, the other bingo respondents sites are so far removed from the catchment area of the Umfolozi Casino that it cannot reasonably be suggested Peermont's own commercial interest could be harmed by what happens at those bingo halls. This is neatly illustrated by Peermont's reliance on an economic impact assessment which is confined to a consideration of the potential impact of EBTs at Galaxy Empangeni and Goldrush Richards Bay[51].

[50] Peermont FA, Vol.1, pp. 76 – 78. The report by RBB Economics, is headed "The introduction of EBTs in Richards Bay and Empangeni: An economic assessment of the likely impact on Peermont's Umfolozi Casino"

[51] See n 50

[42] By parity of reasoning, Peermont would only have a sufficient personal interest to seek declarators in respect of approvals of EBTs for use on those two sites. Peermont would not have a direct and substantial interest or even any lesser commercial interest, in what EBTs are approved for any other bingo halls.

[43] It remains to add that Peermont's reliance on the settlement agreement of June 2012 does not assist it. That settlement agreement cannot confer on Peermont an interest in a bingo hall which could never conceivably affect its business. That settlement agreement also in any event, ceased to have application many years ago. The procedure contemplated in that agreement was complied with during 2014, when the Board invited representations or objections from interested parties (including Peermont) in respect of applications to permit the introduction of EBTs. Public hearings were then held in September 2014 whereafter the Board granted the EBT approvals sought in January 2015. The settlement agreement is therefore no longer relevant. This is all the more so as the legislative context in which the settlement agreement was concluded changed significantly in October 2017, when the Amendment Act 4 of 2017 (which introduced a new definition of 'bingo', as well as a new regime for amending licensing conditions) was assented to.

Peermont's claim to be entitled to rely on 'public interest' standing

[44] As mentioned, Peermont contends that, in addition to relying on own-interest

standing, it also acts in the public interest.

[45] Public interest standing cannot, however simply be asserted. Nor do courts readily accept claims of public interest from commercial entities. That is understandable for if the position were otherwise, businesses could circumvent their shortcomings as regards own-interest standing by professing to represent the public interest.

[46] The first in-depth examination of public interest standing is contained in the judgment of O' Reagan J in *Ferreira v Levin*[52], where the following was stated (at para 234):

> "This court will be circumspect in affording applicants standing by way of s 7 (4) (b) (v) [the equivalent in the interim (1993) Constitution of s 38 (d) of the final Constitution] and will require and applicant to show that he or she is genuinely acting in the public interest. Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument in the Court. The factors will need to be considered in the light of the facts and circumstances of each case."

[47] Those dicta were endorsed by Yacoob J, with whom eight other justices

[52] Ferreira v Levin n.48

concurred in *LHR v Minister of Home Affairs*[53], with the Court merely adding a few minor glosses. Yacoob J stated in this regard:

> "[17] I agree in substance with this approach [of O' Reagan J in para 234 of Ferreira]. Although it forms part of a minority judgment it is not inconsistent with anything said in the majority judgment on the issue of standing… The standing provisions in the interim Constitution and s 38 of the Constitution are for all practical purposes the same and the approach advocated by O'Reagan J is therefore equally applicable to s 38 (d).
>
> [18] The issue is always whether a person or organisation acts genuinely in the public interest. A distinction must however be made between the subjective position of the person or organisation claiming to act in the public interest on the one hand and whether it is, objectively speaking, in the public interest for the particular proceedings to be brought. It is ordinarily not in the public interest for proceedings to be brought in the abstract. But this is not an invariable principle. There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case. The factors set out by O' Reagan J help to determine this question. The list of relevant factors is not closed. I would add that the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important considerations in the analysis."

[48] There are consequently a range of factors which would have to be considered by a court in order to determine whether a person or entity which claims to be acting in the public interest should be granted standing on that basis. The court has to

[53] Lawyers for Human Rights and Another v Minister of Home Affairs and Another 2004 (4) SA 125 (CC)

be satisfied, after considering the kinds of criteria enumerated in the aforementioned judgments of O' Reagan J and Yacoob J, that the public interest is genuinely served by the particular proceedings being brought by the applicant in question. An affluent applicant avowedly seeking to further its own interest and those of other well-resourced entities will not easily satisfy that test. This was illustrated in *SA Reserve Bank v Shuttleworth*[54] where Moseneke DCJ stated the following (at para 76) regarding Mark Shuttleworth's attempt to rely on public interest standing to challenge exchange control regulations, namely:

> "Mr Shuttleworth has not shown that, in the cross appeal, he was genuinely acting in the public interest or that any of the people or groups affected by the exit charge may not be able to take up the challenge themselves. It is needless to add that the group he seeks to represent, being people who are desirous of externalising their wealth, may not be vulnerable or crave for his intervention."

[49] Peermont has not made out a proper case for why the criteria mentioned by the Constitutional Court for public interest standing determinations would purportedly be satisfied in this case. Essentially all that it has alleged in this regard is that Peermont is and has consistently been concerned with the proliferation of EBTs in the province and in particular concerned with insuring that its fellow participants in the Kwa-Zulu Natal gambling industry comply with the regulatory framework for gambling in the province, and that there is a compelling public interest in ensuring that the Board takes lawful decisions.

[54] South African Reserve Bank and Another v Shuttleworth and Another 2015 (5) SA 146 (CC)

[50] That explanation is woefully inadequate. Indeed, it does not advance Peermont's case at all. Peermont's consistent concern has been out of a desire to protect to its own commercial interest. This is in fact acknowledged in Peermont's founding affidavit in which it places some store on the alleged adverse effect of EBTs on its business and indeed infuses the supposed public-interest character of its application with its own own-interest concerns. There is nothing which suggests that Peermont has raised complaints or challenges out of altruism or a desire to raise concerns which would otherwise go unchecked because of the inability of immediately affected persons to make their voices heard.

[51] Peermont's reliance on public-interest standing rings particularly hollow given that the challenges it seeks to raise are, as it acknowledges, already raised by Afrisun in the main application – Peermont, in its own words, seeking leave to apply for 'overlapping (but narrower) relief to that sought by Afrisun.[55]' There can in the circumstances, be no suggestion that it is necessary for Peermont to intervene as an applicant in the main application in the public-interest in order for the relief in question to be sought.

[52] There is even a further obstacle in the way of Peermont's reliance on "public interest standing" in this context. 'Public interest' standing is merely recognised in constitutional challenges involving allegations that "a right in the Bill of Rights has been infringed or threatened" (s 38 (d) of the Constitution). The declaratory relief

[55] Peermont's Heads, p.8, para 11

referred to in paragraph 1.3 of Peermont's notice of motion is plainly not of that type. It involves an allegation that EBTs that the Board has permitted bingo operators to put into bingo halls in Kwa-Zulu Natal "do not comply with the definition of bingo and/or the definition of electronic bingo terminal included in the Kwa-Zulu Natal Gaming and Betting Act 8 of 2010…. by the Kwa-Zulu Natal Gaming and Betting Amendment Act 4 of 2017" and that is something quite different.

[53] I therefor conclude that Peermont does not have public interest standing as envisaged in terms of section 38 (d) of the Constitution.

[54] In all the circumstances, I conclude that save in respect of Goldrush Richards Bay and Galaxy Empangeni, Peermont has failed to make out a case for the relief sought for in its notice of motion. Having come to this conclusion, I do not think it is necessary for me to deal with the issues as to whether Peermont's application is '*time-barred'* or whether there is a '*live dispute'* between the parties. In the light of my findings and save in the case of Goldrush Richards Bay and Galaxy Empangeni, the application against the other respondents falls to be dismissed.

[55] With respect to costs, it was submitted on behalf of the Goldrush and Galaxy respondents that should I grant Peermont leave to intervene in the main application to the limited extent referred to in their open tender, Peermont should

be ordered to pay such costs from the date on which such open tender was made which was 18 February 2020 and that such cost order should include the costs consequent upon the employment of two counsel where two counsel were employed. I am of the view that a reasonable period for Peermont to have considered and made its decision on the open tender would have been five (5) days. I propose therefore to make the costs order to run from 24 February 2020. All the parties employed two counsel. Having regard to the legal issues involved in the mater and the importance of the matter to the respective parties, I think the employment of two counsel was justified.

[55] In the result I make the following order:

[55.1] The intervening applicant (Peermont Global KZN (Pty) Ltd ('Peermont')) is granted leave to intervene as the second applicant in the main application issued under case number 11097/18, subject to what is set out below.

[55.2] It is expressly recorded that Peermont's intervention as second applicant in the main application is confined to being for purposes of challenging decisions pertaining to the seventh main respondent (Goldrush Richards Bay) and the fourteenth main respondent (Galaxy Empangeni) and for purposes of seeking the declaratory order referred to in prayer 1.3 of Peermont's notice of motion insofar as the electronic bingo terminals contemplated in that prayer have been authorised directly for use in the

bingo premises of the seventh and fourteenth main respondents .

[55.3] The affidavit filed by Peermont in support of intervention application shall serve as its founding affidavit in the main application, provided that any references in this affidavit to the third o fifteenth main respondents and/or the bingo operators are confined to their relevance to the relief sought pertaining to the operations and contemplated operations of the seventh and fourteenth respondents only and the decisions relating to these operations only.

[55.4] The time periods and other stipulations (whether from the Uniform Rules of Court or a Court Order) applicable to Afrisun (Pty) Ltd t/a Sibaya Casino & Entertainment Kingdom (the original applicant in the main application) shall apply to Peermont in the main application, subject to any changes that may be necessitated by Peermont's later involvement as an applicant.

[55.5] The respondents shall be granted sixty (60) court days from the date of any supplementary founding affidavit of Peermont to deliver any answering affidavit in response to Peermont's founding papers (as supplemented).

[55.6] Peermont shall pay the costs of the fifth to ninth respondents (the Goldrush respondents) and the eleventh to sixteenth respondents (the

Galaxy respondents) incurred after 24 February 2020 and such costs to include the costs consequent upon the employment of two counsel where so employed.

_____

Y.N. MOODLEY AJ

Date of Hearing	:	28 February 2020
Date of Judgment	:	14 August 2020
		Judgment delayed due to the Acting Judge falling ill and other obstacles in the wake of the COVID-19 pandemic.
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