



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D3994/2020

In the matter between:

HOLLYWOOD SPORTSBOOK KB (PTY) LTD

(formerly known as KRUGERBETS (PTY) LTD

APPLICANT

and

ETHEKWINI MUNICIPALITY

FIRST RESPONDENT

ETHEKWINI TOWN PLANNING APPEALS

COMMITTEE

SECOND RESPONDENT

MEREBANK HOTEL (PTY) LTD

THIRD RESPONDENT

DAN NAIDOO RACING AND GAMBLING CC

FOURTH RESPONDENT

VIS REDDY

FIFTH RESPONDENT

PLAYBETS KZN (PTY) LTD

SIXTH RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed to be 15 December 2021.

JUDGMENT

CHETTY J

[1] This is an application to review and set aside the decision of the second respondent, hereinafter referred to as the 'Appeal Committee', which considered an appeal arising from a special consent application for the operating of a restaurant and 'special building' as a licensed betting outlet in respect of horseracing, sports betting, lucky numbers and limited payout machines ('LPMs'). The application was made in mid-2018 in terms of the eThekweni Municipality's Planning and Land Use Management By-Law, 2016 (Municipal Notice No. 114 of 2017). The applicant stated at the outset that it holds a bookmaker's licence issued in terms of s 94 of the Gaming and Betting Act (KZN) 8 of 2010 ('the KZN Act'). It brought the application as it intends to relocate the operations of its branch in Springfield to Phoenix, Durban, for which it requires planning approval in terms of the Durban Town Planning Scheme (Phoenix Area) ('the Scheme'). The applicant also clarified that it does not hold a totalisator licence in respect of its Springfield branch, nor does it intend to apply for such licence in respect of the operations at the premises in Phoenix. Of critical importance to the outcome of this application is the applicant's contention that it intends to offer *only fixed odds betting* on horseracing, sports and lucky numbers and LPM's at its prospective premises. It is common cause that the building in question falls within 'Special Zone 31' in terms of the Scheme.

[2] The application was considered by the first respondent's ('the municipality's') Joint Advisory Committee ('JAC') which refused the application on 23 April 2019 on the basis that a 'licensed betting outlet in respect of horseracing, sports betting, lucky numbers and limited payout machines is defined as a Totalisator Depot in the scheme and therefore does not comply with the definition of special building.' In addition, it was found that the proposed totalisator depot is not allowed on the upper floor of a Special Zone 31 building in terms of the Scheme. For the purposes of this application, specific attention in argument was devoted to the first reason for the JAC's refusal, which was also the Appeal Committee's reason for dismissing the internal appeal. In this regard, the applicant contends that the activities for which it seeks authorisation do not fall within the definition of a 'totalisator depot' in terms of the Scheme, and therefore the decision of the Appeal Committee constitutes a reviewable irregularity under the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), alternatively on grounds of legality.

[3] Is not disputed that the uses to which a building in Special Zone 31 may be put include those of a '*special building*', defined in the Scheme as 'any other type of building or use not specifically referred to in the set of definitions'. On the basis that the use applied for does not fall within any specific category referred to in the definitions under the Scheme, it was contended by the applicant that such activities would fall under the ambit of a '*special building or uses*' as contemplated in the Scheme and in Column 2 of the table in clause 14(b) of the regulations pertaining to Special Zone 31. This aspect of the applicant's argument was not met with any opposition by the municipality and I therefor accept that this 'would not have been a valid ground to have refused the application.

[4] Pursuant to the application, which contained a detailed analysis of the Scheme provisions and the uses applied for by the applicant, valid objections were received from the third to sixth respondents, who are referred to by the applicant as 'competitor objectors'. The essence of their objections is that the proposed land use falls within the definition of a 'totalisator depot', a prohibited use in terms of the Scheme.

[5] In response to the objections, the applicant provided the municipality with a detailed response dated 11 December 2018. Of particular importance is the contention that the proposed use applied for is that of a 'totalisator depot'. In this regard the applicant's attorney clarified that the applicant was not seeking to use the premises as a totalisator depot, which the Scheme defines as a 'shop, office or other premises used for the purpose of a Totalisator Agency in terms of section 28(3) of the Horseracing Control Consolidation Ordinance, No. 28 of 1957 as amended'. The applicants set out in detail the various definitions pertaining to the use applied for, as compared to that relied on by the competitor objectors.

[6] It bears noting that a 'totalisator' is defined in terms of the KZN Act (which replaced the repealed Horseracing Control Consolidation Ordinance, No. 28 of 1957) as:

'any electronic or mechanical device commonly known by that name and used in connection with betting on horse races, sporting events and any other event or contingency for registering or indicating or registering and indicating the number or value or number and value of—

- (a) bets on horses in any horse race or any combination of horse races;
- (b) bets on any sporting event;

- (c) bets on any other event or contingency; or
- (d) bets on any combination of horse races, sporting events and other events or contingencies,

and which is operated in accordance with a system of betting in which the aggregate amount staked on any one of the aforementioned categories of bets after deduction from such aggregate of any amounts which may lawfully be deducted therefrom in terms of the KwaZulu-Natal Gaming and Betting Tax Act, 2010, is divided amongst those persons who have taken winning bets on such categories of bets in terms of the relevant totalisator rules, and includes any scheme, form or system of betting, whether mechanically operated or not, which is operated on similar principles.’

[7] The applicant’s attorney emphasised that a totalisator (commonly referred to as a ‘tote’) caters for a specific form of betting, often referred to as ‘pool betting’. This operates on different principles to other forms of betting such as sports betting, lucky numbers and LPMs. Notwithstanding, the municipality refused the application for the reasons set out above. The applicant thereafter exhausted its rights to pursue an internal appeal against the refusal.¹ It was correctly pointed out that the refusal was based on an interpretation of the provisions of the Scheme, in particular whether the use applied for by the applicant fell within the definition of a ‘totalisator depot’. No other reasons were proffered for its conclusion.

[8] In its internal appeal, the applicant contended that the first respondent erred in identifying the proposed activities on the premises with that of a totalisator depot and proceeded to crystallise for the Appeal Committee the basis on which the erroneous decision was reached. In particular, the following extract from the applicant’s appeal memorandum is of relevance:

‘7.10 What is therefore crystal clear is that, to be a Totalisator, the successful punter is paid a specific percentage of the pool of bets and not any specific odds offered on the bet.

7.11 What the Appellant proposes is not any form of Totalisator and therefore the Appellant cannot be said to be operating a “Totalisator Depot”.

7.12 The Appellant does not divide winning bets into any pool which may have accumulated for the purpose of that bet and, instead offers specific odds on any bet which may be taken and the number of bets or the pool of bets on a particular event is totally irrelevant.

¹ It is noted at page 142 of the record that an administrative fee of R5 000 was paid by the applicant in order to pursue the internal remedy of appeal.

7.13 Most importantly, the Appellant does not hold any Totalisator licence, and if the Appellant attempted to operate any Totalisator Depot, the Appellant would be acting unlawfully.

7.14 The proposed activities of the Appellant therefore do not fall within the scheme definition of a Totalisator Depot, and, as noted above, the Appellant has no[t] idea why the municipality came to the conclusion that the proposed activities constituted the operation of a “Totalisator Depot”.

7.15 What also needs to be noted is that Sivest contended that the proposed activities of the Appellant fell under the scheme definition of a “Casino” which is not the basis for the municipality refusing the application and only very obliquely suggested that the Appellant had not shown, in its motivation, that the proposed activities fell outside the scheme definition of a “Totalisator Depot”.’

[9] The appeal was determined by the Appeal Committee which resolved against allowing oral submissions to be made to it, and instead confined its decision to a consideration of the written submissions presented to it. The only reason for the Appeal Committee’s rejection of the appeal, dated 11 December 2019, is a regurgitation of the first reason submitted by the municipality when it rejected the initial special consent application. It is against this decision that the review application is lodged.

[10] When the matter came before me, counsel were in agreement that the only issue for determination is whether the Appeal Committee’s refusal of the special consent application, on the sole basis that the proposed use of the premises constituted a totalisator depot, is a reviewable irregularity in terms of PAJA, alternatively under the rule of law. As will appear from what is set out below, the competitor objectors, being the third, fourth, fifth and sixth respondents, do not oppose the application. The application is however opposed by the municipality which persists in its contention that the activities applied for in terms of the special consent application do indeed fall within the definition of a totalisator depot. The issue therefore falls to be determined by what constitutes the proper interpretation of the nature of the use applied for by special consent. Put differently, the issue is whether the application for special consent could, on any reasonable interpretation, have been construed as an application for authorisation to operate a ‘totalisator depot’.

[11] As a starting point, Ms *Pudifin-Jones* who appeared on behalf of the applicant, submitted that the municipality has made the fundamental error of confusing the two types of betting - that is pool betting and fixed odds bets. It is, as counsel put it, like comparing tennis with squash. Both are ball-games, involving the use of rackets, and played on courts. That however is where the similarity ends. Despite this distinction being made pertinently clear in the applicant's appeal memorandum, the point appeared not to resonate with the Appeal Committee, even after the applicant made it clear that it did *not* have a totalisator licence,² and if it did engage in the activities of a tote, it would be acting unlawfully. In order for the applicant to operate a facility which offers fixed odds bets on horseracing, sports events, lucky numbers and LPMs, it does *not* require a totalisator licence. On the contrary, the applicant pointed out that it has a bookmaker's licence³ which permits it, as a 'bookmaker' defined in the KZN Act, to 'accept offers or stakes in the process of transacting bets on horse races, sports, sporting events or any other events or contingencies, or on a combination of such horse races, sports, sporting events, other events or contingencies'. On that basis, the applicant contended that it was inconceivable that the use applied for could be construed as that of a 'totalisator depot'.

[12] In opposing the review and declaratory relief sought by the applicant, the municipality contends that the application is unsustainable on three primary grounds. Firstly, it is contended that the use applied for by the applicant is consistent with that contained in the definition of a 'totalisator depot'. Therefore, as I understood the argument of the municipality, the JAC properly considered the application as it was framed, and correctly refused the application. Accordingly, there is no irregularity in procedure followed by the municipality in refusing the application, and consequently the review application must fail. Second, it is contended that the applicant was deliberately attempting to 'move the goalposts', as it were, from what was stated in the initial application, to the explanation now proffered in the application for review. In

² A 'totalisator licensee' is defined in s 1 of the Gaming and Betting Act (KZN) 8 of 2010 ('the KZN Act') as 'a person licensed by the Board, in terms of section 110, to conduct a totalisator on a horse race, sporting event or other event or contingency'.

³ Defined in s 1 of the KZN Act as 'a licence issued, in terms of section 94, to a person that owns one or more bookmaking rights and which licence authorizes the holder thereof to operate a bookmaking business'

other words that the applicant was attempting to make out a different case to that which it made in the application for special consent.

[13] In its answering affidavit, the municipality accuses the applicant of conflating issues and misconstruing the facts in this application. It alleges further that the applicant now ‘goes to an extent of trying to explain the type of betting it will offer. Something it never [stated] at the initial application for special consent’. The municipality alluded to the wording of the application for special consent, as well as the advertisement placed in the local newspaper, in which reference is made to a ‘bet’ or ‘betting’ intended to take place on the premises. Applying that line of reasoning, it contends in its answering affidavit that:

‘It is clear that anything that includes betting as described in the act mentioned above conforms with the definition that the Durban scheme defines as a totalisator depot. Totalisator betting in any form, is by its very nature part of “gambling and wagering” and has been recognised as such, for some time.’ (emphasis in original)

Lastly, the municipality appeared to make an argument based on the category of application made by the applicant, suggesting that the use applied for was not available for the upper floors of a building, referring to the intended use to be located on the fourth floor of the premises.

[14] When the matter came before me I enquired at the outset from Mr *Mthethwa*, who appeared on behalf of the first and second respondents, whether the municipality, having had regard to the lengthy explanation provided by the applicant regarding the difference between a totalisator depot and use it applied for, was still of the view that the special consent application would nonetheless have been refused. After taking instructions, Mr *Mthethwa* conceded that with hindsight, the municipality would ‘probably’ have agreed to the granting of the special consent application based on what has now been put before the court. This concession in my view significantly lowered the threshold for the applicant to succeed on the merits.

[15] As regards the second contention that the applicant was attempting to alter the ambit of its application, to apply for a use which it had not initially applied for, Mr *Mthethwa* was unable to offer any meaningful rebuttal of the argument on behalf of the applicant that in deciding an appeal, the Appeal Committee was obliged to deal with

the matter on the basis that it was a wide appeal, and not one strictly confined to the record of the decision by the JAC. As stated earlier, the JAC provided no reasons for its decision other than to contend that the use applied for fell within the definition of a tote, and therefore it was a prohibited use which could not be authorised. I agree with the applicant's submission that the appeal before the Appeal Committee was an appeal in the wider sense, in which it was at large to reconsider the merits of the application, with or without additional information or evidence. As such, the Appeal Committee was not bound to any record that may have served before the JAC. In this regard, counsel relied on *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T). Indeed, the lack of a record, as well as the procedural and decisional powers granted to the Appeal Committee, are more suggestive of a wider appeal than one which is constrained to the 'record', such as it was, before the JAC. See Hoexter *Administrative Law in South Africa* 2 ed (2012) at 68-70; de Ville *Judicial Review of Administrative Action in South Africa* revised 1 ed at 385-387.

[16] To the extent that the municipality contends that the applicant altered the ambit of its application from the time of the special consent application to the averments contained in the founding affidavit in this review application, the question which remains is why then does the municipality persist with its opposition to this application, knowing fully the clear ambit of the applicant's case? The applicant submits that there was no error or misrepresentation in the manner in which it cast its application for special consent. Its application made no reference to any form of 'tote' betting. To the extent that the municipality inferred this from the wording of the application, such inference was incorrectly and improperly drawn. There is no factual basis to sustain such an inference. Moreover, even if one accepts the municipality's contention that it believed the application encompassed what was essentially 'tote' betting, this uncertainty was put resoundingly to rest when the applicant filed its response to the competitor objectors. As stated above, the applicant categorically denied that it intended to engage in any activities associated with a tote, emphasising that it did not hold a totalisator licence. The municipality's contention that the applicant transformed or expanded the scope of the authorisation applied for, must therefore fail.

[17] It is evident that the members of the Appeal Committee failed to have regard to the contents of the applicant's response to the competitor objectors' complaints, which

clarified the scope of the special consent application. Had the decision makers applied their minds to the content of the appeal memorandum and in particular paragraphs 7.10 to 7.15 as alluded to above, they would not, in my view, have arrived at the decision they did. To that end, the Appeal Committee took into account irrelevant information and disregarded relevant considerations and its decision to dismiss the appeal is liable to be set aside on the grounds in s 6(2)(e)(iii) of PAJA.

[18] Counsel for the applicant submitted that the municipality, in considering the special consent application and in concluding that the activities for which authorisation was sought fell within the ambit of a ‘totalisator depot’ as defined in the Scheme, was influenced by an error of law and its decision is accordingly reviewable under s 6(2)(d) of PAJA. This was based on an incorrect interpretation of the definition contained in the KZN Act. In this regard, it was submitted that the municipality misquoted and/or misread the definition of a ‘totalisator’ in the KZN Act⁴ inasmuch as it appears to have read *only* item (d) of the definition as being limited by the words ‘and which is operated in accordance with a system of betting . . . whether mechanically operated or not, which is operated on similar principles’. This is evident from a perusal of the municipality’s answering affidavit where the provisions of item (d) of the definition are worded as one continuous sentence so as to read:

‘(d) bets on any combination of horse races, sporting events and other events or contingencies, and which is operated in accordance with a system of betting. . . .’

[19] I agree with counsel for the applicant that the upshot of the municipality’s interpretation is that *any* form of betting would fall under the ambit of a ‘totalisator’. This is evident from the municipality’s response to the applicant’s appeal memorandum,⁵ where the municipality says the following, which I believe encapsulates its reasoning:

‘The definition of the Totalisator Depot is described as ‘wrong’ by the appellant. As a Land Use Management Planner, we make a list of what the use entails, for example, is there liquor being sold? Are there pay out machines? Is there betting for horse racing? Are there betting for any monetary returns? This is not a difficult point. Any use that includes betting as

⁴ The term “totalisator depot” is only used in the Scheme, the term “totalisator” is defined in the Act.

⁵ Dated May 2018 and submitted by eThekweni Municipality Development Planning, Environment and Management: Land Use Management (Central Regional Office).

described in the KZN Betting Act 2010 that the Durban Scheme defines as a Totalisator Depot.’

[20] The municipality persisted in the contention that the use applied for constituted a ‘totalisator depot’, but also inferred that the applicant was being less than candid in the manner in which it framed its application. The municipality contended that:

‘The municipal decision to refuse the application was correct, given the nature of the application. “Betting outlet in respect of horse racing, sports betting, lucky numbers and limited period machines” this is regarded [as] a Totalisator Depot which is defined in the scheme, and such use cannot be ghostly camouflaged as a “Special Building or Uses.”. . . .

The Respondent believe[s] that the Appellant has the right to spell out or submit any information pertaining his intention when making an application. It is very sad to note that some of the information may also use certain technique to hide or camouflage the actual or real activities with the intention of achieving the desired outcome so as to benefit the Appellant. This is exactly what happened in this instance.”. (*sic*)

[21] As the Constitutional Court stated in *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC), apart from words used in a statute being given their ordinary grammatical meaning, statutory provisions should always be interpreted ‘purposively’, in the correct context and in a manner where the interpretation is made so as to preserve the constitutional validity of the statute under consideration. On the contrary, it would appear from the municipality’s answering affidavit that despite the applicant attempting to clarify the distinction between an entity operating a betting facility on the basis of all bets being pooled as opposed to fixed odds betting, the municipality adopted the view that “any form, is by its very nature part of “gambling or wagering”. This led the municipality to conclude that the applicant was concealing its true intentions and viewed this as an opportunistic attempt by the applicant, and formed the basis on which the review application was opposed.

[22] The issue for determination is therefore whether the activity for which the applicant sought authorisation in terms of the special consent application, fell within the definition of a ‘totalisator depot’. This aspect has received the attention of our courts, particularly in the Supreme Court of Appeal and the Constitutional Court. The municipality acknowledges in its answering affidavit that our courts have drawn a clear distinction between lotteries and sports pools on the one hand, and gambling, casinos

and wagering on the other. It however contends that the courts have not distinguished between the uses for which the applicant proposes, being fixed odds betting on sports (including horse racing) lucky numbers and LPMS, on the one hand, and a totalisator depot on the other. Based on this, the municipality contends that the definition of a 'totalisator depot' applies to the activities for which the applicant sought authorisation.

[23] The Constitutional Court in *Phumelela Gaming and Leisure Ltd v Grundlingh and Others* 2006 (8) BCLR 883 (CC) para 1 describes the difference in the placing of bets by a 'punter' in terms of the choices available to him as follows:

'A person who wishes to wager money on the outcome of a horserace may choose to place a bet with a bookmaker or on a totalisator. The two systems are different in that the bookmaker quotes odds in advance while the totalisator does not fix odds in advance but pays out 'dividends' in proportion to the amount of money wagered. To the extent that both rely for their business on the betting money of the public, they are in competition. Both operate by virtue of licences issued by the provinces and their activities are regulated by provincial legislation within the framework of national legislation and the Constitution.'

[24] The applicant explained in its appeal memorandum and in its founding papers the difference between a bet taken at the totalisator or 'tote' and a fixed odds bet. The applicant's argument draws heavily on *Grundlingh and others v Phumelela Gaming and Leisure Ltd* [2005] 4 All SA 1 (SCA) para 6 where Comrie AJA provided the following example to clearly illustrate the difference between the two forms of betting:

'[6] An obvious example of a fixed-odds bet with a bookmaker would be 5 to 1 for a win on the celebrated race horse Appeal Court. The odds (5 to 1) would be fixed at the moment when the bet is laid, and the payout in the event of Appeal Court winning would be calculable at the same moment. We know from the evidence that the odds given by bookmakers may shorten or lengthen as the race approaches and that different bookmakers may offer different odds. In the event of Appeal Court winning, the bookmaker must pay all the winning bets on that horse from his own resources – save to the extent that he may have "laid off" such bets. He takes the betting risk. There is no pool of bets to be divided among successful punters. The agreed odds rule.

[7] As the definition indicates, the totalizator operates on principles different from those described in the preceding paragraph. All the bets (tote bets) on a particular race (eg all the bets for a win in race no 1) are pooled. From the resulting (gross) pool or total, tax and administration expenses (which include the profit of the tote operator) are deducted. The net

pool is divided equally between all the successful punters in proportion to their respective stakes. There is no betting risk to the totalizator or its operator. Subject to lawful deductions, the tote pays out in winnings (or dividends) what it has received in bets. As it was succinctly put in the papers (in lay terms) punters on the tote bet against each other; (whether that is the correct legal position is unnecessary to decide – cf *Tote Investors Ltd v Smoker* (*supra*); whereas a punter placing a bet with a bookmaker bets against that bookmaker. It is also clear that the odds on a tote bet are not fixed when the bet is laid because no odds are agreed. On the contrary, everything depends on how much money is wagered on the race, via the tote, and on how many winning tickets there are. The dividend can only be calculated after the race has been run.

[8] The essence of a tote bet – ie a bet on the totalizator – is the pool system, namely that each pool is divided among the successful punters. That essence is reflected in the definition of a totalizator set out above. It also accords with the descriptions and analyses of the totalizator to be found in several of the decided cases cited in the opening paragraphs of this judgment and in the judgments referred to therein.’

[25] What may be distilled from the above extract is that in the context of a tote bet, the operator carries no risk. Subject to any deductions which in law must be made, the tote operator must pay out winnings or ‘dividends’ on the bets placed. In comparison, a bookmaker carries the risk when bets are placed – in other words, a punter wagers a bet against the ‘house’. The bookmaker assumes all the risk and must pay out on a winning bet, based on the odds given at the time. Put differently, as stated in the applicant’s heads of argument, punters on the tote bet against each other, whereas when a punter places a bet with a bookmaker, he or she bets against the bookmaker (or ‘the house’). The applicant seeks permission to operate fixed odds betting focusing on sports betting, including horse racing, lucky numbers and LPMS. There is no opportunity in this scope of activity for a pooling of bets to be divided amongst winning punters. That only arises in the case of a bet taken at a tote. Even if the applicant was seeking to operate a tote under the guise of a fixed odds betting establishment, it does not hold a totalisator licence and would therefor be operating unlawfully.

[26] In *Grundlingh*, Comrie AJA, in paragraph 14 of his dissenting judgment (noting that the majority took no issue with his explanation of the different types of bets that could be placed), went on to clarify the distinction between the two forms of betting:

'It is clear to me that the exotic bets under review are not tote bets. This is because the appellants do not operate a "totalizator" as defined. They maintain no pools of bets to be divided among winning punters, nor do any actual divisions of this kind take place. As I have already recorded, the appellants are on risk and must pay all winning bets from their own resources. On any given race or combination of races, they may show a profit or a loss. That is quite different to a totalizator which runs no betting risk and which shows no betting loss or profit. It follows that the bets under review are not outlawed by the concluding words of the definition of fixed odds bets: "but excludes a totalisator bet". Indeed, the presence of these words of exclusion seems to suggest, at least *prima facie*, that tote bets, or some tote bets, are fixed odds bets, hence the legislative wish to exclude them for one or other reason of policy.'

[27] The decision in *Grundlingh* is instructive, not only because of the clear manner in which Comrie AJA articulated the difference between the two forms of betting, but also because the facts in that matter closely resemble those presently before me.⁶ The appellants in that case were bookmakers who were interdicted in the High Court by the respondents from offering 'fixed odds bets'. The respondents operated computerised totalisator agencies throughout the country on the basis of pool betting. The respondents contended that the appellants were offering 'tote bets', similar to the allegation in the present matter, and in contravention of their licence. The appellants appealed the High Court's order to the Supreme Court of Appeal which concluded that the operations of the appellant did *not* fall within the definition of a 'totalisator', for reasons which have been alluded to in the foregoing paragraphs.

⁶ In *Grundlingh* it was noted the definition of "totalisator" in the Gauteng Gambling Act 4 of 1995 is very similar to that in the KZN Act, except that the definition in the KZN Act is more comprehensive. A notable difference between the Gauteng Act and the KZN Act is that the former had a definition of "fixed odds bet" whereas the latter does not. Importantly, the definition of "fixed odds bet" in the Gauteng Act specifically *excludes* a totalisator bet (*Grundlingh*, para 5), but there is no definition of "fixed odds bet" in the KZN Act. The comments by Farlam and Conradie JJA in *Grundlingh*, para 39 are noteworthy:

'The review of the legislation in the Transvaal, more recently in Gauteng, and also nationally shows that in regulating the racing industry the provincial (and latterly national) legislatures have not, apart from a short interval of proscription enacted by the Gauteng Provincial Legislature, considered it offensive for bookmakers to make use of totalizator dividends in calculating the pay-out on exotic bets. Under the national Act presently in force it would be lawful for a bookmaker to take a bet where the payout is based on a totalizator dividend. For many years before 1995 it was also expressly permitted in the Transvaal.'

[28] In a further appeal, the Constitutional Court added their approval to the distinction drawn by Comrie AJA and said the following in paragraph 5:

‘Totalisators work on the basis that all the money placed on any particular betting event is pooled and, after deductions for administration fees and taxes, divided equally among the winners. The amount of money paid out to an individual winner therefore depends on the size of the pool and the number of winning bets.’

As to fixed odds betting, the Constitutional Court made the following observations in paragraph 7, again endorsing the distinction made by the Supreme Court of Appeal:

‘A bookmaker, on the other hand, fixes odds in advance. A bookmaker may take “fixed odds bets”, “starting price bets” and “open bets”, depending on what the provincial legislation and the bookmaker’s individual licence permits. To determine a “fixed odds bet”, a bookmaker, prior to the race, calculates contingencies on a particular event happening. With an “open bet” no fixed odds are agreed upon at the time that the bet is laid, but the amount to be paid out is dependent on other contingencies.’

[29] Yet again the issue of whether a specific form of betting constituted a ‘tote’ bet or a ‘fixed odds’ bet received the attention of the Supreme Court of Appeal in *KwaZulu-Natal Bookmakers’ Society and another v Phumelela Gaming and Leisure Ltd and others* [2019] 4 All SA 652 (SCA). In that case the issue before the court was whether bookmakers, in addition to their right to accept bets on horse racing, also had the right to accept bets for other sports, to the exclusion of totalisator operators, whom it was contended are confined to taking bets on horse racing. The bookmakers contended that the Lotteries Act 57 of 1997 prohibited totalisator betting on sports other than horse racing. The court considered the provisions of s 4(2) of the National Gambling Act 7 of 2004 which defines totalisator betting as taking place when:

‘A person places or accepts a totalisator bet when that person stakes money or anything of value on the outcome of an event or combination of events by means of –

- (a) a system in which the total amount staked, after deductions provided for by law or by agreement, is divided among the persons who made winning bets in proportion to the amount staked by each of them in respect of a winning bet; or
- (b) any scheme, form or system of betting, whether mechanically operated or not, that is operated on similar principles.’

The court stated the following in paragraph 24:

'Consequently, in totalisator betting the payout that each of the winners receive is determined by the amount staked by each of them in their winning bets, in proportion to the total amount staked by all of the persons participating in an event, or combination of events, after any deductions from the total amount staked, in terms of any law or agreement.' (emphasis added)

[30] Swain JA in *KwaZulu-Natal Bookmakers' Society* arrived at the same conclusion as Comrie AJA in *Grundlingh* as to the basis of the distinction between pool bets taken at a tote and fixed odds bets taken through a bookmaker. None of the bets which the applicant intends to offer at the new premises in Phoenix fall within the ambit of a 'totalisator' or a pool bet, nor has the municipality been able to advance any credible argument in support of its conclusion. The municipality has been unable to advance any argument as to why the ratio in *Grundlingh* does not apply to the facts before me. As counsel for the municipality indicated at the outset, with the benefit of hindsight and having regard to the activities which the applicant has clarified to constitute fixed odds betting, the decision maker would *probably* have granted the special consent authorisation. The municipality appears, as I have alluded to earlier, to have misinterpreted the statutory definition of a 'totalisator' in the KZN Act, in concluding that it applied to *any* bet wagered on horse racing, sports events, lucky numbers and LPMs. But for this error of interpretation, the decision maker ought to have concluded that the activities for which authorisation was sought would fall within the definition of a 'special building' as contemplated in the Scheme, and consequently the application for special consent should have been granted. As 'special building or uses' is a land use permissible by special consent, it follows that this is not a prohibited use which the municipality would have been precluded from authorising.

[31] In the result, for all of the above reasons, I am satisfied that the application must succeed. The applicant has sought a declarator that the activities which it seeks to offer in terms of the KZN Act, namely fixed odds betting on horse racing, sports events, lucky numbers and LPMs do not fall within the definition of a 'totalisator' as defined in the Scheme. Ms *Pudifin-Jones* accepted that the granting of declaratory relief is discretionary, but submitted that the court should exercise its discretion in favour of the applicant inasmuch as this would help guide the municipality, to avoid a repetition of the same dispute which is currently before the court. In *Rumdel Cape v South Africa*

Roads Agency Soc Ltd (234/2015) [2016] ZASCA 23 (18 March 2016) the court pointed out that:

'[15] . . . The mere fact that parties are locked in dispute on a point of law or fact does not necessarily entitle either of them to an order declaring which standpoint is correct. Generally speaking, a court does not act in an advisory capacity by pronouncing upon hypothetical, abstract or academic issues. Instead, in order to entertain an application for declaratory relief, a court must be persuaded that the applicant has an interest in an existing, future and contingent right or obligation that will be determined by the declarator and that its order will be binding upon other interested parties.

If it is so satisfied, the court then exercises a discretion whether to grant or refuse the order sought. In doing so the court may decline to deal with the matter where there is no actual dispute, where the question raised is, in truth, hypothetical, abstract or academic, or where the declarator sought [will] have no practical effect.

[32] I am satisfied that in light of the nature of the applicant's business, it is more likely than not that a similar application for special consent which gave rise to the present application may be sought in respect of new premises in other parts of the municipality, or in KwaZulu-Natal. The municipality's interpretation of the statutory provision determining whether to allow the special consent application has been found to be erroneous. Added to this, the municipality's approach to the application appears to have been tinged with some degree of doubt as to the applicant's *bona fides*. I put it no higher than that for the purposes of this application. This conclusion is reached having regard to the language used, and averments made by municipal officials charged with assessing the applicant's application for special consent.⁷ I am satisfied that the applicant has made out a case for the declaratory relief as sought in paragraph 1 of the notice of motion.

[33] In light of the delay which has been occasioned in awaiting the resolution of this application, more than three years has elapsed from the time when the applicant applied for the special consent, and more than two years from April 2019 when the special consent application was refused. The applicant has been liable throughout this period for rental on the premises, despite being unable to use it for the purposes

⁷ See para [20] above, where the municipal official commenting on the special consent application stated the following : "The Respondent believe[s] that the Appellant has the right to spell out or submit any information pertaining his intention when making an application. It is very sad to note that some of the information may also use certain techniques to hide or camouflage the actual or real activities with the intention of achieving the desired outcome so as to benefit the Appellant. This is exactly what happened in this instance." (sic)

for which it was intended. The prejudice to the applicant is self-evident. The cause of this prejudice is due to an incorrect interpretation of the relevant statutory provision, despite the applicant making it clear to the municipality the precise nature of its business and the scope of its activities. I am satisfied that the matter must be remitted to the decision maker in light of the reasons set out above, and that a decision on the application must be rendered without delay. I consider a period of 30 days from the date of this order to be adequate and reasonable for the municipality to arrive at a decision. The applicant has sought to review and set aside only the decision of the Appeals Committee and not the Town Planning Committee which refused the special consent application. While the reasoning in this judgment applies to the decision of the Appeals Committee (as the relevant decision maker), it applies equally to the Town Planning Committee which was initially seized with the special consent application. However, as the applicant has confined itself to seeking a remittal of the matter back to the Appeals Committee and not the Town Planning Committee, I see no reason why such relief should be altered. The Appeals Committee will have to reconsider the matter in light of the views expressed in this judgment.

[34] In light of the municipality's conduct, I was asked to award attorney-client costs. Counsel relied on *Aqua Transport and Plant Hire (Pty) Ltd v Chief Executive Officer of Dube Tradeport Corporation N.O. and Others* (7456/2017) [2018] ZAKZDHC 15 (21 May 2018) para 36 where Lopes J said the following as regards punitive costs:

'With the regard to the question of costs, there can be no doubt that the applicant improperly made allegations of impropriety on the part of Rokwil and/or Dube. The affidavits and the heads of argument are replete with nouns and adjectives designed to impugn the integrity of both of them in their conduct regarding the award of the tender. That those allegations have no merit is contained in the withdrawal by Mr *Kemp* at the outset of the hearing. That, however, is not the end of the matter. In my view it is both unfair and undesirable that reviews are brought to court on the basis of spurious allegations of impropriety, without the facts to back them. As set out above, it was no doubt those initial allegations which led to the prosecution of the application. When matters became clearer, and it was obvious that there was no impropriety, the applicant continued nonetheless, despite the apparent apologies. Papers issued in matters such as this one, are matters of public record. The suggestion that is conveyed in the founding papers is that Rokwil and an outsourced consultant were connected and they contrived with Dube to have the contract awarded to Rokwil. Withdrawing those allegations at the outset of the argument does not easily undo the taint of suspicion

created by the affidavits. If those allegations were reported, the reputational damage to all three entities may be enormous. Without evidence to back up those allegations, the entities are left in an untenable situation. They cannot defend themselves. It is no apology to purport to withdraw allegations of impropriety, but then continue to suggest that Aqua will continue to rely on improprieties as evidenced by the conduct of the parties, as will emerge in the debate! In those circumstances I am of the view that the applicant should bear the costs of the application, and on an appropriate scale to express this court's disapproval at the conduct of making such unsubstantiated allegations.'

[35] I am not satisfied that punitive costs are necessary in these circumstances as the error is fundamentally one of interpretation of a statutory provision. I cannot conclude with any degree of certainty that the municipality acted for ulterior purpose or with malice. While its categorisation of the applicant's motive and manner in which it framed its application is less than commendable, it does not warrant a sanction of punitive costs. My decision not to award punitive costs is in large measure also due to the manner in which Mr *Mthethwa* approached the matter on the day of the hearing. He focused strictly on whether the municipality's interpretation of the scheme was correct in law. If it was not, he conceded that the decision could not stand. No attempt was by counsel made to trawl through much of the invective which the municipal officials appear to have been caught up with. For those reasons, I decline to make a punitive award of costs.

[36] It is necessary for me to make a few concluding comments, *albeit obiter*, as to the procedure followed by the municipality in processing the internal appeal following their refusal to grant the special consent application. It appears from the papers that the fee to register an appeal against a planning decision of the municipality is a amount of R5 000.00. PAJA obliges an applicant to exhaust all domestic remedies before resorting to litigation. While the applicant, being a commercial entity, has not raised the issue concerning the payment of an administrative appeal fee, I am of the view that where internal appeals are provided for as a necessary step before litigation, such processes and procedures should not come at an exorbitant cost. Alternatively, the amount so levied should be reasonable in relation to the time and effort the administrator has to take in processing such an appeal. In any event, where an applicant is ultimately successful I see no reason why this administrative appeal fee

should not be refunded to the applicant. In any event, the applicant has not asked for the administrative fee to be refunded, and despite the sentiments I have expressed, I am constrained to adjudicate only the issues canvassed on affidavit before me, and more importantly to do so with 'judicial restraint'.⁸ Moreover, in terms of the order below, the matter will serve again before the Appeal Committee. There is no basis in law for the applicant to have to pay any further administrative charge for the matter to be reconsidered.

[37] Before I conclude, I am constrained to say that I find it inconsistent with the rights of just administrative action under PAJA for a decision maker, charged with hearing an administrative appeal, not to accord a right to an internal appellant to present oral submissions, particularly where a dispute centres around a question of statutory interpretation and where the appellant's attorney specifically requested the right to be heard. It is worth noting that Hoexter *Administrative Law in South Africa* 2 ed (2012) at 65 says the following in relation to administrative appeals:

'Another major distinction is that judicial review is an external safeguard against maladministration, whereas administrative appeals constitute an internal or "domestic" check. Govender ['Administrative Appeals Tribunals' in T W Bennet et al (eds) *Administrative Law Reform* (1993) 77 quoting Baxter *Administrative Law* (1984) 255] explains their main advantages as follows: "Effective administrative appeal tribunals breed confidence in the administration as they give the assurance to all aggrieved persons that the decision has been considered at least twice and reaffirmed. More importantly, they include a second decision-maker who is able to exercise a 'calmer, more objective and reflective judgement' in reconsidering the issue."

⁸ See *Fischer & another v Ramahlele & others* 2014 (4) SA 614 (SCA) where the stated :

[14] It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.

[38] To have denied the applicant the right to make oral submissions at the appeal stage, without rendering reasons for why this position was adopted⁹, in my view serves to undermine confidence in the decision-making processes of the municipality. It infringes on an appellant's the right to have its dispute adjudicated in a fair, open and transparent manner.

[39] In the result, I make the following order:

1. It is declared that the activities which the Applicant seeks to offer on the premises situated on the Upper Floor of Redbro Centre, 46 Parthenon Street, Phoenix, Durban (namely fixed odds betting on horse racing, sports and lucky numbers and limited payout machines) do *not* fall within the definition of a "*totalisator depot*" in the Durban Town Planning Scheme (Phoenix Area);
2. The decision of the Second Respondent of 11 December 2019 under reference TPAC06/05/2019/C is declared unlawful and invalid, and is reviewed and set aside;
3. The matter is remitted to the Second Respondent to be reconsidered within a period of 30 days from the date of this Order;
4. The first respondent is directed to pay the applicant's costs.



M R CHETTY

Appearances

For the applicant:	S Pudifin-Jones
Instructed by:	Richard Evans & Associates
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C/O	Goldman Schultz Attorneys
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⁹ The appeal was considered in December 2019 before the emergence of the Covid 19 pandemic and subsequent measures to have virtual hearings.

For the respondent: B Mthethwa

Instructed by: Poswa Incorporated

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Umhlanga

Date reserved: 29 October 2021

Date of Judgment: 15 December 2021