



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	/NO
Of Interest to other Judges:	/NO
Circulate to Magistrates:	/NO

Case number: A339/2017

In the matter between:

VUKANI GAMING (PTY) LIMITED

Applicant

and

**MR D PILLAY, THE CHAIRPERSON,
FREE STATE GAMBLING,
LIQUOR AND TOURISM AUTHORITY.**

1st Respondent

**MR K DICHABE, THE CHIEF EXECUTIVE OFFICER,
FREE STATE GAMBLING,
LIQUOR AND TOURISM AUTHORITY .**

2nd Respondent

**FREE STATE GAMBLING,
LIQUOR AND TOURISM AUTHORITY .**

3rd Respondent

RESTIVOX (PTY) LTD.

4th Respondent

**THE MEMBER OF THE EXECUTIVE COUNCIL
DEPARTMENT OF ECONOMIC,
SMALL BUSINESS DEVELOPMENT, TOURISM
AND ENVIRONMENT AFFAIRS, FREE STATE.**

5th Respondent

**THE ENTITIES LISTED IN ANNEXURE A TO
THE NOTICE OF MOTION.**

6th to 56th
Respondents

CORAM: JORDAAN, J et NAIDOO, J

HEARD ON: 18 NOVEMBER 2019

JUDGMENT BY: JORDAAN, J

DELIVERED ON: 05 DECEMBER 2019

- [1] The applicant (Vukani) is the holder of a route operator gambling license issued by the Free State Gambling Liquor and Tourism Authority (the Authority), the third respondent. The first respondent is the chairperson and the second respondent the CEO of the Authority respectively. The fourth respondent (Restivox) has been granted a similar license by the Authority. The fifth respondent is the MEC of the responsible provincial department. The sixth to fiftysixth respondents are the holders of site operator licenses related to the route operator license of Restivox.
- [2] The first, second and third respondent's interest in this matter coincide and they make common cause. I will refer to them collectively as the Authority or the Board.
- [3] The applicant applies for the review and setting aside of the Board's decision to grant the route operator license to Restivox. The application is opposed by the latter and the Authority.

A. BACKGROUND HISTORY.

- [4] Following upon an invitation by the Authority for applications for a route operator license in 2011, Restivox applied but the application was refused in December 2013. Restivox then applied for review of the refusal. The application was settled on the basis that the refusal is set aside and the application for the licence referred back to the authority for reconsideration. After reconsideration, the licence was granted to Restivox, notwithstanding objections raised by Vukani.
- [5] Vukani then launched a review application which was upheld in December 2016 and the matter referred back for reconsideration after following a proper public participation process. Restivox's application for leave to appeal was refused.
- [6] Restivox then informed the Authority of certain amendments to its application, by means of a letter addressed to the Authority. These amendments sought to address the objections raised by Vukani prior to the first granting of the licence to Restivox and again raised in the successful review application of Vukani.
- [7] The authority then re-advertised the "amended application" which was open for inspection and perusal prior to the date published for a public hearing.

- [8] Vukani again objected, in essence raising the same objections as before. In addition it objected to the amendments being sought without a prior application for amendment and prior approval by the Board.
- [9] In the meantime the Authority sought and obtained a full report on the investigation of Restivox's application and the changes brought about by the amendments, from an independent investigative entity, Gobodo Forensic and Investigative Accounting (Gobodo). The first report apparently dated 30 January 2017 was supplemented by further reports dealing with the amendments purportedly brought about by Restivox. I will deal with these reports more fully later.
- [10] The application and amendments and the objections raised by Vukani were dealt with in a public hearing held on 20 April 2017. In a subsequent meeting of the Board, held on 31 May 2017, the latter approved the amended application and granted the licence to Restivox.
- [11] Vukani then sought information and the reasons for the decision in terms of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). Being dissatisfied with the Authority's response, Vukani launched an application in terms of PAJA. It was opposed by the Authority and Restivox was joined. The application was resolved by an order agreed to by all the parties, specifying which further information should be provided.

[12] In the meantime, because of time limits for launching of review proceedings, Vukani issued yet another application for review, the one serving before us for consideration. After the Authority filed a record of the proceedings, Vukani filed a supplementary founding affidavit in July 2018. Restivox filed its opposing affidavits to which Vukani replied. The Authority only filed its opposing affidavits, with an application for condonation on 1 February 2019. On 3 April 2019 Vukani filed opposing affidavits to the condonation application and on 1 August 2019 filed an application for condonation of the late filing of the aforesaid opposing affidavits. The Authority filed opposing affidavits to the latter condonation application as well as replying affidavits to its own condonation application. Vukani then filed replying affidavits to its own condonation application. Vukani also applied for the joinder of site operator license holders.

[13] Vukani also brought an application to compel the Authority to supplement the record by providing all the Gobodo reports as well as the minutes of the board meeting of 31 May 2017. An order compelling the supplementing of the record was granted by agreement. The costs of the application as well as the costs of the application in terms of PAJA stood over for later adjudication, by agreement.

B. THE ISSUES TO BE DECIDED

[14] We are called upon to decide the following main issues:

- (a) the condonation application of the Authority;
- (b) the condonation application of Vukani;
- (c) Restivox's application to strike out hearsay evidence in Vukani's supplementary founding affidavit;
- (d) the costs of Vukani's application in terms of PAJA and its application to compel, and
- (e) the merits of the review application.

C. THE CONDONATION APPLICATIONS

[15] At the commencement of the proceedings we indicated that, in our view, it would be in the interest of justice to allow both condonation applications so that all relevant information serve before us. None of the parties objected thereto. I am therefore satisfied that both applications for condonation should be granted, the applicant in each of those applications to bear the costs thereof.

D. THE APPLICATION TO STRIKE OUT

[16] This application concerns paragraphs 8.3 up to 8.10 of Vukani's supplementary founding affidavit.

[17] It is alleged that an ex-employee of the Authority approached the deponent of Vukani's founding affidavits and tendered to divulge

certain information on condition that he remains anonymous. This allegedly happened during the later part of 2017. It was then arranged that the witness consult with Vukani's attorney, Ms Brand in Cape Town. The witness met with her on 31 August 2017 and she kept notes of the conversation. The information gained from the witness was thus available more than two months prior to the issue of the review application on 20 November 2017. It was however not mentioned in the initial founding affidavit but only in the supplementary founding affidavit where the aforesaid paragraphs mention some of the information allegedly obtained from the witness. The full version (of which some parts were blocked out) as contained in the attorney's hand-written notes was annexed to Vukani's eventual replying affidavits.

[18] The witness was allegedly later again approached for consent to divulge his identity but he indicated that he has in the meantime obtained contract work for the Authority and would be prejudiced if his identity became known.

[19] On behalf of Vukani it was argued that the hearsay evidence should be admitted. It was argued that some parts of his allegations has been shown to be correct and is substantiated by the evidence. It is therefore sufficiently reliable and truthful, so it was argued.

[20] The witness is clearly still alive and available. At the time when he volunteered the information he was not in the employ of the

Authority and only later became involved in contract work for the latter again. It is not explained why the witness deemed it necessary to approach the deponent for Vukani to tender information. It is unknown how it came about that his employment with the Authority was terminated. We do not know whether he resigned or was dismissed. If he was dismissed, he might have had a motive to discredit the Authority.

[21] When reading the notes made by the attorney, quite a number of concerns regarding the reliability, objectivity and credibility of the witness arise:

(a) *According to him there “appeared” to be some relationship between the first respondent, some board members and Restivox.*

-He is however not sure which board members.

(b) *The board arrived at decisions after “apparent consultations”.*

-The facts underlying his conclusion are unknown.

(c) *When Restivox’s review application was settled out of court, he realised that there was a relationship.*

-Why that fact leads to the conclusion that there was a relationship remains unexplained.

(d) *According to him, M Naidoo of Restivox “would see” the first respondent at his offices as CEO of The Tourism Authority and it was common for the former to raise issues with the latter.*

-How he came to know about what happens at the offices of Tourism, when that happened and whether he was present is unknown.

- (e) *At meetings of the board, applications were not properly interrogated and specific submissions not dealt with.*

-Whether he was present at such meetings or whether it represents his own conclusions remain unknown.

- (f) *He “doesn’t think” board members were given copies of Vukani’s submissions prior to the public hearing.*

-He obviously does not know.

- (g) *He is of the opinion that draft minutes of meetings can be easily fabricated. According to him meetings are always recorded and he will find out whether such recordings exist.*

-If he was present at meetings he would have known whether recordings were made and would have known that such recordings existed. It would not be necessary to find out.

- (h) *The authority allegedly continued to process site operator licenses because they were persuaded to do that by Restivox. That, according to him, shows that there was communication between the latter and board members.*

-This obviously reflects his own conclusion, unsupported by any factual evidence.

- (i) *According to him the Authority granted the licence to Restivox because “they wanted a one horse race”.*

-That is obviously his own untenable conclusion controverted by the fact that Vukani was already licensed and the granting of the licence to Restivox resulted in a “two horse race”.

[22] The aforesaid and the reading of the attorney’s notes as a whole casts serious doubt on the objectivity and reliability of the witness’s perceptions and (sometimes unfounded) conclusions. That, in conjunction with the witness’s unexplained desire to approach Vukani and tender “information” out of his own, even going to the trouble of attending a consultation in Cape Town creates serious suspicion of bias in favour of Vukani.

[23] To allow the hearsay evidence in these circumstances is highly prejudicial to Restivox, more so where the evidence was available when the initial founding affidavit was made, only excerpts were mentioned in the supplementary affidavit and the full version only made available in reply. I am not persuaded that the evidence should be admitted in our discretion. The application to strike out should therefore be granted.

E. COSTS THAT STOOD OVER

[24] The application in terms of PAJA followed upon various requests and attempts to obtain the necessary information from the Authority, which remained unattended to for long periods. Although the eventual order was granted by agreement, the application was

in essence successful. The same applies to the application to compel the supplementing of the record. Both were essentially successful. There is no reason why the successful applicant should not be awarded its costs.

F. THE REVIEW

[25] In the judgement which gave rise to the reconsideration of the application, the court found that, when the licence was granted to Restivox, seven directors had resigned, unknown to the Authority. It was accepted that the changes were material and the question arose as to whether those changes necessitated further public scrutiny.

[26] The court found that, after Vukani raised important concerns, it was entitled to be apprised of Restivox's response thereto. The court found that the Board allowed crucial amendments to Restivox's application but failed to subject the process to a further public participation process. It found that the decision to grant a licence was taken at the time when the Authority was not informed of the resignation of the seven directors, which impacted on the Board's ability to consider whether Restivox still possessed of the necessary appropriate knowledge, expertise and experience to operate the business.

[27] The decision was therefore set aside and referred back, directing the Authority to follow an appropriate public hearing process.

[28] As previously mentioned, Restivox informed the Authority of the changes and a public hearing was held during which Vukani again raised essentially the same objections. These objections were fully debated at the public hearing.

G.THE GOBODO REPORTS

[29] As aforesaid, following upon the judgement delivered on 8 December 2016, the Authority sought an independent investigation in respect of the objections raised by Vukani. The first report obtained was dated 30 January 2017. Upon the amendments sought by Restivox, a supplementary report was sought and obtained, dated 10 May 2017 and titled "Final Supplementary Report". Three further reports were included in the court papers namely a supplementary report dated 17 May 2017, a supplementary report dated 31 May 2017 and a final supplementary report dated 7 June 2017. The contention by Mr Torres of Gobodo that there were only three reports can, in view of the objective evidence, not be correct.

[30] Mr Farlam who appeared for Vukani pointed out some differences between the reports dated 31 May and 7 June and submitted that the report dated 7 June was obviously not available to the Board when it took the decision to grant a licence. It is however common cause that the report dated 10 May is identical to the report of 7 June. From the notes of the proceedings of the board on 31 May

2017 it appears that the report then considered was the report dated 10 May.

[31] The reliability and veracity of the notes of the proceedings are questioned by Vukani on the basis of a suspicion that it was drafted later and do not appear to represent a shorthand rendition of the meeting. Furthermore it was pointed out that the notes were not signed and certified as correct. In the notes it is recorded that Mr Torres who presented and explained the report indicated that the report was mistakenly dated 10 May. To include such an insignificant remark in the recordal of the meeting as a fabricated afterthought is highly improbable. The inclusion of that gives credence to the notes and negates the suspicion of it being tailored to suit the Board. Whether the notes are compatible to a rendition of shorthand notes is unknown and speculative.

[32] The fact that the notes are not certified and signed may be contrary to statutory prescripts but that fact does not necessarily preclude the court from having regard to it. According to its contents, it refers to various issues that were investigated and the results of the investigations, most of which were directed at the complaints raised by Vukani. The content of the notes gives some reassurance as to its reliability and credibility. It therefore has to be accepted that it was the report dated 10 May 2017 that was discussed and dealt with at the meeting of 31 May 2017. Since that report is identical to the report of 7 June 2017, there can be no mention of relevant considerations flowing from the 7 June report not having been taken into account. What is more, the slight differences in the reports as pointed out by Vukani are not material

at all. All the reports come to the same conclusion in respect of all the aspects investigated.

H. BIAS

[33] The reliance on a reasonable suspicion of bias is largely founded on the inadmissible hearsay evidence containing the anonymous witness's suspicions and conclusions. As dealt with before, there are stronger indications of bias on the side of that witness.

[34] The board sought an independent investigation of the objections raised by Vukani. The results of such investigations were unknown beforehand and could go either way, in favour or against Restivox. There was a real risk of results unfavourable to the latter. If the Authority was biased, it could easily have avoided that the risk by not reverting to an independent investigation. The fact that they have sought such an investigation belies to the suspicion of bias.

[35] Insofar as the suspicion of bias is founded upon the laxity of the Authority to respond to legitimate requests by Vukani, it is highly speculative and based on conjecture. Laxity does not necessarily equate to bias.

I. THE PREVIOUS OBJECTIONS

[36] The previous objections were again raised and rehashed in the present application. All those were investigated and reported on in the Gobodo reports. The objections were fully discussed and

argued in the public meeting. The report of 10 May was dealt with and explained in the Board meeting of 31 May 2017. I will deal with that again later in this judgement.

J. AMENDMENTS

[37] Vukani takes issue with the fact that the amendments sought by Restivox were not separately applied for and approved prior to the consideration of the amended application on 31 May 2017. That is factually correct but not of any material importance. The amendments were fully canvassed and discussed during the public hearing and also dealt with in the Board meeting on 31 May. The amendments formed part of the consideration and were approved.

K. THE PRESUMPTION IN SECT.5(3)

[38] The Authority did not respond to Vukani's request for reasons but only provided reasons when prompted to do so for purposes of the review application. That was done long after the expiration of the 90 day period stipulated in section 5(2). It was argued that the authority was not permitted to provide reasons belatedly. Reliance is placed on inter-alia dicta in the decision of National Lotteries Board v SA Education and Environment Project, 2012(4) SA (SCA). The issue in that matter was whether an administrative body was entitled to rely on new reasons, different from its initial reasons provided. It is distinguishable from the present situation where no reasons were provided initially but only provided belatedly. For the purpose of this judgement, it is not

necessary to decide the issue. I accept that an applicant who is not provided with reasons, is entitled to apply for review on the strength of the presumption without having to rely on other factors.

[39] The presumption remains rebuttable. If it appears from the evidentiary material that the decision was taken for good reason, the presumption may be rebutted. The presumption only prevails in the absence of proof to the contrary. The presumption can be controverted by the facts which, in my view, have been done in this matter.

[40] It is evident from the papers that Vukani's objections were fully canvassed, argued and considered in the public hearing on 20 April 2017. The CEO, chair and three board members were present. The process was transparent and fair. Independent investigations were sought and obtained, dealing with all Vukani's objections at the time.

[41] In belated reasons the Authority informed the interested parties that it has considered and approved all material amendments including the change in shareholding and directors. It informed that probities on all relevant individuals and entities were conducted and none found to be disqualified. It has considered all relevant information, objections and investigation reports and, based on the evidence, dismissed the objections.

[42] We sit as a court of review and not appeal. We are not called upon nor empowered to decide the correctness of the decisions taken. It is clear that the decision to grant a licence was not taken arbitrarily or capriciously but was substantiated by the available evidence. In my view, none of the grounds of review on which Vukani relies are convincing. The application for review stands to be dismissed with costs.

IN CONCLUSION I PROPOSE THE FOLLOWING ORDERS:

1. The first, second and third respondents' application for condonation of the late filing of the answering affidavits is granted, the said respondents to bear the costs of the application for condonation.
2. The condonation application for the late filing of the applicants answering affidavits to the condonation application in paragraph 1 above is granted, the applicant to bear the costs thereof.
3. The application to strike out paragraphs 8.3 to 8.10 of the applicant's supplementary founding affidavit is granted and the said paragraphs struck from the record with costs.
4. The costs of the applicant's application in terms of the Promotion of Administrative Justice Act and the costs of the applicant's application to compel are to be paid by the third respondent.
5. The application for review is dismissed with costs.
6. All the aforesaid costs orders are to include costs occasioned by the employment of two counsel, where so employed.

I concur and it is so ordered

On behalf of the Applicant:

Adv. PBJ Farlam, SC

Adv. CD Pienaar

Instructed by: Lovius Block

Bloemfontein

On behalf of the 1st, 2nd, 3rd Respondent: Mr. NW Phalatsi

Instructed by: NW Phalatsi & Partners.

Bloemfontein

On behalf of the 4th Respondent: Adv. B Roux, SC

Adv. M Smit

Instructed by: CJ Lewis.

C/O Attorneys: Noordmans Inc.

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