



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

Case No. 1366/15

In the matter between:

**AFRISUN KZN (PTY) LIMITED t/a AFRISUN
CASINO & ENTERTAINMENT KINGDOM**

Applicant

And

**THE PREMIER OF KWAZULU-NATAL
THE MEMBER OF THE EXECUTIVE COUNCIL
FOR THE PROVINCE OF KWAZULU-NATAL
FOR FINANCE**

First Respondent

Second Respondent

**THE PEOPLES FORUM AGAINST ELECTRONIC
BINGO TERMINALS**

Third Respondent

**PEERMONT GLOBAL (KZN) (PTY) LIMITED
THE KWAZULU-NATAL GAMING AND BETTING
BOARD**

Fourth Respondent

Fifth Respondent

SIBUSISWE NKOSINOMUSA ZULU

Sixth Respondent

PEARL DAWN ARNOLD-MFUSI

Seventh Respondent

ASHWIN HIRJEE TRIKAMJEE

Eighth Respondent

ISOBEL ELIZE KONYN

Ninth Respondent

THOKOZANE IAN NZIMAKWE

Tenth Respondent

THEMBELIHLE PRETTY MAIPA-NDLOVU

Eleventh Respondent

HEINRICH OOSTHUIZEN	Twelfth Respondent
PETROS ZAMOKUHLE DLAMINI	Thirteenth Respondent
NOZIBUSISO DOROTHY SHABALALA	Fourteenth Respondent
GALAXY BINGO PAVILION (PTY) LTD t/a GALAXY PAVILION	Fifteenth Respondent
GALAXY BINGO MIDLANDS (PTY) LTD t/a GALAXY MIDLANDS	Sixteenth Respondent
POPPY ICE TRADING 18 (PTY) LTD t/a POPPY ICE	Seventeenth Respondent
GALAXY BINGO GATEWAY (PTY) LTD t/a GALAXY GATEWAY	Eighteenth Respondent
CHESTNUT HILL INVESTMENTS 61 (PTY) LTD t/a GOLDRUSH PHOENIX	Nineteenth Respondent
GOLD RUSH GAMING (PTY) LTD	Twentieth Respondent
VITUBYTE (PTY) LTD t/a GOLDRUSH RICHARDS BAY	Twenty First Respondent
GALAXY BINGO KZN (PTY) LTD t/a GALAXY BINGO EMPANGENI	Twenty Second Respondent
BINGO ROYALE HILLCREST (PTY) LTD t/a BINGO ROYALE	Twenty Third Respondent
GOLD RUSH (PTY LTD	Twenty Fourth Respondent
VITUBYTE (PTY) LTD t/a GOLDRUSH MALVERN	Twenty Fifth Respondent
ALLEXIGENIX (PTY) LTD t/a GOLDRUSH CHATSWORTH	Twenty Sixth Respondent
GALAXY BINGO AMANZIMTOTI (PTY) LTD t/a GALAXY AMANZIMTOTI	Twenty Eighth Respondent
ZAROPIX (PTY) LTD t/a GOLDRUSH SCOTTBURGH	Twenty Ninth Respondent
GALAXY BINGO SOUTH COAST (PTY) LTD t/a GALAXY BINGO SOUTH COAST	Thirtieth Respondent
GALAXY BINGO EMPANGENI (PTY) LTD	Thirty First Respondent

**EMIKAMACK (PTY) LTD t/a GOLDRUSH
RICHARD'S BAY**

Thirty Second Respondent

In Re:

**THE PREMIER OF KWAZULU-NATAL
THE MEMBER OF THE EXECUTIVE COUNCIL
FOR THE PROVINCE OF KWAZULU-NATAL
FOR FINANCE**

First Applicant

Second Applicant

**AFRISUN KZN (PTY) LIMITED t/a AFRISUN
CASINO & ENTERTAINMENT KINGDOM
THE PEOPLES FORUM AGAINST ELECTRONIC
BINGO TERMINALS
PEERMONT GLOBAL (KZN) (PTY) LIMITED**

Third Applicant

Fourth Applicant

Applicant for Intervention as
Fifth Applicant

and

**THE KWAZULU-NATAL GAMING AND BETTING
BOARD**

First Respondent

SIBUSISWE NKOSINOMUSA ZULU

Second Respondent

PEARL DAWN ARNOLD-MFUSI

Third Respondent

ASHWIN HIRJEE TRIKAMJEE

Fourth Respondent

ISOBEL ELIZE KONYN

Fifth Respondent

THOKOZANE IAN NZIMAKWE

Sixth Respondent

THEMBELIHLE PRETTY MAPIPA-NDLOVU

Seventh Respondent

HEINRICH OOSTHUIZEN

Eighth Respondent

PETROS ZAMOKUHLE DLAMINI

Ninth Respondent

NOZIBUSISO DOROTHY SHABALALA

Tenth Respondent

**GALAXY BINGO PAVILION (PTY) LTD t/a GALAXY
PAVILION**

Eleventh Respondent

GALAXY BINGO MIDLANDS (PTY) LTD t/a

Twelfth Respondent

GALAXY MIDLANDS

POPPY ICE TRADING 18 (PTY) LTD t/a POPPY ICE	Thirteenth Respondent
GALAXY BINGO GATEWAY (PTY) LTD t/a GALAXY GATEWAY	Fourteenth Respondent
CHESTNUT HILL INVESTMENTS 61 (PTY) LTD t/a GOLDRUSH PHOENIX	Fifteenth Respondent
GOLDRUSH GAMING (PTY) LTD	Sixteenth Respondent
VITUBYTE (PTY) LTD t/a GOLDRUSH RICHARDS BAY	Seventeenth Respondent
GALAXY BINGO KZN (PTY) LTD t/a GALAXY BINGO EMPANGENI	Eighteenth Respondent
BINGO ROYALE HILLCREST (PTY) LTD t/a BINGO ROYALE	Nineteenth Respondent
GOLD RUSH (PTY) LTD	Twentieth Respondent
VITUBYTE (PTY) LTD t/a GOLDRUSH MALVERN	Twenty First Respondent
ALLEXIGENIX (PTY) LTD t/a GOLDRUSH CHATSWORTH	Twenty Second Respondent
GALAXY BINGO AMANZIMTOTI (PTY) LTD t/a GALAXY AMANZIMTOTI	Twenty Third Respondent
ZAROPIX (PTY) LTD t/a GOLDRUSH SCOTTBURGH	Twenty Fourth Respondent
GALAXY BINGO EMPANGENI (PTY) LTD	Twenty Sixth Respondent
EMIKAMACK (PTY) LTD t/a GOLDRUSH RICHARD'S BAY	Twenty Seventh Respondent

Coram: Koen J
Heard: 1 June 2018
Delivered: 22 June 2018

ORDER

(a) Afrisun (Pty) Limited, having been granted leave to intervene in the proceedings under case number 1366/15 on 5 February 2015, and joined as the third applicant, is declared entitled to pursue the review application under that case number, unless and until a Court pursuant to paragraph 1.1 of the order granted by the Honourable Mr Justice Lopes dated 28 April 2015, upholds any argument that would disqualify it from doing so;

(b) Afrisun (Pty) Limited is declared entitled to obtain dates to set down the hearing of the issues referred to in paragraph 1 of the aforesaid court order granted by the Honourable Mr Justice Lopes in the main application.

(c) All questions of the costs of the application stand over for subsequent determination. The parties are invited to make written submissions as to why a particular costs order should be granted, for consideration by this Court in determining an appropriate costs order. These written submissions are to be submitted to the Registrar within 20 court days of this judgment being delivered.

J U D G M E N T

Koen J

Introduction

[1] This is an application in which the applicant, Afrisun KZN (Pty) Limited, trading as Sibaya Casino & Entertainment Kingdom ('Afrisun'), seeks the following orders:

- '1. That it be declared that the transfer of the administration of the KwaZulu-Natal Gaming and Betting Act 8, of 2010 to the Premier of KwaZulu-Natal is unconstitutional and invalid, due to the non-compliance with section 137 of the Constitution of the Republic of South Africa, 1996;
2. Setting aside the transfer of the administration of the KwaZulu-Natal Gaming and Betting Act 8 of 2010 to the Premier of KwaZulu-Natal;
3. Reviewing and setting aside the decision of the Premier of KwaZulu-Natal, and concurred in by the MEC for Finance, KwaZulu-Natal, to withdraw the Main Review (instituted by them and dated 30 January 2015);
4. Declaring that the aforementioned decision is unlawful and invalid;
5. Setting aside the notice of withdrawal filed on behalf of the Premier of KwaZulu-Natal and the MEC for Finance, KwaZulu-Natal, stamped by the Registrar on 18 November 2016 and served on 21 November 2016;
6. Setting aside the notice in terms of Uniform Rule 15(2) dated 30 November 2016 in terms of which notice was given of the substitution of the Premier of the Province of KwaZulu-Natal as second applicant in place of the MEC for Finance, KwaZulu-Natal, delivered on 2 December 2016;
7. Alternatively, to the aforementioned paragraphs, and in the event that the above relief was refused, or it was found that the Main Review was validly withdrawn, an order declaring that:
 - 7.1 The proceedings (the Main Review) have not terminated;
 - 7.2 Afrisun is entitled to proceed with its review application as an intervening applicant;
 - 7.3 Afrisun is entitled to obtain dates to set down the hearing of the issues referred to in paragraph 1 of the court order granted by the Honourable Mr Justice Lopes in the main application dated 28 April 2015.¹

¹ Afrisun also seeks costs of the application from the Premier and the MEC as well as any other party opposing the application

Relevant Background Chronology

[2] There is a history of *inter alia* Afrisun, the Peoples Forum Against Electronic Bingo Terminals ('the Forum'),² and Peermont Global KZN (Pty) Ltd ('Peermont'),³ being opposed to the introduction of electronic bingo terminals ('EBTs')⁴ in the province of KwaZulu-Natal.⁵

[3] On 16 January 2015, the KwaZulu-Natal Gaming and Betting Board⁶ ('the Board') pursuant to the provisions of the KwaZulu-Natal Gaming and Betting Act 8 of 2010 ('the Act')⁷ passed a resolution ('the impugned decision') to approve various applications made by bingo operators to use EBTs in various locations in KwaZulu-Natal. The impugned decision⁸ *inter alia* 'unanimously approved all applications to use Electronic Bingo Terminals at bingo premises brought by all the applicants listed below...' and allocated certain numbers of EBTs 'for each application'. The successful 'applicants' referred to in the resolution included some of the Galaxy parties,⁹ the Gold Rush parties,¹⁰ the seventeenth respondent Poppy Ice (Pty) Ltd ('Poppy Ice'), and the

² The Forum is the third respondent in this application.

³ Peermont is the holder of a casino licence for a Casino at Empangeni and the fourth respondent in this application.

⁴ EBTs are machines that purport to offer the game of bingo electronically.

⁵ The basis of such opposition includes *inter alia* that the game played on these EBTs does not comply with the definition of 'bingo' in the Act, or its predecessor, the KwaZulu-Natal Gambling Act 10 of 1996, and that a public consultative process still needs to be completed. In a previous successful review brought by Afrisun and Peermont under case number 7084/11 of a decision by the KwaZulu-Natal Gaming and Betting Board to approve EBTs in principle in respect of bingo halls in KZN, part of the settlement included that any future consideration of EBTs would include an application therefor and that 'If and when such an application is received, the Board will not take a decision on such application without consultation, representations from all interested parties and following the processes prescribed in the KwaZulu-Natal Gaming and Betting Act and Regulations (which regulations are still to be made) and any other applicable legislation.'

⁶ To avoid any confusion, as the parties are cited differently in this application and the main review, the parties will be referred to by name.

⁷ The Act has recently been amended by the KwaZulu-Natal Gaming and Betting Amendment Act 4 of 2017 ('the Amendment Act'). That amendment does not feature in the allegations in the affidavits. Afrisun maintains that it does not affect the issues in this application, which fall to be decided on the legislation as it existed before the amendment. Some of the respondents have however contended that it disposes of the present litigation, as it renders any decision of this Court academic. This aspect shall be returned to below.

⁸ Designated as resolution no BD0115.11.

⁹ See paragraph 5 below.

¹⁰ See paragraph 5 below.

twenty third respondent Bingo Royale Hillcrest (Pty) Limited trading as Bingo Royale ('Bingo Royale').

[4] The Member of the Executive Council for Finance for the Province of KwaZulu-Natal ('the MEC')¹¹ thereafter suspended all the members of the Board.

[5] On 30 January 2015 the First Respondent, the Premier of KwaZulu-Natal ('the Premier')¹² and the MEC launched an application under the above case number (the 'main review')¹³ seeking a review of the impugned decision in the following terms:

1. That the matter be heard as one of urgency and the forms and services provided by the Uniform Rules be and are hereby dispensed with.

2. That a rule nisi [be] hereby [issued] calling upon Respondents to show cause, if any, before the above Honourable Court on the day of MARCH 2015 at 09h30 or so soon thereafter as the matter may be heard, why an order in the following terms should not be granted : -

2.1 THAT the decision of the First Respondent at its meeting on 16th January 2015 purportedly approving the applications by Eleventh to Twenty-Fifth Respondents amend their licence conditions and to use Electronic Bingo Terminals (EBTs) at their listed premises in the numbers allocated as set out in the decision be and is hereby set aside alternatively, is declared to be null and void ab initio.

2.2 THAT the First Respondent is interdicted and restrained from issuing such licences as amended or from processing them in any manner.

2.3 THAT no order of costs is sought unless any Respondent opposes this application in which case an order will be sought against such opposing Respondents.

2.4 FURTHER and/or alternative relief.

3. That pending the final determination of this application the following interim orders are granted:-

3.1 That the decision of the First Respondent referred to in paragraph 2.1 hereof is suspended;

¹¹ The second applicant in the Main Review and the second respondent in this application. In terms of a Premier's minute 1/2014 dated 26 May 2014 the Gaming and Betting function was assigned to the MEC for Finance.

¹² The first applicant in the Main Review and the first respondent in this application

¹³ Afrisun argues that the Premier and MEC are public officials who brought the main review against the Board and the other various respondents in the performance of and in the exercise of a public power and/or the performance of a public function in terms of the KZN Act, the Public Finance Management Act 1 of 1999 ('the PFMA') and sections 125, 127, 132, 133 and 195 of the Constitution, based on a number of alleged irregularities committed by the Board.

3.2 That an order be granted in terms of paragraph 2.2 hereof.

4. THAT Applicant be granted such further and / or alternative relief as to this Honourable Court seems meet.'

The Galaxy parties,¹⁴ the Gold Rush parties,¹⁵ Poppy Ice (Pty) Ltd¹⁶ and Bingo Royale Hillcrest (Pty) Limited trading as Bingo Royale¹⁷ were amongst the respondents in the main review.¹⁸ Afrisun, the Forum and Peermont, were not cited as parties to the main review. The main review was set down for 5 February 2015.

[6] During this same time, an urgent application was launched by the Galaxy parties under case number 1338/15 to review the MEC's suspension of the Board's members referred to in paragraph 4 above. This application was set down for 6 February 2015.

[7] On 3 and 4 February 2015 Afrisun and the Forum, having become aware of the main review, launched applications under case number 1472/2015 for leave to intervene in the main review. In its notice of motion dated 3 February 2015 Afrisun also contemplated a review of the impugned decision. The relevant relief claimed by Afrisun was as follows:

'1. . . .

2. That (Afrisun) is granted leave to intervene as the Third Applicant in the (Main review).

3. Granting the relief sought by the (Premier and MEC) in paragraphs 1, 2.1, 2.2, 2.4, 3 and 4 of the Notice of Motion to the (Main review).

4. That (Afrisun) (as the Third Applicant in the Main review) is granted leave to file a supplementary affidavit and/or amended notice of motion in respect of the relief that it seeks, in

¹⁴ These include Galaxy Bingo Pavilion (Pty) Ltd t/a Galaxy Pavilion, Galaxy Bingo Midlands (Pty) Ltd, Galaxy Bingo KZN (Pty) Ltd t/a Galaxy Bingo Empangeni, Galaxy Bingo Amanzimtoti (Pty) Ltd t/a Galaxy Amanzimtoti, Galaxy Bingo South Coast (Pty) Ltd t/a Galaxy Bingo South Coast, and Galaxy Bingo Empangeni (Pty) Ltd, who are respectively the Fifteenth, Sixteenth, Eighteenth, Twenty Second, Twenty Eighth, Thirtieth and Thirty First Respondents in this application.

¹⁵ These include Chestnut Hill Investments 61 (Pty) Ltd, Gold Rush Gaming (Pty) Ltd, Vitubyte (Pty) Ltd t/a Goldrush, Gold Rush (Pty) Ltd, Vitubyte (Pty) Ltd t/a Goldrush Malvern, Allexigenix (Pty) Ltd t/a Goldrush Chatsworth, Zaropix (Pty) Ltd t/a Goldrush Scottburgh and Emikamack (Pty) Ltd t/a Goldrush Richard's Bay who are respectively the Nineteenth, Twentieth, Twenty First, Twenty Fourth, Twenty Fifth, Twenty Sixth, Twenty Ninth and Thirty Second Respondents in this application.

¹⁶ The Seventeenth Respondent in this application.

¹⁷ The Twenty Third Respondent in this application.

¹⁸ The respondents in that review are the Board, nine members of the Board, Galaxy, eight companies in the Gold Rush group (who are also respondents in the present application), the fourth Respondent ('Poppy Ice (Pty) Ltd), and Bingo Royale.

the (Main review), in accordance with rule 53(4) of the Uniform Rules of Court, once the (Board) files the record called for by the Premier and MEC in the Notice of Motion in the (Main review).

5. That the costs of this application shall be in the cause, save and unless there is opposition from any party or parties, in which event such party or parties be directed to pay the costs of this application, jointly and severally in the case of several parties opposing the application.

6. That cost be awarded against the First Respondent and/or the Second Respondent, jointly and severally in the case of several parties opposing, in respect of the Main Application.'

Those applications were set down for 5 February 2015.

[8] On 5 February 2015 an order agreed to by the parties to the main review, Afrisun and the Forum, was recorded by Vahed J ('Vahed J's order'),¹⁹ in the following terms:

'1. The application is adjourned to an opposed hearing to be held on 28 April 2015.

2. Case no 1338/2015 is enrolled and adjourned to the same opposed hearing to be held on 28th April 2015.

3. The records in the main application are to be filed by Applicants on 13th February 2015.

4. Supplementary affidavits in terms of rule 53(4) are to be filed by 20th February 2015.

5. All final answering affidavits are to be filed 6th March 2015.

6. All replying affidavits are to be filed by 13th March 2015.

7. Full heads of argument are to be filed by 3rd April 2015.

8. Afrisun²⁰ (Pty) Ltd t/a Sibaya Casino and Entertainment Kingdom and the Peoples Forum against Bingo Terminals are hereby granted leave to intervene²¹ without prejudice to any party to raise any arguments in this respect (Case No's 1472/2015 and 1366/2015).²²

9. All issues of costs are reserved.'

[9] On 26 February 2015 Afrisun filed a supplementary affidavit in case number 1366/2015. This affidavit was filed pursuant to the provisions of rule 53(4) after the record relating to the impugned decision was produced. In the heading Afrisun,

¹⁹ Poppy Ice and the Goldrush parties submit that the order was made without any argument heard in regard to the intervention but simply as a practical approach to manage the various interim applications together, which would facilitated the future hearing of the applications, but did not take the right away from parties to revisit the intervention.

²⁰ Although the designation of 'KZN' was omitted from the name in the court order, the reference clearly was intended to be to Afrisun as described in this judgment. No other similar entity has featured in the litigation.

²¹ Afrisun and the Forum have thereafter been reflected in the heading to affidavits in the main review as third and fourth applicants.

²² Whatever the exact import of that order may be, it certainly did not include Peermont.

following the wording in the notice of motion in its application for leave to intervene, cited itself as the third applicant. It cited the Forum as the fourth applicant. The effect of this affidavit was that Afrisun consolidated its own review with the main review and claimed some expanded relief. According to what is termed the 'Third Applicant's Amended Notice of Motion' filed with the supplementary affidavit, Afrisun claimed the following relief:²³

- '1. Reviewing and setting aside the decision of the first respondent taken on 16 January 2015 to approve all applications by the 11th to 27th respondents to use Electronic Bingo Terminals at the premises and in the numbers set out in the first respondent's resolution number BD0115.11 taken on 16 January 2015, a copy of which is contained at pages 89 to 93 of the Rule 53 record.
2. Reviewing and setting aside the decision of the first respondent taken on 15 January 2015 to approve the application submitted by WMS Gaming Africa (Pty) Limited for the registration of gaming equipment in respect of Electronic Bingo Terminals set out in the first respondent's Resolution number BD0115.07, a copy of which is contained at page 82 of the Rule 53 record.
3. Reviewing and setting aside the decision of the first respondent taken on 16 October 2014 to approve the application submitted by International Gaming Technology – Africa (Pty) Limited for the registration of Electronic Bongo Terminals,
4. Reviewing and setting aside the decision of the first respondent taken on 16 October 2014 to approve the application submitted by Vukani Gaming Corporation (Pty) Ltd for the registration of Electronic Bingo Terminals.
5. Declaring that the Electronic Bingo Terminals manufactured and/or distributed and/or sold and/or leased by WMS Gaming Africa (Pty) Limited and by International Gaming Technology – Africa (Pty) Limited are not permissible and may not be used by the eleventh to twenty-seventh respondents in bingo halls.
6. Alternatively to prayer 5 above, that the above Honourable Court order that:
 - 6.1 the application for the declaratory relief be postponed to be heard after the Electronic Bingo Terminals manufactured and/or distributed and/or sold and/or leased by WMS Gaming Africa (Pty) Limited and by International Gaming Technology – Africa (Pty) Limited are made available for inspection to the third applicant and its experts;

²³ While some of the relief sought pertaining to the Review and the setting aside of the impugned decision is the same, the Premier and the MEC on the one hand, and Afrisun on the other, had some different grounds of review. In addition to the review and setting aside, Afrisun also sought other self-standing relief.

6.2 WMS Gaming Africa (Pty) Limited and by International Gaming Technology – Africa (Pty) Limited be directed to make the Electronic Terminals manufactured and/or distributed and/or sold and/or leased by them available for inspection within 20 days of the order;

6.3 The third applicant supplements its founding papers within 15 days after such inspection;

6.4 in the interim and pending the further hearing of the application for the declaratory relief, that the eleventh to twenty-seventh respondents are interdicted from using Electronic Bingo Terminals manufactured and/or distributed and/or sold and/or leased by GWS Gaming Africa (Pty) Limited and by International Gaming Technology – Africa (Pty) Limited in their bingo halls.

7. That costs be awarded against the respondents, jointly and severally, the one paying the other to be absolved.

8. Further and/or alternative relief.'

[10] On 19 February 2015 Peermont also launched an application in which it seeks leave to intervene in the main review as a party, as it too wishes to review the impugned decision. The relief claimed in its notice of motion was as follows:

'1. Condoning the applicant's non-compliance with the time periods provided for in Rule 6 of the Uniform Rules of Court;

2. Granting the applicant leave to intervene as the fifth applicant in the main application issued under case number 1366/15, and in those proceedings, granting the applicant an order in the following terms:

2.1 Exempting the applicant from the requirement that it exhaust internal remedies;

2.2 Reviewing, setting aside and declaring invalid the first respondent's decision of 16 January 2015, recorded as Resolution BD0115.11 on pp 50-54 of the court papers;

2.3 Granting costs, jointly and severally, against all the respondents that oppose the relief sought in 2.1 and 2.2 above;

3. Directing that the affidavit filed in support of this application will serve as the applicant's founding affidavit in the main application;

4. Ordering that any respondent that opposes this intervention application shall pay the costs thereof and, in the event that there is no opposition, that costs be costs in the cause;

5. Granting such further and/or alternative relief as the court may deem just.'

Peermont's founding affidavit in its intervention application setting out the basis on which it claimed to be entitled to intervene for the aforesaid relief, was stated to also 'double as its founding affidavit for its own review in the event that it was admitted'. To

date no court order has been granted giving leave to Peermont to intervene and the issue of Peermont's joinder remains pending in the main review.²⁴

[11] On 11 March 2015 Afrisun launched an application ('the joinder application') against International Game Technology-Africa (Pty) Ltd, WMS Gaming Africa (Pty) Limited and Vukani Gaming Corporation (Pty) Limited, manufacturers of EBTs, as first second and third respondents, respectively, for the following relief:

'1 Joining the First, Second and Third Respondents, in terms of rule 10(3) as read with rule 6(14) of the Uniform Rules of Court, as the Twenty-Eighth, Twenty Ninth and Thirtieth Respondents respectively in the application proceedings launched in this Honourable Court by the Premier of KwaZulu-Natal and the Member of the Executive Council for the Province of KwaZulu-Natal for Finance under case number 1366/15;

2. further and/or alternative relief; and

3. in the event that any Respondent opposes this application, that the costs of this application be borne by such Respondent.'

[12] On 28 April 2015 the above matters all came before Lopes J as an opposed motion (as foreshadowed in paragraph 1 of Vahed J's order). Lopes J directed that the litigation be managed in two parts. The various interlocutory applications and disputes between the parties set out in paragraph 1 of his order would be dealt with first, where after the remaining issues in the pending review applications would be dealt with. His order (with suitable insertions of the parties' names to avoid any confusion) reads:

'1 The –

1.1 Intervention applications of the [Forum²⁵] and [Peermont²⁶] and the objections to the [Afrisun²⁷] intervention in case number 1366/2015; and

1.2 The issue at/(sic) whether or not prayer 2-6 of the 3rd Applicants [Afrisun's] amended notice of motion is permitted to be argued in the main application.

1.3 The joinder application launched by [Afrisun] in case number 1366/2015;

²⁴ Based on Peermont not having yet been granted leave to intervene in the main application I concluded in a written unreported judgment delivered on 17 April 2018 that a claim by the Galaxy parties that Peermont's review brought subsequently and referred to below in this judgment, had to be stayed as the dilatory defence of *lis alibi pendens* could not be sustained.

²⁵ Described as the fourth applicant.

²⁶ Described as the 'fifth applicant' although it had not been granted leave to intervene?

²⁷ Described as the third applicant.

1.4 Interlocutory objection raised to the introduction of the issue relating to the registrability of EBTS as it arises in the interclaim(?) application are postponed for hearing to a date to be arranged by the Registrar.'

[13] The previous Premier, Mr Senzu Mchunu, was replaced during May 2016 with Mr Thembinkosi Willies Mchunu as Premier of KwaZulu-Natal. Mr Willies Mchunu states that he familiarised himself with the litigation and took legal and other advice from various quarters and formed the view that the matter should be settled. It is also alleged in the respondents' papers that the MEC agreed with this decision of the Premier.

[14] On 28 September 2016 the Gaming and Betting function was purportedly restored/transferred from the Office of the MEC, to be henceforth controlled from the office of the Premier in terms of a Premier's minute no. 2/2016 dated 28 September 2016, which inter alia provided:

- (a) That the MEC was assigned the function of Finance;
- (b) In schedule 2 'Casinos, racing gambling and wagering, excluding lotteries and sport pools, was recorded as a power 'retained' by the Premier.

[15] On 17 November 2016 Afrisun's attorneys addressed a letter to the Registrar requesting dates for the set down of the interlocutory matters foreshadowed in paragraphs 1.1 to 1.4 of Lopes J's order. This letter was copied to the Galaxy parties' attorneys, ENS, amongst others.

[16] On 18 November 2016 ENS wrote to Lopes J, care of the Registrar of this Court, responding to the aforesaid letter from Afrisun's attorneys, and advising that the 'matter has become settled between the parties and the applicants (being the Premier and the MEC for Finance) have now withdrawn the application'. Further, that:

'to the extent that Afrisun (Pty) Ltd seeks allocation of hearing dates on the basis that it has applied to intervene in the proceedings, its locus to do so is misconceived. Its intervention application has been opposed and is yet to be determined. This much is apparent from paragraphs 1.2, 1.3 and 2 of your aforementioned Order, which requires amongst other matters the joinder application to be set down by the Registrar for hearing in due course.'

The letter concluded that, '[i]t is not open to Afrisun (Pty) Ltd, as a party seeking to intervene but who has not yet been granted leave to do so, to take conduct of the matter' and that '[i]n the circumstances, it is respectfully submitted that the request directed to you should be refused.'

[17] The Premier had in the interim apparently concluded a settlement agreement²⁸ ('the settlement agreement') with a number of the respondents in the main review, pursuant to which he agreed²⁹ to withdraw the main review. According to the answering affidavit filed on behalf of the Premier and the MEC, the MEC concurred with that course of conduct.

[18] On 18 November 2016 a notice of withdrawal of the main review was filed on behalf of the Premier and the MEC. The notice recorded an agreement regarding costs in respect of some of the respondents to that application. There was no offer of costs or any agreement with Afrisun, the Forum and Peermont, but the notice did record that: 'should the remaining Respondents or the Intervening Parties seek any Order as to costs, arising from the withdrawal of the proceedings, in the absence of any agreement, they may do so by setting the issue of costs down for determination on not less than 60 days' notice to the Applicants'.

At that stage too, the Premier had not been substituted as the second applicant in place of the MEC in the main review.³⁰

²⁸ It appears that on 19 September 2016 the new Premier of KwaZulu-Natal, Premier Willies Mchunu, called upon all the role players in the '*bingo litigation*' to attend a meeting at his office on 23 September 2016. The Premier duly convened the meeting with the parties on that date. On 13 October 2016 it was reported in the Daily News newspaper that the MEC, Ms Belinda Scott, had been stripped of her powers over gambling and that the Premier had moved that portfolio to his own department, that is from Treasury to the office of the Premier. On 3 November 2016, a report back meeting was held with the Premier in relation to the ongoing 'bingo litigation', following which he advised that he intended withdrawing the MEC's review for various reasons mentioned at the meeting. No mention was made of the MEC nor of any involvement by her in making that decision; his presentation suggested that it was his decision. In an exchange of correspondence thereafter between Afrisun and the attorneys for the Premier and the MEC on 7 and 8 November 2016 concerning the intended withdrawal of the MEC's review Afrisun contended that a withdrawal of the review could not competently take place without an application to Court for leave to withdraw the application.

²⁹ There is no indication who the parties to the alleged settlement agreement were, when it was concluded, how it was concluded and what its exact terms were, specifically whether it was agreed as part of the settlement to leave the impugned decision in place and for it to be implemented and/or whether one of the objectives of the settlement was to bring the proceedings to an end.

³⁰ Afrisun contends that for that reason alone the notice of withdrawal was unlawful.

[19] This notice of withdrawal prompted an objection from Afrisun which in correspondence³¹ disputed the validity of such withdrawal. When that did not elicit a satisfactory response, its correspondence was followed by a rule 30(2)(b) notice on 29 November 2016 objecting to the notice of withdrawal and affording the Premier and MEC ‘an opportunity of removing the cause of complaint raised in the notice by 14 December 2016.’

[20] On 2 December 2016, the Premier filed a notice dated 30 November 2016 in terms of Uniform Rule 15(2), in terms of which notice was given of the substitution of the Premier as the second applicant in the main review, in the place of the MEC.

[21] On 8 December 2016 Peermont brought a separate review (‘the Peermont review’) for relief³² on grounds in many respects similar to that in the main review and the Afrisun review, attacking the validity of the impugned decision. This step was triggered by the Premier’s decision to withdraw the main review, and to allow Peermont to persist with its challenge to the impugned decision.³³

[22] On 31 January 2018 this application was set down for 1 June 2018. The main review, after its adjournment on 28 April 2015, has never been set down again.

[23] It is against that background that Afrisun applies for the relief set forth in its notice of motion.

³¹ On 24 November 2016 Afrisun’s attorney addressed a letter to PKX Attorneys (copied to all the bingo litigation parties) in response to the purported notice of withdrawal.

³² The relief sought in the Peermont review is as follows: ‘1. Condoning [Peermont’s] non-compliance with the time periods provided for in section 7(1) of Promotion of Administrative Justice Act 3 of 2000 and, to the extent necessary, exempting [Peermont] from the requirement that it exhaust internal remedies; 2. Reviewing, setting aside and declaring invalid the second respondent’s [the MEC’s] decision of 16 January 2015, recorded in resolution BD0115.11 (as appears in annexure DLP28 to the founding affidavit) (‘the impugned decision’); 3. Granting costs, jointly and severally, against all the respondents that oppose any of the relief sought in prayers 1 and 2 above; and 4. Granting such further and/or alternative relief as the Court may deem just.’

³³ Peermont was not a party to the order granted by Vahed J on 5 February 2015.

[24] Afrisun's application is opposed by the Premier and the MEC insofar as the relief in paragraphs 1 to 6 of Afrisun's notice of motion is concerned. They abide by the Court's decision insofar as it concerns the relief in paragraph 7. The Forum abides by the decision of this Court.³⁴ The Galaxy parties oppose the relief, with the Gold Rush parties and Poppy Ice³⁵ subsequently also having joined in that opposition. There are some factual disputes on the papers. While accepting that there are some limited factual disputes, Afrisun contends that the relief sought falls to be decided principally on legal issues. Where any material factual dispute does arise, it shall be dealt with on the basis of what is the respondents' version, in accordance with the approach in *Plascon-Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd*.³⁶

The Issues

[25] Some of the heads of argument deal with objections to the locus standi of Afrisun and the Forum and reasons why leave to intervene should not be granted, resulting in one expecting that these might be issues for determination in this application under the relief claimed in paragraph 7.2 of the notice of motion. Any confusion in this regard was however clarified during argument. Those arguments fall under the issues yet to be heard as contemplated in paragraph 1.1 of the order of Lopes J. which is still to be enrolled for determination in further proceedings as foreshadowed in paragraph 7.3 of Afrisun's notice to motion (should it be found that Afrisun is indeed a party to the main review). What is in issue in this application, as stated by Afrisun's counsel, is a determination of the status of Afrisun, or restoring its status, if required, to what it was immediately prior to the filing of the notice of withdrawal. To the extent that paragraph 7.2 of the order might create any confusion it was suggested that if this judgment was to conclude that it was the relief to be granted, that paragraph 7 be amended to contain

³⁴ That is in terms of a notice dated 24 May 2018.

³⁵ The 17th respondent. On 11 May 2016 Poppy Ice launched an urgent application against the Board and the MEC ('the Poppy Ice Application'), premised on the impugned decision, in which it sought orders to enable it to enrol EBTs in its bingo hall in Ladysmith. Poppy Ice did not join Afrisun and Peermont as parties thereto, and urgent intervention applications were brought by them. The intervention applications together with the Poppy Ice Application were heard on 12 August 2016 and judgment was delivered on 10 October 2016, in terms of which I granted Afrisun (and the other intervening parties) leave to intervene and dismissed the Poppy Ice Application.

³⁶ 1984 (3) SA 623 (A) at 634E-G.

such formulation as I may consider more appropriate. I shall respond to that invitation below.

[26] That this is the true issue for determination is also consistent with the dispute that had arisen between Afrisun and the Galaxy parties referred to in paragraphs 15 and 16 above as to Afrisun's status, and hence whether it is entitled to have the interlocutory issues identified in paragraphs 1. 1 to 1.4 of Lopes J's order set down for determination *initio litis*. It is to clarify its position in that regard that a declaration of rights is required.

[27] Accordingly, the primary enquiry relates to a determination of the effect of paragraph 8 of Vahed J's order. The Galaxy parties accept that if it had the effect of granting leave to intervene to Afrisun and joining it as a co-applicant to the main review, that it is the end of the enquiry. Afrisun must then enrol the issues in paragraphs 1.1 to 1.4 of Lopes J's order for hearing. Conversely, if Afrisun was not granted leave to intervene and joined, then the application should be dismissed, unless I was otherwise persuaded in respect of the relief claimed in paragraphs 1 to 6 of the notice of motion, which might result in Afrisun's application to intervene remaining pending in respect of the main review (which then would not have been withdrawn lawfully). I agree with this summation of the issues and shall proceed in this judgment on that basis.

[28] I shall accordingly consider the issues arising in the aforesaid sequence *seriatim*. Before doing so it is however necessary to return briefly to the formulation of the relief in the notice of motion, to determine the actual relief claimed by Afrisun, as it will impact on what issues this Court has to decide.

The Formulation of the Relief Claimed

[29] The relief claimed in paragraph 7.1, 7.2 and 7.3 of its notice of motion encapsulates the relief which Afrisun seeks, namely the right to pursue a review of the impugned decision in its own right as a co-applicant on the grounds it alleges (which grounds also incorporate by reference, grounds which were advanced by the Premier and the MEC in their founding papers in the main review). If Afrisun indeed has that

right in the main review, then the validity or otherwise of the decision to withdraw and the actual withdrawal by the Premier and the MEC from the main review are irrelevant and academic to Afrisun. Declaratory orders are not granted in respect of academic issues and furthermore are granted in respect of rights, not facts.³⁷

[30] The preamble to paragraph 7 of the notice of motion however records that the relief sought in paragraphs 7.1 to 7.3 is sought in the alternative to the relief claimed in paragraphs 1 to 6, 'in the event that the above relief was refused, or it was found that the main review was validly withdrawn'. In the way this paragraph is formulated, in the event of the relief in paragraphs 1 to 6 not being refused or it being found that the main review was not validly withdrawn, that is that the main review of the Premier and MEC remains extant, the relief in paragraph 7 would then fall away. That would leave Afrisun with no judicial determination having been made as to whether it was already joined as a co-applicant to the main review in terms of Vahed J's order, or whether it was still only a prospective applicant for joinder in terms of its application to intervene in the main review, the merits of which will then still have to be determined. This application would then have been of no practical value as regards the rights of Afrisun, or if of any practical value, of little material significance. That is clearly not what was envisaged.

[31] The problem lies with the formulation of the contingencies giving rise to the claim for the alternative relief, contained in the preamble to paragraph 7 of the notice of motion. Having regard to what has been identified during argument as the true issue for determination, paragraph 7 should be viewed as relief which should have been pursued 'In the alternative, but in any event' to paragraphs 1 to 6 of Afrisun's notice of motion. If the 'alternative' relief in paragraph 7 is granted, then the relief in paragraphs 1 to 6 of the notice of motion falls away, or would only be of academic interest to Afrisun. When I raised the value of this relief with Afrisun's counsel the high-water mark was that a determination of some of the relief in paragraphs 1 to 6 of the notice of motion might be of some value to the parties in dealing with the Premier, MEC or the Board in the future.

³⁷ AC Cilliers *et al Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa* 5ed (2009) at 1439.

That is however insufficient to require a judgment in respect thereof. I shall accordingly approach the relief claimed in the balance of this judgment on the aforesaid basis.

The Joinder of Afrisun and the Forum and the Application to Intervene by Peermont

[32] Paragraph 8 of Vahed J's order affected Afrisun and the Forum only, not Peermont. To the extent that paragraph 1.1 of Lopes J's order provided that the 'Intervention applications of the [Forum] and [Peermont] and the objections to the [Afrisun's] intervention in case number 1366/2015' are to be determined, it more correctly should have read that the intervention application of Peermont, and the objections to Afrisun and the Forum's intervention in case number 1366/2015, should be determined. As this application is brought by Afrisun, I consider only Afrisun's position, although what is concluded should probably similarly apply to the Forum.

[33] The primary enquiry concerns the correct interpretation and effect of Vahed J's order, specifically whether it had the effect that Afrisun was and already had been granted leave to intervene resulting in it becoming the third applicant, or whether the application by it for leave to intervene remains pending/outstanding.³⁸

[34] This issue is raised as one of locus standi. The challenges by the Galaxy and Gold Rush respondents are to the effect that Afrisun has no locus standi to bring these proceedings because it is not a party to the main review³⁹ as it has not yet been granted leave to intervene in the main review, thus remaining only a prospective applicant. Accordingly, when the main review was withdrawn, the application for leave to intervene and Afrisun's subsequent consolidation to include its own review on more extensive grounds and wider relief came to an end. Therefore, the submission goes, Afrisun has no right to challenge the validity of the withdrawal of the main review and/or prosecute

³⁸ Whether Afrisun, the Forum and Peermont have the required locus standi which would entitle them to intervene and be joined as applicants to the main review does not arise in this application, but will only be determined as part of paragraph 1.1 of the order of Lopes J once it is enrolled.

³⁹ This would seem specifically with reference to the relief in paragraphs 1 to 6 of the notice of motion.

its review as an intervening applicant in the main review because it never was a party to the main review.

[35] Afrisun however contends that in terms of Vahed J's order Afrisun indeed had become a party in the main review, and following on that, it would also have a direct and substantial interest in the determination of the issue as to whether the main review has been lawfully withdrawn due to its own rights and interests in those proceedings.

[36] The Galaxy parties, Gold Rush parties and Poppy Ice argue that Vahed J's order related only to procedural directions in regard to the interlocutory applications, including Afrisun's application for leave to intervene, and simply identified Afrisun as a prospective co-applicant in the pending review. This, they submit, is confirmed by Lopes J's order to separate out for prior determination whether Afrisun was permitted to intervene or not. As that application was never determined, Afrisun was not a party to the main review and never has been.

[37] The starting point is to interpret the order of Vahed J. Regarding the interpretation of a court order, the Constitutional Court in *Electoral Commission v Mhlope and others*⁴⁰ held that:

'The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. . . . (A)s in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. *If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it*' (my emphasis).⁴¹

After noting that the approach in *Firestone* and *BHP Billiton* had been endorsed in *Eke v Parsons*,⁴² the Court referred to *Ex Parte Women's Legal Centre: In Re Moise v Greater*

⁴⁰ 2016 (5) SA 1 (CC).

⁴¹ *Mhlope* n 39 para 33 citing *Firestone South Africa (Pty) Limited v Genticuro* 1977 (4) SA 298 (A) at 304D-F; see also *Finishing Touch 163 (Pty) Limited v BHP Billiton Energy Coal South Africa Limited and others* 2013 (2) SA 204 (SCA) para 13.

⁴² 2016 (3) SA 37 (CC) para 29.

*Germiston Transitional Council*⁴³ where Kriegler J added that the interpretation of a court order 'entails determining the legal context in which the words in the order were used'. It is only if a court order is ambiguous that extrinsic facts and evidence become relevant.

[38] Paragraph 8 of Vahed J's order was to the following effect:

'8. Afrisun (Pty) Limited t/a Afrisun Casino and Entertainment Kingdom and the Peoples' Forum Against Electronic Bingo Terminals are hereby granted leave to intervene without prejudice to any party to raise any arguments in this respect.'

It was not an order granted after hearing argument and part of a reasoned written judgment, but was a consent order presented by the parties as a practical way forward to resolve the various disputes amongst the parties. This does not however mean that the issue of the intervention by Afrisun and the Forum would not have exercised the learned judge's mind. Having no doubt read the papers he would have formed a view on the aspect of leave to intervene being granted and Afrisun joined, as per its prayer for relief, as the third applicant to the main review. There has been some suggestion in the papers that the learned judge might have been conflicted possibly because of some previous involvement with one or more of the parties. This has not been pursued with any force, and correctly so, because even assuming some potential conflict, it would not have precluded the grant of the order where the parties were all *ad idem* that Afrisun and the Forum should be granted leave to intervene and be joined, and they simply requested the learned judge to make such an order by consent. The court file reveals that all the parties were at the relevant time represented by counsel.

[39] The language and terms of Vahed J's order are clear. Afrisun is granted leave to intervene. The fact that this was ordered without prejudice to any party subsequently to raise arguments in this respect does not detract from what was ordered. Leave to intervene was granted.

⁴³ 2001 (4) SA 1288 (CC) para 11.

[40] The opposing respondents' contention that it was simply an order dealing with procedural matters cannot be sustained. The order did deal with some procedural matters, such as dates for exchanging affidavits and the like. However, an important interlocutory issue was also whether Afrisun should be a co-applicant to the main review so that it could pursue whatever rights and relief it wished to pursue by filing and exchanging affidavits, rather than its application for leave to intervene first being pursued and finalised, before, assuming it was then granted leave to intervene, it would only file affidavits as a party to the main review. If the intention was not that it be granted leave to intervene resulting in it becoming the third applicant, then it would have been easy to simply refer to Afrisun in Vahed J's order as the 'first intervening applicant', or by some similar description. The choice of language was deliberate and to the contrary.

[41] The opposing respondents have argued that in 'granting leave to intervene' but directing that it be 'without prejudice to any party to raise any arguments in this respect', the cart is put before the horse, and that such a sequence is illogical and goes contrary to the natural flow in matters of this nature, and is unheard of in our law.

[42] However sight must not be lost of the fact that the main review was at 5 February 2015 being pursued with urgency. The manner in which the order was framed is therefore not surprising and had practical appeal to the parties. The order is not necessarily a 'provisional' joinder which could subsequently possibly be 'reversed'. The order for intervention was granted, but if in the further exchange of affidavits some basis was advanced which negated Afrisun's (or the Forum's) locus standi to have been granted leave to intervene in the first place, this could be argued without being met by a counter argument that the order joining Afrisun and the Forum precluded such an argument from being entertained at all. That is the preservation of rights which the qualification to the order sought to ensure. It is that kind of 'reconsideration' that is covered in the order made by Lopes J, namely that one of the interlocutory issues to be determined will be any legitimate objections to Afrisun's and the Forum's intervention. If

any such objection is successful, Afrisun's application will simply be dismissed with costs. The order granted might be unusual, but that is what it intended to achieve.

[43] Such an interpretation is in accordance with the principles endorsed by the Constitutional Court in *Mhlope*.⁴⁴ Reading the court order as a whole in the legal context of the proceedings, it is clear that this was the intention behind the order. The order served the purpose of regulating the further progress of the matter by allowing Afrisun to intervene, for the filing of affidavits to deal with any objections thereto, and a hearing in due course on whether Afrisun might not in any event be non-suited.

[44] Such an interpretation is also consistent with the factual context of this matter. As it has emerged subsequently in the exchange of affidavits, Poppy Ice objects to the locus standi of Afrisun, the Forum and Peermont in the sense of whether they have demonstrated a 'legally recognized interest'. It contends that Afrisun lacks locus standi because it never met the requirements to establish its standing. An objection was also raised to the locus standi of the Forum. It is contended that the Forum did not have locus standi in the sense of the capacity to litigate, and that the deponent who deposed to its affidavit was not authorised to bring the application.⁴⁵ These are exactly the kinds of arguments which probably were present to the minds of the parties when the order was taken by consent. The order reserved to the opposing respondents the right to advance these arguments, and if successful, for example in the case of the Forum if the Forum could not prove that it had locus standi in the sense of the legal capacity to litigate,⁴⁶ the review by Afrisun or any relief claimed by the Forum could be refused with costs.

⁴⁴ *Mhlope* n 39 para 33.

⁴⁵ It is now accepted that such a challenge should, in terms of rule 7, be a challenge to the authority of the attorneys of the Forum to bring the application, the authority of the deponent being irrelevant as he is simply a witness. Afrisun contends that this influenced, if it did not determine, the portion of Vahed J's order permitting argument to be raised, precisely because of a concern as to whether the Forum had the capacity to litigate, and not out of any concerns about Afrisun's intervention.

⁴⁶ The Forum has in a subsequent affidavit put up its Constitution in support of its contention that it has the legal capacity to litigate in its own name.

[45] It is also significant that after Vahed J's order the parties, and in particular Afrisun, acted as the third applicant, describing itself as such and participating in the processes, without any objection in terms of rule 30 being raised that any such steps taken by it constituted an irregular step or proceeding.

[46] It further does not appear that there was initially opposition to Afrisun's application for leave to intervene. The opposition only commenced when Afrisun sought to seek additional relief on more extensive grounds to that which the Premier and the MEC had sought and relied upon, and when it applied to join various manufacturers of EBTs to the main review. The Galaxy parties did not base their opposition to Afrisun's intervention on its lack of locus standi per se, but rather on the basis that Afrisun sought to introduce these new grounds of review and sought also to review other decisions by the Board, such as the decisions to approve the applications by WMS, IGT and Vukani for the registration of their EBTs. Specifically, they complained about Afrisun's contention that EBTs could not be licensed for operation in bingo halls based on the definition of the game of bingo in the KZN Act. However, this was already included as a ground of review in Afrisun's intervention application before Vahed J's order was granted on 5 February 2015. Furthermore, once Afrisun was granted leave to intervene as a party with the rights of a party to the main review, it would be entitled to raise additional grounds of review that might emerge from the record when filed (as per paragraphs 3 and 4 of Vahed J's order). This right of a reviewing applicant often unavoidably broadens the grounds of review and relief claimed without any party to the review being entitled to object to such a widening of the issues.

[47] Interpreting the order in the way contended for by the opposing respondents will lead to impractical consequences which would stultify the broader operation of the order.⁴⁷ The trouble Afrisun had gone to, of intervening and obtaining relief against the respondents in the main review, would have been wasted.

⁴⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 26.

[48] I therefore conclude that Afrisun became a party to the main review with all the rights and obligations of a co-applicant on 5 February 2015. Whether any valid objection can be raised to its joinder which would disentitle it from continuing with a review of the impugned decision in the main application, will be determined when the issues in paragraph 1.1 of Lopes J's order are determined.

[49] Afrisun is accordingly entitled to an order as set out in paragraph 7 of the notice of motion, amended in my discretion and in response to the invitation to do so, as follows:

7.1 Afrisun (Pty) Limited, having been granted leave to intervene in the proceedings under case number 1366/15 on 5 February 2015, and joined as the Third Applicant, is declared entitled to pursue the review application under that case number, unless and until a Court pursuant to paragraph 1.1 of the order of the Honourable Mr Justice Lopes dated 28 April 2015 upholds any argument that would disqualify it from doing so;

7.2 Afrisun (Pty) Limited is declared entitled to obtain dates to set down the hearing of the issues referred to in paragraph 1 of the aforesaid court order granted by the Honourable Mr Justice Lopes in the main application.'

[50] This conclusion disposes of the application on what I have construed to be the true purpose thereof. Given that as a fact the Premier and the MEC have subsequently withdrawn from the main review but that their affidavits will obviously stand as evidence, it is of no consequence, certainly no cogent legal interest has been advanced, as to why Afrisun's pursuit of the review would require a resolution of the remaining legal issues, such as whether the gambling function was taken control of lawfully by the Premier, whether the Premier and the MEC could lawfully withdraw from the main review, and the like. The relief in paragraphs 1 to 6 of Afrisun's notice of motion regarding the validity of the decision of the Premier and/or the MEC to withdraw the main review at their instance, and/or the validity of the notice of withdrawal per se, is truly relief that would only arise in the alternative as far as Afrisun is concerned.

[51] It was submitted somewhat faintly that some of the orders sought in paragraphs 1 to 6 of the notice of motion might have some significance to the parties, to have legal

clarity for their future dealings with the Premier, the MEC and/or the Board, for example whether the relevant parts of the gambling portfolio indeed now reside with the Premier or the MEC. No dispute of any legal significance to Afrisun has however been articulated which would necessitate the grant of a declaration of rights in respects as contemplated in paragraphs 1 to 6 of the notice of motion. At best the declarations sought in those paragraphs have legal significance only in regard to the issue whether Afrisun has status and would have a valid pending application to intervene and be admitted as a co-applicant to the proceedings under case number 1366/15. Once it is found that it has, then the issues contemplated for decision by the declaratory orders in paragraphs 1 to 6 of Afrisun's notice of motion all only have academic interest as far as Afrisun is concerned. Any decision in regard thereto, even if it might result in the conclusion that proceedings in the main review have not yet been withdrawn, or withdrawn lawfully, would appear to be obiter and academic.⁴⁸ Courts do not issue declarations of right where their orders would be mainly of academic interest.

[52] I accordingly am not disposed to making an order in respect of the relief claimed in paragraphs 1 to 6 of Afrisun's notice of motion, unless I am persuaded otherwise by any submissions made by the parties in respect of the question of costs, referred to at the end of this judgment.

Has the Main Review become academic – the effect of the KwaZulu-Natal Gaming and Betting Amendment Act 4 of 2017 ('the Amendment Act')

[53] I need to comment briefly on this issue.

[54] The opposing respondents, particularly Poppy Ice and the Gold Rush parties, have in their heads of argument submitted that the entire application should be dismissed as the outcome has become entirely academic. The contention is that it is

⁴⁸ Whether the main review has been lawfully withdrawn may be of real interest to Peermont, but it has not pursued any relief in this regard and was not represented in the application before me.

necessary when considering the application, to understand the true context of the present application and the main review. They submit that Afrisun's gambling interests are in the casino industry which offers slot machines and tables for games such as roulette and poker, but which do not offer the game of bingo in its casinos. The opposing respondents offer bingo, a game traditionally consisting of so-called paper bingo but which has evolved to include bingo now played on EBTs. The casino licensees have however objected to bingo being played on EBTs, as according to them EBTs are similar to slot machines operated in their casinos, and would confuse their patrons to go to a bingo hall to play what they perceive to be slot machines. In support of this contention they have relied on the definition of bingo in the Act, which they maintain is not what EBTs offer. This is, amongst others, one of the grounds in the main review.

[55] The opposing respondents contend that it was in order to bring an end to disputes regarding the interpretation of what is meant by 'bingo' that the legislature amended the definition of 'bingo' in the Amendment Act 2017 to provide for the game offered on EBTs. Thereafter and pursuant to the amendment the Board has issued bingo licences which, in terms of the amended definition of bingo, will include playing bingo on EBTs. They accordingly submit that as it is now unequivocal that bingo can be played on EBTs, and as licences have to be renewed annually and will be issued annually post the amendment, the validity of the impugned decision is academic and belongs to history. They maintain that the effect of the amendment is that it does not assist to further contend that EBTs may not be used to play bingo, being what the impugned decision is premised on, and that the real purpose of the main review has become academic. Courts do not make decisions which are only of academic interest.⁴⁹ Accordingly, even if the relief sought in the main review is granted and the decision of the Board, permitting the Galaxy and Goldrush parties to amend their licence conditions

⁴⁹ *Manong and Associates v The Director General: Department of Public Works* 2003 JDR 0760 (C) at p14 quoted *SA Post Office Ltd v Chairperson: Western Cape Provincial Tender Board* 2001 (2) SA 675 (C) at 22 where by Cleaver, J stated 'In this connection it is trite that a court will not interfere on review with a decision of a statutory body where there has been an irregularity if it is satisfied that the complaining party has suffered no prejudice, the underlying principle being that the court is disinterested in academic disputes.'

to use EBTs, is set aside, the decision setting it aside will not serve to prevent the use of EBTs in Bingo Halls post the amendment. For similar reasons they submit that the challenge sought to be mounted by Afrisun against the Board's decision approving the application of certain manufacturers of EBTs to register their EBTs, would similarly be only of academic interest.

[56] Dispositive as the aforesaid argument, if found to be valid, might possibly be, the difficulty is that it was not, and could never have been foreshadowed in the affidavits. Afrisun's counsel in reply to this argument, has stressed that the issue is not simply a legal one of the interpretation of the definition of bingo and provisions of the Act, that the board notwithstanding request has not made subsequent licences issued to bingo operators available for scrutiny to Afrisun, and that there are also other grounds apart from the definition of bingo involved in the main review which attach to the impugned decision, such as whether the consultative process which the Board had agreed to implement before authorising the use of EBTs had been followed.

[57] The issue does not arise properly before me on the papers and therefore cannot be determined properly. It might however be that in the future management of this litigation attention be directed to defining the factual foundation, whether by the exchange of affidavits or some form of stated case, for this issue also to be addressed.

Costs

[58] The Premier and the MEC have elected to abide by the decision of this Court in regard to the relief claimed in paragraph 7 of Afrisun's notice of motion, but have opposed the relief claimed in paragraphs 1 to 6, contending that if that relief is not granted, but relief is granted in terms of paragraph 7 of the notice of motion, that they would require Afrisun to pay their costs. Courts do not however decide issues where the only relevance or significance in regard thereto will be a question of costs, unless persuaded to the contrary.

[59] Afrisun has requested that the issue of the costs of this application stand over to allow the parties to make submissions in regard thereto, once my conclusion and more importantly my reasons for such conclusion are made known. That is a reasonable proposal with which I concur. The parties are invited to make written submissions as to why a particular costs order should be granted, for consideration by me preparatory to me exercising my discretion in determining an appropriate costs order. These submissions may also extend to whether a decision on the relief claimed in paragraphs 1 to 6 is required. These written representations are to be submitted to the Registrar within 20 court days of this judgment being delivered.

Order

[60] The order I grant is therefore as follows:

- (a) Afrisun (Pty) Limited, having been granted leave to intervene in the proceedings under case number 1366/15 on 5 February 2015, and joined as the third applicant, is declared entitled to pursue the review application under that case number, unless and until a Court pursuant to paragraph 1.1 of the order granted by the Honourable Mr Justice Lopes dated 28 April 2015, upholds any argument that would disqualify it from doing so;
- (b) Afrisun (Pty) Limited is declared entitled to obtain dates to set down the hearing of the issues referred to in paragraph 1 of the aforesaid court order granted by the Honourable Mr Justice Lopes in the main application.
- (c) All questions of the costs of the application stand over for subsequent determination. The parties are invited to make written submissions as to why a particular costs order should be granted, for consideration by this Court in determining an appropriate costs order. These written submissions are to be submitted to the Registrar within 20 court days of this judgment being delivered.

APPEARANCES

FOR APPLICANT:	Mr N Singh SC
	Mr. T Dalrymple
INSTRUCTED BY:	KNOWLES HUSAIN LINDSAY INC.
C/o:	CAJEE SETSUBI CHETTY INC.
Ref.: Mr Asif Essa	
Tel.:033 345-6719	

FIRST AND SECOND RESPONDENTS: (PREMIER AND MEC)

	Mr A.J.Dickson SC
INSTRUCTED BY:	PKX ATTORNEYS
Ref.: M Potgieter	
Tel.: 033 347-5354	

FOR FIFTEENTH, SIXTEENTH, EIGHTEENTH, TWENTY-SECOND, TWENTY-EIGHTH, THIRTIETH AND THIRTY-FIRST RESPONDENTS' (GALAXY PARTIES):

	Mr M Pillemer SC
	Mr P Farlam SC
	Mr M du Plessis SC
INSTRUCTED BY:	EDWARD NATHAN SONNENBERGS
	C/o THATHAM WILKES INC
Ref.: HM DRUMMOND/Gisela 03A1226/15	
Tel.: 033 345-3501	

FOR SEVENTEENTH, NINETEENTH, TWENTIETH, TWENTY-FIRST, TWENTY-FOURTH; TWENTY-FIFTH, TWENTY-SIXTH, TWENTY-NINTH and THIRTY-SECOND RESPONDENTS', (GOLD RUSH, CHESTNUT and POPPY ICE)

	Mr B Roux SC
	M Smit
INSTRUCTED BY:	CLIFFE DEKKER HOFMEYER INC

Ref.: R Moodley/01951917

Tel.: 011 562-1666

C/o

AYOOB ATTORNEYS

Ref.:Mr A.K.A Ayooob

Tel.: 033 342-7175