

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 2289/08

In the review between:-

VUKANI GAMING FREE STATE (PTY) LIMITED

Applicant

and

THE CHAIRPERSON OF THE FREE STATE
GAMBLING AND RACING BOARD

First Respondent

FREE STATE GAMBLING AND RACING
BOARD

Second Respondent

INTERPLAY (PTY) LTD

Third Respondent

THUO GAMING FREE STATE (PTY) LTD

Fourth Respondent

THE MEMBER OF THE EXECUTIVE
COUNCIL FOR ECONOMIC AFFAIRS AND
TOURISM, FREE STATE PROVINCE

Fifth Respondent

CORAM:

VAN DER MERWE, J *et* MOOLLA, AJ

HEARD ON:

8 FEBRUARY 2010

JUDGMENT BY:

VAN DER MERWE, J

DELIVERED ON:

18 MARCH 2010

[1] This is an application to review and set aside the decisions of
the second respondent to grant licences in terms of the Free

State Gambling and Racing Act, No. 6 of 1996 (“the Act”) to the third and the fourth respondent and to refuse to grant such licence to the applicant.

[2] The second respondent is the Free State Gambling and Racing Board (“the board”), established in terms of section 2 of the Act. The first respondent is the chairperson of the board. The fifth respondent (“the MEC”) is the member of the executive council of the Free State Province responsible for the administration of the Act. The board consists of eight members appointed by the MEC in consultation with the executive council of the province including the chief executive officer of the board, who in terms of section 4(3) of the Act, is, *ex officio*, a member of the board. At all times relevant hereto the chief executive officer of the board was Ms Mokotudi Jennifer Bokwa.

[3] On 29 March 2007 the board published a notice inviting applications for two limited gaming machine operator licences. The board indicated that the applications would be adjudicated upon in terms of a document entitled “Request

For Proposal” (“the RFP”). A gaming machine is defined in section 1 of the Act as

“any electronic, electro-mechanical or mechanical device, contrivance or machine which, upon insertion of a coin, banknote, token or similar object, or upon payment of any consideration, is available to play or operate, the play or operation of which, whether by reason of the skill of the operator or application of the element of chance, or both, may deliver or entitle the person playing or operating the machine, or any other person, to receive cash or anything of value (other than an opportunity to play a further game)”.

In colloquial terms a gaming machine is therefore a “slot machine”. A limited gaming machine is a gaming machine with a restricted prize. In terms of the RFP the maximum prize which may be paid out in respect of a game played, is R500,00.

- [4] The limited gaming machine industry makes use of “route operators” and “site operators”. A limited gaming machine operator licence is issued to a route operator and a limited gaming machine site licence is issued to a site operator. One route operator would be linked to several site operators.

In general the route operator provides and maintains the limited gaming machine equipment and the necessary infrastructure while the site operators provide the venues at which the limited gaming machines are housed. After having been issued with a licence, a route operator will assist potential site operators to apply for their limited gaming machine site licences. Once such licences have been granted, an agreement between the route operator and each site operator will be entered into. One of the obligations of the route operator in terms of such an agreement, would be to ensure that the premises on which the limited gaming machines are to be installed at each site are prepared in accordance with the regulations. A route operator also arranges for the installation of a so-called site data logger which connects the site operator to the central electronic monitoring system required by the National Gambling Act, No. 7 of 2004. The central electronic monitoring system monitors every gaming event relating to a specific machine. The data is provided to the route operator on a regular basis to enable it to audit the returns on each machine and to determine the revenues due to it and to the site operator respectively. It is the duty of the route operator to ensure

that the operational costs of each machine, including taxes and levies payable to the gambling board, are paid. A successful route operator therefore requires significant knowledge of the industry, technical skills and capital to roll out and maintain limited gaming machine sites. It is not disputed that an estimated R25 million in respect of capital would be required at the inception of a limited gaming machine operator licence in terms of the RFP.

- [5] Section 31 of the Act deals with limited gaming machine operator licences. Section 31(2) of the Act provides as follows:

- “(2) A gaming machine operator licence shall not be granted by the board:
 - (a) unless the board is satisfied that the applicant:
 - (i) has appropriate knowledge and experience, or is able to acquire such knowledge and experience, to operate gaming machines; and
 - (ii) meets the prescribed requirements;
 - (b) for the operation of more than the prescribed number of gaming machines.”

In terms of section 31(5) of the Act the board shall only grant a limited gaming machine operator licence after consultation with the MEC.

- [6] It is stated in the RFP that although in terms of the National Gambling Act the maximum number of limited gaming machines which may be licensed in the Free State is 4 000, the board would award no more than two limited gaming machine operator licences, each in respect of 1 000 limited gaming machines. Important requirements of the RFP are that at least 70% of the financial interest in a licensee shall be held by broad based black economic empowerment (“BEE”) persons or groups and that at least 55% of the shares in a licensee shall be owned by residents of the Free State Province. The RFP also specifies and describes evaluation criteria for those proposals that meet the requirements of the RFP. These are empowerment and community criteria, economic criteria, social criteria, financial criteria, management criteria and development criteria.

- [7] The applicant (“Vukani”), the third respondent (“Interplay”) and the fourth respondent (“Thuo”) submitted proposals to the board in response to the RFP. The proposals were scrutinised by Gobodo Forensic Accounting which provided the board with a voluminous detailed report. Then followed a laborious and protracted process of evaluation of the proposals by the board. The process included a public hearing where each proposal was presented as well as closed sessions by the board with each applicant. After several days the board concluded its deliberations on 30 March 2008. On 1 April 2008 the board submitted a written submission to the MEC in which the MEC was informed that the board resolved to award the two limited gaming machine operator licences to Thuo and Interplay. In terms of the submission it was recommended to the MEC that he should take cognisance of this decision in order to consult the board as required by section 31(5) of the Act. On 10 May 2008 the decision to award a licence to each of Thuo and Interplay, was publically announced.
- [8] Apart from costs, Vukani now seeks an order in the following terms:

- “B1 Reviewing and setting aside the decision of the Second Respondent, taken in April or May 2008, to refuse the Applicant’s application for a Limited Gaming Machine Operator Licence in terms of section 24(4)(a) read with section 23(b) of the Free State Act.
- B2 Reviewing and setting aside the decision of the Second Respondent, taken in April or May 2008, to grant a Limited Gaming Machine Operator Licence to the Third Respondent in terms of section 24(4)(b) read with section 23(b) of the Free State Act.
- B3 Reviewing and setting aside the decision of the Second Respondent, taken in April or May 2008, to grant a Limited Gaming Machine Operator Licence to the Fourth Respondent in terms of section 24(4)(b) read with section 23(b) of the Free State Act.
- B4 Directing the Second Respondent forthwith to grant a Limited Gaming Machine Operator Licence to the Applicant, *alternatively* directing the Second Respondent to reconsider the applications referred to in paragraphs B1, B2 and B3 above.”

[9] The board and the MEC abide the court’s decision. However, in an “informatory affidavit” by Ms Bokwa, the following was stated:

2.

The first respondent, the members of the second respondent, and I have acquainted ourselves with the contents of the applicant's Founding Affidavit and have compared such allegations with the three applications which had been considered for the granting of the relevant licence(s).

3.

.....

4.

After perusal of the Founding Affidavit and consideration of the applications which were submitted by the third and fourth respondents, it emerged – and the second respondent was advised – that those applications are, in fact, deficient in the respects alluded to in the applicant's Founding Affidavit and should, therefore, not have been considered by the second respondent and that, moreover, the licences could and/or should not have been granted to the third and fourth respondents.

5.

The first and second respondents, consequently, cannot object to the relief provided for in paragraphs B2 and B3 of the applicant's Review Application.

6.

6.1 First and second respondents, however, consider themselves dutibound to respectfully direct this

Honourable Court's attention to the fact that, in the recent (subsequent to receipt of the Application for Review) process of comparing all three the applications which had been considered for the granting of a Limited Gaming Machine Operator Licence or Limited Gaming Machine Operator Licences with legislative requirements, it also appeared that neither the applicant's application nor the third respondent's application complied with the – clearly, I believe, peremptory – provisions/requirements of Section 24(2)(b) of the Free State Gambling and Racing Act, No. 5 of 1996, as neither the application of the third respondent nor the application submitted by the applicant was accompanied by an approval or representations of any of the local authorities within whose area of jurisdiction the relevant premises are situated.

6.2 The first respondent, the second respondent, and I are, therefore, constrained to respectfully suggest to this Honourable Court that:

6.2.1 the relief provided for in paragraph B1 of the applicant's Application for Review is academic;

6.2.2 the relief provided for in paragraph B4 of the applicant's Application for review cannot be granted *alternatively* is untenable under the circumstances and might very well constitute an illegality, as the applicant's application cannot

sustain consideration and the granting of a Limited Gaming Machine Operator Licence.

7.

The first and second respondents abide the decision of this Honourable Court, but take the liberty of respectfully suggesting that:

- 7.1 merely the grant of the licences to the third and fourth respondents should be reviewed and set aside;
- 7.2 an order pertaining to the payment of costs should be based upon equitable consideration and with due regard of the facts and circumstances herein alluded to and the time when this affidavit was filed and the other parties apprised of the contents hereof.

8.

I attach hereto as annexure "NJB1" my letter, dated 23 April 2008, and wherein the reasons for the second respondent's decision to grant licences to the third and fourth respondents and not to grant a licence to the applicant, are set out."

[10] Thuo also abides the decision of this court. Only Interplay opposes the application. Interplay, however, does not contest the granting of prayer B3 in respect of Thuo. In essence, Interplay contends that the decisions to award

limited gaming machine operator licence to Interplay but not to Vukani, were not irregular and should not be set aside.

[11] It is clear that the evaluation of and the adjudication on the three proposals by the board constituted one comprehensive integrated process. In my judgment it follows that a material error by the board or material flaw in the reasoning of the board in respect of only one of the proposals, would vitiate the whole process and all of its results. In the result such error or flaw would require setting aside the whole result of the adjudication process and reconsideration of all three proposals. This was conceded by Mr. Cohen on behalf of Interplay.

[12] According to the RFP the applicants should provide signed shareholders' agreements. It is clear that the board abandoned this requirement and accepted proposed shareholders' agreements. In this regard, the RFP also provides that the board has the right to waive any immaterial defect or lack of compliance with any formality in any proposal or process. None of the three applicants submitted signed shareholders' agreements nor were they

subsequently requested to provide signed shareholders' agreements. Instead the board considered the proposals on the basis of the structure and effect of their proposed shareholders' agreements and proposed shareholding.

- [13] In this regard it is admitted or not disputed that Vukani demonstrated the following. In terms of Vukani's proposed shareholding the BEE shareholding in Vukani would in fact be more than 70%, namely 79,26% and 55% of Vukani's shareholding would be held by residents of the Free State. In terms of the proposed shareholders' agreement Vukani Gaming Corporation (Pty) Ltd would hold 45% shareholding in Vukani, SACTWU Welfare Trust Free State 25%, Free State Gaming Consortium (Pty) Ltd 15% and Lehadima Gaming CC 15%. Hosken Consolidated Investments Ltd through another company holds all the shares in Vukani Gaming Corporation (Pty) Ltd. The effect hereof would be 24,26% BEE shareholding in Vukani. SACTWU is a labour union in the clothing and textile industry. At least 25 000 dependants of SACTWU Free State will be indirectly benefitted via the 25% shareholding of SACTWU Welfare Trust Free State in Vukani. SACTWU Welfare Trust Free

State, Free State Gaming Consortium (Pty) Ltd and Lehadima Gaming CC are all three 100% Free State based BEE entities. There is no limitation in terms of the shareholders' agreement on the right of shareholders to vote and to representation on the board. In the result each holder of 7,5% of the shares in Vukani would be entitled to appoint a director to the board of Vukani.

- [14] Importantly, the BEE shareholders in Vukani would acquire their shareholding without having to pay anything in return. Hosken Consolidated Investments Ltd undertook to finance Vukani's operation by a loan which will be repaid from the profits of Vukani. During the period of repayment of the loan, however, no dividends would be declared to any shareholder of Vukani. It is expected that the repayment of the loan would take about seven years but it may possibly be a shorter period. The result of all this is that although none of the shareholders in Vukani would receive any dividend for up to seven years, the BEE shareholders in Vukani would receive valuable and lucrative assets without risk and without them having to pay anything to obtain the assets.

[15] This position must be contrasted with the corresponding position of Interplay. First, Interplay's proposed shareholding is unclear and unsettled to say the least. Interplay is a so-called shelf company of which the only registered shareholder is Lebone Trust, a family trust of which Mr. Quentin Eister and his sister are the trustees. Only an incomplete draft shareholders' agreement between Lebone Trust, "Free State Women in Tourism", "Other Women Investors", "Interplay Employee Trust" and "Youth Trust" was submitted by Interplay to the board. However the "Other Women Investors", "Interplay Employee Trust" and "Youth Trust" had not yet been created. Moreover the draft agreement indicated that Lebone Trust would hold 45% of the issued shares, "Free State Women in Tourism" 30%, "Interplay Employee Trust" 10%, "Youth Trust" 10% and "Investors" 15%. This adds up to 110%.

[16] Second, Interplay's revised financial model, presented at an oral hearing before the board, made provision that no dividends would be paid for the first seven years. This is of course similar to the position with Vukani. The difference however is that the proposed BEE shareholders of Interplay

would have to come up with considerable funding to acquire their shareholding and to so contribute to the funding of the project.

[17] In these circumstances I agree with Vukani's submission that its BEE shareholding structure should have been considered a strength.

[18] However, the aforesaid reasons of the board for refusing to issue a licence to Vukani included the following:

“(a) Although 55% of the shareholding in the applicant will be held by Free State based BBEE persons or groups, which meet the minimum criteria laid down in the RFP, the Board is not satisfied with the following:

- (i) No financial benefits will accrue to the Free State based BEE shareholders in the sense that these Shareholders will not receive any financial benefits as a result of their shareholding because of the fact that dividends will only be declared in year 7, despite a net profit projected in year 4.
- (ii) The non-contribution by BEE shareholders to the funding of the project places them in a

disadvantaged position, as they will only accrue benefits after the loan has been serviced.

- (iii) The shareholding is structured in such a manner that the Free State based companies will not have a controlling interest in the applicant.”

[19] The board’s thinking is also reflected in a so-called confirmatory affidavit by Ms Bokwa that forms part of Interplay’s answering affidavits. Ms Bokwa, *inter alia*, said:

“21.3 There was no indication in the Applicant’s application that its shareholders would have a vote on the Applicant’s annual general meeting, at least not until the Applicant’s loan was settled. There was no, proverbial, “*flow through*” to the Applicant’s shareholders to have any say in the Applicant’s business, at least not for seven years; which is not what empowerment is all about.

21.4 Not even a trickle of a financial benefit would accrue to a shareholder of the Applicant until the loan had been paid off.”

I do not think that it is unfair to say that these remarks are both nonsensical and wrong.

[20] All three sub-paragraphs from the board's reasons quoted above contain fundamental misconceptions. Substantial financial benefits would accrue to the Free State based BEE shareholders of Vukani. That the BEE shareholders of Vukani did not have to contribute to the funding of the project but nevertheless obtain a 79,26% shareholders interest therein, place them in a very advantageous position and not the other way round. The Free State based BEE shareholders will hold an unqualified 55% of the shares in Vukani and an controlling interest.

[21] In my judgment the board materially misdirected itself in respect of Vukani's proposal. In the language of the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA"), irrelevant considerations were taken into account or relevant considerations were not considered. To prefer Interplay's proposal to that of Vukani in respect of BEE considerations in these circumstances, is arbitrary, irrational and a decision that a reasonable decision maker could not take. See sections 6(2)(e)(iii) and (vi), 6(2)(f)(ii) and 6(2)(h) of PAJA.

See also PHARMACEUTICAL MANUFACTURERS ASSOCIATION OF SA AND ANOTHER: IN RE EX PARTE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2000 (2) SA 674 (CC) at 708 paras [85] and [86]; TRINITY BROADCASTING (CISKEI) v INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA 2004 (3) SA 346 (SCA) at 354 H – 355 A; BATO STAR FISHING (PTY) LTD v MINISTER OF ENVIRONMENTAL AFFAIRS AND OTHERS 2004 (4) SA 490 (CC) at 512 – 513 paras [44] and [45].

[22] For these reasons the decisions of the board to issue limited gaming machine operator licences to Interplay and Thuo and the refusal to grant such licence to Vukani, must be reviewed and set aside. It follows that prayers B1, B2 and B3 quoted above, must be granted. In the result it is unnecessary to consider the many other grounds for review relied upon by Vukani.

[23] The next question is whether the matter should be referred back to the board for reconsideration of all three proposals as should normally be done or whether the board should be

directed to issue a license to Vukani as Vukani urged us to do.

- [24] Section 72 of the Act provides for review by the High Court of a decision of a competent authority such as the board. Section 73 of the Act then provides:

“The court reviewing a decision of the competent authority in terms of section 72, shall if it sets aside a decision, issue an order that the competent authority consider afresh the matter in respect of which the decision was made, unless, in its opinion, exceptional circumstances warrant another order.”

This provision echoes the provisions of section 8(1)(c) of PAJA. In my view the reasons why exceptional circumstances are acquired for the court to substitute its decision for that of an administrative functionary that is vested by statute with the power or discretion in question, are not only the principle of separation of powers, but also that the administrative functionary is generally best equipped by reason of its experience and knowledge of the particular field. Therefor, even if the court finds that there are exceptional circumstances that may justify the court to

substitute its decision for that of the administrative functionary, a court will only do so if it is able to do so.

- [25] There is no *numerus clausus* of what constitutes exceptional circumstances. A case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. See **GAUTENG GAMBLING BOARD v SILVERSTAR DEVELOPMENT LTD AND OTHERS** 2005 (4) SA 67 (SCA) at 75 E – F. In the final analysis

“... The court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and ..., although the matter will be send back if there is no reason for not doing so, in essence it is a question of fairness to both sides.”

See **LIVESTOCK AND MEAT INDUSTRIES CONTROL BOARD v GARDA** 1961 (1) SA 342 (AD) at 349 G.

- [26] Certain guidelines have however evolved over the years in this regard. In **JOHANNESBURG CITY COUNCIL v**

ADMINISTRATOR, TRANSVAAL, AND ANOTHER 1969 (2)

SA 72 (T) at 76 E – G the following was said:

“2. The Court will depart from the ordinary course in these circumstances:

- (i) Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter. This applies more particularly where much time has already unjustifiably been lost by an applicant to whom time is in the circumstances valuable, and the further delay which would be caused by reference back is significant in the context.
- (ii) Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again.”

In **AIROADEXPRESS (PTY) LTD v CHAIRMAN, LOCAL ROAD TRANSPORTATION BOARD, DURBAN, AND OTHERS** 1986 (2) SA 663 (AD), in a passage at 680 E – G that I find particularly instructive, Van Heerden JA said the following:

“But, even if such a decision is set aside, it does not follow that a Court will direct a local board to exercise its functions in a manner determined by the Court, eg by issuing a permit. On the contrary, since the issue of a permit is in the discretion of the board and not of the Court, the ordinary course is to remit the matter to the board for reconsideration. In special cases the Court may, however, order the board to issue a permit. This Court has held that ‘it is a matter of fairness to both sides’: *Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A) at 349. But in the absence of exceptional circumstances such as bias or gross incompetence on the part of the board, or a long delay occasioned by an arbitrary decision, a court will not order the issue of a permit unless the only proper decision of the board on remittal would be to grant the application. Cf *Garda's case supra* at 349; *Johannesburg City Council v Administrator, Transvaal, and Another* 1969 (2) SA 72 (T) at 76; *Vries v Du Plessis NO* 1967 (4) SA 469 (SWA) at 482.”

Although this was a minority judgment, the majority judgment does not effect the validity of this passage. See **COIN SECURITY GROUP (PTY) LTD v SMIT NO AND OTHERS** 1992 (3) SA 333 (AD) at 347 H – J;

ERF ONE SIX SEVEN ORCHARDS CC v GREATER
JOHANNESBURG METROPOLITAN COUNCIL
(JOHANNESBURG ADMINISTRATION) AND ANOTHER

1999 (1) SA 104 (SCA) at 109 D – G.

[27] It will be recalled that in its “informatory affidavit” the board conceded that the proposals of Thuo and Interplay were in fact deficient in the respects alluded to in Vukani’s founding affidavit and that as a result licences should not have been granted to Thuo or Interplay. These deficiencies included fundamental disqualifying shortcomings. I agree with this conclusion of the board.

[28] As I have already pointed out, neither Thuo nor Interplay dispute that Thuo’s proposal submitted to the board was materially defective. In the circumstances it suffices to say that it is undisputed that Thuo’s proposal did not meet the requirement of at least 70% BEE financial interest and that its subsequent attempt to amend its proposal by changing its proposed shareholding, was irregular and ineffective.

[29] As I mentioned already, section 31(2)(a)(i) provides that a gaming machine operator licence shall not be granted unless the board is satisfied that the applicant has appropriate knowledge and experience to operate gaming machines or is able to acquire such knowledge and experience. It is common cause that Interplay has no such knowledge and experience. Interplay's case before the board and in its answering affidavits to the effect that it has the ability to acquire the knowledge and experience to operate gaming machines, hinged particularly on the statement that Interplay will obtain the services of Mr. Peter Heeger. It is common cause that Mr. Heeger has substantial experience in the gambling industry and that his services could provide Interplay with the necessary knowledge and experience. During a closed session with the board, Mr. Eister indicated that Mr. Heeger would join Interplay as its chief executive officer or general manager but that he could not do so at that point in time as he was bound to a restraint of trade agreement with Thuo. The statement was considered by the board.

[30] In an affidavit forming part of Vukani's reply, this is denied by Mr. Heeger in emphatic terms. He said that he never concluded any agreement with Interplay to take up the position of its general manager or any other position. He said that during late 2007/early 2008 he merely assisted Mr. Eister as a favour to a mutual friend and that a salary was never discussed with him by or on behalf of Interplay.

[31] Although this affidavit forms part of the reply, its contents must in the particular circumstances of this case in my judgment be accepted as correct. The affidavit deals with a narrow issue. It was clear that Vukani would and did rely heavily on this evidence. At the hearing before us the veracity of this evidence was not questioned, nor was leave asked to reply thereto. I have no doubt that if Mr. Heeger's evidence was not true, an application to file an affidavit or affidavits to challenge the truth or correctness of the evidence of Mr. Heeger, would have been made. See **MARSHALL v MARSHALL (PTY) LTD AND OTHERS** 1954 (3) SA 571 (N) at 576 B – D.

[32] In the circumstances the board should not have been influenced by the allegation that Mr. Heeger would at least materially contribute to Interplay's knowledge and experience to operate gaming machines. In the absence of this allegation, Interplay in my judgment did not meet the peremptory requirement of section 31(2)(a)(i) of the Act. I should add that Interplay's response hereto was that the board could and did intend to make it a condition of the licence to be issued that Interplay demonstrate the ability to acquire the knowledge and experience. In my judgment this reasoning is flawed. A peremptory requirement for a licence to be granted cannot be relegated to a condition to be fulfilled after a licence has been granted.

[33] I also agree with the linked submission that Interplay did not demonstrate to the board that it would be able to obtain even the R17 million that it eventually said would be required to finance its operations for the first year. The letters from RentWorks Africa (Pty) Ltd and Standard Bank Ltd referred to by Interplay in this regard are vague and contain no commitment to provide any finance. In the result it is

unnecessary to determine whether Interplay also failed to comply with the provisions of section 24(2)(b)(ii) of the Act.

[34] I have already pointed out that the board erred in respect of Vukani's BEE shareholding and that the board not only should have found that Vukani complied with the RFP in this regard, but should have considered it as a factor in its favour. The board however also provided the following further reasons for refusing to grant a licence to Vukani:

- “(b) The Board is not satisfied with the applicant's level of commitment to contribute to the economy of the Free State by sourcing labour, goods and services within the Province. The Applicant indicated that they will provide the Board with Procurement Policies that are in the process of being developed. However, no targets were provided on sourcing of goods and services from previously disadvantaged groups in the Free State Province.
- (c) The Board is not satisfied with the lack of benefits offered to employees beyond the workplace.
- (d) The Board is not satisfied with the proposal on Corporate Social Investment (CSI), especially related to the following:

- (i) Funding of CSI projects are done through the HCI Foundation. The Board is concerned with the fact that Vukani FS may not have an influence on CSI projects and that the projects might therefore not benefit the people of the Free State Province.
- (ii) The Applicant did not specify a definite percentage of what will be spend towards CSI.”

[35] The first point to be made here is that none of these matters constituted non-compliance with the RFP or rendered Vukani’s proposal non-compliant. These were matters considered by the board in its comparative evaluation of the three proposals. As the proposals of Thuo and Interplay are no longer in contention, the question now is whether any of these matters could legitimately, rationally or reasonably justify the rejection of the proposal of Vukani on the basis of individual evaluation thereof.

[36] I think not. The evidence put forward by Vukani in this regard is not disputed by Interplay. The group of companies to which Vukani belongs has been active in the limited gaming machine industry since 1996. Subsidiaries of Vukani hold and operate limited gaming machine operator licences

in five provinces. Vukani's proposal indicated that it was preparing a preferential procurement policy and it attached to its proposal, as an example, the preferential procurement policy of its Limpopo subsidiary. This policy clearly shows commitment to local procurement. Vukani's proposal further indicated that it would request at least two quotations from locally based SMME's for all its procurement requirements during the set-up phase of the business and that it would ensure ongoing support of such SMME's throughout the project. It listed the following items as being available from locally based companies: data cables and plugs, electronic equipment, signage, stationary, promotional items, office equipment and furniture, and upgrading of such. The RFP provides that the sourcing of products and services within the Free State Province is subject to the suppliers meeting the price, quality and other commercial criteria of the applicant. Absolute specificity at the date of submission of the proposal was accordingly not possible. Nevertheless at Vukani's closed session with the board, the board pressed Vukani's representatives to be more specific and to provide the names of specific service providers. Vukani's representatives explained that it was not possible to give names of SMME's

at that time as some of the services that were required, were services that were not necessarily available in the Free State Province. They further explained that the Vukani group in such a situation assisted in the setting up of a local SMME to provide the required services. It was mentioned that, for example, the Western Cape Vukani subsidiary could not find a suitable SMME to revamp the games areas of sites. It accordingly committed a portion of the procurement to enable the establishment of a new locally based black-owned business for this purpose. More than R3 million was subsequently channelled through this SMME. The board indicated to Vukani's representatives that it understood and accepted this explanation.

- [37] Vukani provides a medical scheme for its employees, a provident fund, life and disability insurance including an income protector plan, as well as a company car and cellphone where necessary. Vukani does not provide housing, but pointed out to the board that whilst housing would be a highly relevant consideration in the case of an application for a casino licence, that is not the case in

respect of an application for a limited gaming machine operator licence.

- [38] Vukani's ability to contribute significantly to CSI in the different provinces has been a key feature to the success of its group's licence applications to date. This aspect was not placed in question in one of the five other provinces in which Vukani's subsidiaries are limited gaming machine operators. Vukani's approach is to obtain information at grassroots level from persons residing in the province on specific CSI opportunities. It uses its own staff members and site owners to identify specific needs in the provinces. These opportunities are considered at Vukani provincial level and once they have been considered as suitable for that level, these opportunities are referred to and again considered by Vukani's head office. These opportunities are approved at that level. They are finally referred to the HCI Foundation which is the CSI vehicle for the entire group, including Vukani. The involvement of the HCI Foundation in relation to CSI commitments has been regarded as extremely positive. Vukani's subsidiary's licence in Limpopo was in fact made conditional upon this involvement. HCI Foundation has ensured that each and every one of the group's CSI projects

in the different provinces has been properly scrutinised, executed and evaluated. Vukani and its competitors are focussed on route operating, whilst the HCI Foundation is completely focussed on CSI. Its infrastructure is geared to CSI and it is far better equipped to investigate and monitor different CSI projects than a route operator would be.

[39] The RFP does not require that a specific percentage of what will be spent towards CSI must be indicated. Also, the board did not request Vukani to provide a specific percentage, which Vukani could then have addressed.

[40] In my judgment the board could not factually, reasonably or rationally be dissatisfied in respect of any of the aforesaid matters.

[41] What remains is the belated suggestion that Vukani's proposal should not be (re)considered as a result of non-compliance thereof with the provisions of section 24(2)(b)(i) of the Act. This section provides as follows:

“Any application for a licence shall-

- (a)
- (b) be accompanied by-
 - (i) the approval or representations of the local authority within whose area of jurisdiction the premises in respect of which the application is made, are situated;”

It is common cause that Vukani did not comply with this provision, nor did Interplay.

[42] Counsel for Vukani and Interplay are however agreed that this subsection is inapplicable to an application for a limited gaming machine operator licence, on the basis that in the case of a limited gaming machine operator licence, there are no premises “... in respect of which the application is made”. I agree, for the reasons that follow.

[43] Section 23 of the Act provides for casino licences, limited gaming machine operator licences, limited gaming machine site licences, bingo operator licences, manufacturer, maintenance or supplier licences, totalizator licences, bookmaker licences and race-meeting licences. The essential functions of a limited gaming machine operator or

route operator are to assist in establishing site operators, to provide and maintain gaming machines and related equipment and to provide related services and to ensure the proper distribution of the proceeds of the limited gaming machines. Section 31(3) provides that a limited gaming machine operator licence shall authorise the operation of gaming machines specified in the licence, on the licenced premises of the holders of gaming machine site licences. Section 32 in turn provides that a limited gaming machine site licence shall not be granted unless the board is satisfied that the premises in respect of which the licence is to be granted will not be primarily utilised for the operation of gaming machines and that the limited gaming machine site licence shall authorise the operation and keeping of gaming machines in or on the licenced premises specified in the licence. Section 31(4) provides that the holder of a limited gaming machine operator licence shall link all the gaming machines in respect of which the licence has been granted (that is situated in or on the premises of the holders of the site licences) to an electronic monitoring system referred to in section 42. Electronic monitoring system is defined in section 42(3) as

“any electronic or computer or communication system or device that is so designed that it may be used, or adapted, to send or receive data from gaming devices in relation to the security, accounting or operation of gaming devices.”

For understandable reasons there is no provision as to where the electronic monitoring system should be situated. In my judgment it follows that an applicant for a limited gaming machine operator licence does not make application in respect of premises of its own. The same applies to, for instance, maintenance or supplier licences in terms of section 34.

[44] This position must also be contrasted with that of a casino licence, bingo operator licence, totalizator licence, bookmaker licence and race-meeting licence. A casino must obviously be situated at specific premises. Section 30(2) provides that the board shall only grant a casino licence, *inter alia* if satisfied that the applicant has consulted the local authority, any regional or traditional authority, or any other competent authority of the area where the casino will be or is

situated and that the applicant shall have and maintain sole and exclusive legal possession of the licensed premises. Section 30(3) provides that a casino licence shall authorise the playing of casino games on the licensed premises specified in the licence. Similar provisions are to be found in section 33 in respect of bingo operator licences, section 35 in respect of race-meeting licences, section 36 in respect of totalizator licences and section 37 in respect of bookmaker licences.

[45] The point is perhaps best illustrated by the fact that the board regarded the following letter by an environmental health practitioner of the Directorate of Community and Social Development: Health Management of the Mangaung Local Municipality as compliance with section 24(2)(b)(i) of the Act:

“To Whom It May Concern:

During an inspection conducted on the 11th June 2007, this letter serves to confirm that the premises located at Unit 2 at 65 Kelner Street (Kelner Park) Westdene complied with all the Health Related Regulations.”

[46] It follows that the only compliant and viable proposal before the board was that of Vukani.

[47] It is true that the board was under no obligation to grant any licence and that the RFP provides that if fewer than two applicants are found suitable for licensing as limited gaming machine operators, the board reserves the right to re-advertise and invite other applications. At no stage, however, did the board indicate that it would not grant only one licence in the event of there being only one suitable candidate, nor did the board or Interplay suggest any reason or ground for such stance. On the contrary, the board understandably appeared to be keen to make the benefits of limited gaming machines operations available to the Free State Province and its people. These benefits have already been delayed considerably. The suggestion that the board could refuse to grant any licence simply because there was only one suitable candidate, in the words of Heher JA in the **SILVERSTAR**-case, "... approaches the level of frivolousness."

These matters, as Heher JA said, depend on evidence and not conjecture.

[48] As stated before, the MEC also abides by this court's decision. There is therefore no reason to believe that consultation with the MEC in terms of section 31(5) of the Act could result in any legitimate ground for refusing the award of a limited gaming machine operator licence to Vukani.

[49] Vukani submitted that the board exhibited bias against it and/or in favour of Interplay. In my judgment this was not proved. I do not think that the fact that the firm of attorneys of which Ms Bokwa's husband is a member previously acted in litigation for Lebone Trust, constitutes a conflict of interest or improper relationship or that its non-disclosure was improper or indicative of bias. In my view nothing can be made of the fact that Ms Bokwa at the specific request of Thuo destroyed a letter directed by Thuo to the board. The letter contained a major change of position by Thuo at a very late stage that Thuo probably wisely decided not to proceed with. The passage in the transcription of the record of proceedings before the board where according to Vukani it was suggested that Ms Bokwa is aligned to Interplay, is

rather nebulous and in any event denied by Ms Bokwa. On the principles applicable to the determination of factual disputes in applications, the evidence of Ms Bokwa in this regard must be accepted. The same applies to the evidence denying that Mr. Eister knew about the results of the board's adjudication process before he should have. The "confirmatory affidavit" of Ms Bokwa which forms part of Interplay's answering affidavits in this application, was primarily intended to deal with the allegations of bias made by Vukani in respect of Ms Bokwa and the board. It is correct that in this affidavit Ms Bokwa continued to defend the board's decision in respect of Vukani on grounds that I have found to be untenable. This can however at least equally be explained by incompetence, to which I will revert. The reference during the deliberations of the board to the first name of Mr. Eister (and to the first name of Mr. Mutsi of Thuo) is a red herring that deserves no further consideration. Similarly, the submission that Mr. Eister and the MEC had "... some sort of connection" and that to the knowledge of the members of the board the MEC favoured the award of a licence to Interplay, is in my view based on nothing more than speculation.

[50] Based on what I have said before, I agree with Vukani that the rejection of its proposal by the board is to a large extent beyond comprehension. Whilst I do not agree that this is an indication of bias, it does show incompetence to such a degree that it would in the circumstances be unfair to require Vukani to again be evaluated by the board. The parties represented before me are agreed that six of the members of the board, but not Ms Bokwa, have since been replaced as a result of expiry of their terms of office. I do not think however in the circumstances that this makes any material difference.

[51] As I have pointed out, there has already been a considerable delay in the matter. Re-advertisement of the two (or four) limited gaming machine operator licences would cause a further substantial delay that does not appear to be justified or fair in all the circumstances of this case.

[52] To sum up, Vukani was the only compliant or suitable candidate for award of a limited gaming machine operator licence by the board. The board has never indicated that it would not consider granting a licence in such circumstances.

Fairness requires that the matter should not be reconsidered by the board nor further delayed. In much the same circumstances the court in **SILVERSTAR** held that exceptional circumstances justified an order directing the issue of a licence. See also the unreported judgment of Kroon J in the High Court of South Africa, Eastern Cape, Grahamstown in the matter of **EKUPHUMLENI RESORT (PTY) LTD AND ANOTHER v THE EASTERN CAPE GAMBLING AND BETTING BOARD AND OTHERS**, Case No. 402/2007, delivered on 18 February 2010, paras [86] – [91].

- [53] The matter can also be approached in the following manner. Although each of the three factors mentioned in the quoted passage in the **AIROADEXPRESS**-case, *supra*, individually would constitute exceptional circumstances, all three of these factors are present here. There was gross incompetence on the part of the board, there was a long delay occasioned by an arbitratary decision and the only proper decision of the board on remittal would be to grant the application of Vukani.

[54] For these reasons I became convinced that exceptional circumstances justify an order directing the board to grant a limited gaming machine operator licence to Vukani in respect of 1 000 limited gaming machines in terms of Vukani's proposal. Vukani has correctly accepted that the board may in respect of the licence impose such conditions as the board considers appropriate in terms of section 41 of the Act.

[55] The costs of the application should be borne, jointly and severally, by the parties that opposed the relief claimed, for the duration of the opposition. The board, its chairperson and the MEC filed a notice of withdrawal of opposition on 17 June 2008, whilst Thuo delivered its notice of withdrawal of opposition on 1 June 2009. Vukani and Interplay are agreed that the employment of three counsel was justified. Vukani also asked for an order that costs should include the costs occasioned by its attorneys having to listen to tapes of the proceedings before the board and the costs associated with the engagement of a sound engineer in order to provide a workable transcript thereof. There is no basis upon which Interplay or Thuo could be ordered to pay these costs. Also these costs were incurred after 18 June 2008. Vukani

reached an agreement with the board, its chairman and the MEC that any claim for costs by Vukani against them would be limited to a claim up to and including 18 June 2008.

[56] The following orders are issued:

1. An order reviewing and setting aside the decision of the second respondent to refuse the applicant's application for a limited gaming machine operator licence.
2. An order reviewing and setting aside the decision of the second respondent to grant a limited gaming machine operator licence to the third respondent.
3. An order reviewing and setting aside the decision of the second respondent to grant a limited gaming machine operator licence to the fourth respondent.
4. An order directing the second respondent to forthwith grant a limited gaming machine operator licence to the applicant in accordance with its proposal, on such conditions as the second respondent considers appropriate.
5. An order directing the third respondent, jointly and severally with the first, second and fifth respondents up

to 18 June 2008 and with the fourth respondent up to 1 June 2009, to pay the costs of the application including the costs of three counsel where so employed.

C.H.G. VAN DER MERWE, J

I agree.

E.A. MOOLLA, AJ

On behalf of the applicant: Adv. P.B. Hodes SC
With him:
P. Farlam
Instructed by:
Matsepes Inc
BLOEMFONTEIN

On behalf of the third
respondent: Adv. C.Z. Cohen SC
With him:
B. Knoetze SC and J.G. Gilliland
Instructed by:
Symington & De Kok
BLOEMFONTEIN

/sp