

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case Nr: 1272/2006

Case Heard: 30/10/2006
Date delivered: 6/11/2006
In the matter between:

M M B VAN ROOYEN
Section 1.1

APPLICANT

and

Section 1.2 THE CHAIRPERSON: NORTHERN CAPE
Section 1.3 GAMBLING BOARD FIRST RESPONDENT
Section 1.4 THE MEC FOR FINANCE AND
Section 1.5 ECONOMIC AFFAIRS SECOND RESPONDENT
Section 1.6 PEERMONT GLOBAL (PTY) LTD THIRD
RESPONDENT
Section 1.7 LEITHLO (PTY) LTD FOURTH RESPONDENT
Section 1.8

Coram: Olivier J

JUDGMENT

OLIVIER J:

1. The applicant, mr Matthys Machiel Basson van Rooyen, applied for an interdict barring the first respondent, the chairperson of the Northern Cape Gambling Board (*"the Board"*) from proceeding with public hearings in respect of a casino licence in Kuruman and from *"taking any further steps or doing any such other thing as may be relevant to the casino applications"*, pending the finalisation of his application under case number 770/06 (which has been set down for hearing on 2 March 2007 and will hereinafter be referred to as the *"main application"*).
2. The *"casino applications"* alluded to were the proposals of Peermont Global (Pty) Ltd (the third respondent) and Leithlo (Pty) Ltd (the fourth respondent) for the grant of a licence to operate a casino within the Kuruman area. Neither of these respondents entered opposition to the application for

interim relief (the “*interim application*”). The second respondent, the member of the Executive Council responsible for finance and economic affairs in the Northern Cape Province, eventually withdrew his opposition in the interim application and indicated that he would abide by the Court’s decision.

3. The relief claimed in the notice of motion in the main application is a declaratory order that policy directives laid down by the second respondent were not amended and is still in force, alternatively that the applicant should be furnished with certain information regarding the amendment of such policy. As will also appear in what follows, the policy indicated that the province’s third casino licence would be allocated in the Colesberg area (and not in the Kuruman area).
4. The applicant’s aim with the interim relief was therefore clearly to stop all proceedings in the consideration of the proposals of the third and fourth respondents to be granted the licence to operate a casino in the Kuruman area.
5. The interim application was brought on an urgent basis on 30 October 2006. It was not disputed that the application was indeed of an urgent nature and it was accordingly dealt with as such. After hearing argument and perusing the papers in both applications I dismissed the applicant’s interim application with costs and indicated that my reasons would follow. These are my reasons.

BACKGROUND

6. In Provincial Gazette Extraordinary no 264 of 29 September 1997 the Premier’s Notice No 7 of 1997 was published under the title “*Policy directives for gambling and related matters in the Northern Cape Province*”. In paragraph 1.3 of the introduction thereto it was stated that the directives “*constitute policy determinations within the meaning of section 2 (2) of the Northern Cape Gambling and Racing Act, No 5 of 1996*”.
7. In paragraph 5 it was stated that the maximum permissible number of casino licences in this province would be three, that Kimberley, Upington and Colesberg “*have been identified as suitable for casino developments*” and that licences would therefore be awarded in only those areas.

8. Paragraph 7 of the notice will probably be of specific importance in the main application and reads as follows:
"In order to ensure some degree of certainty to potential investors, the provincial government undertakes the following:
 - a) *the spirit and context of current provincial policy will remain for a minimum of ten (10) years, unless national norms require otherwise, and*
 - b) *there will be no change in levies or fees as set out in schedule 3 for a minimum of five (5) year period."*

9. On 1 February 1999, and by means of a similar notice, proposals for a casino licence for Colesberg were invited. It was common cause that there had been no reaction to this invitation.

10. As long ago as during 2002 attorneys (purporting to act on behalf of Desert Dune Hotel and Casino) approached the then Premier of this province and the Board with a suggestion that the licence which was originally allocated to Colesberg be relocated to Kuruman, where their client was interested in operating a casino.

11. After numerous enquiries they were informed, on 22 November 2005, that a decision had been taken to relocate the third licence from Colesberg to Kuruman. A copy of the relevant resolution of the Executive Council of this province can be found in the papers in the main application. It is dated 14 September 2005 and reads as follows:

"THIRD CASINO LICENCE
RESOLVED:-
That the Executive Council approves the granting of the third casino licence to Kuruman."

(The other two licences having been allocated to Kimberley and Upington.)

12. Thereupon the attorneys on more than one occasion attempted to obtain information about this decision, as well as copies of certain documentation.

The applicant's case was that, in order for him to submit a proposal for the licence for the Kuruman area, he was entitled to such information to enable him to ensure that the abovementioned directives had been properly amended and that the process of relocating the third licence to Kuruman was legally valid. The main contention on his behalf in this regard was that he was required to submit a non-refundable deposit of R500 000,00 with his proposal for the licence and that it could not be expected of him to make such a huge financial commitment without the assurance that the relocation of the third casino licence was valid.

13. The requests for information elicited no response (as was sadly also the case with a substantial part of the other correspondence which the attorneys had directed to, **inter alia**, the Premier's office).
14. On 26 December 2005 (and again by means of a notice published in a Provincial Gazette) proposals for a casino licence for the Kuruman area were invited. On 15 February 2006 the attorneys (once again stating that they were acting on behalf of Desert Dune Hotel and Casino) addressed a letter to the Board in which it was stated that this notice had come to their attention "*recently*".
15. As will be referred to again in what follows, it is the applicant's case that the attorneys had in fact been acting on his behalf. What is of importance for the moment is that the applicant had therefore by then been aware of the invitation for proposals for the licence in the Kuruman area. In fact, the initial closing date (for the submission of such proposals) of 28 February 2006 was extended to 31 March 2006 at the request of the same attorneys.
16. It is also of interest to note that, in the letter of 15 February 2006, the attorneys made the unqualified statement that they had been instructed "*to draft and submit an application (for the licence)*". No mention was at that stage made of the earlier requests for information.
17. No such proposal for the licence was, however, submitted before the extended closing date or behalf of either the applicant of Desert Dune Hotel and Casino. Instead the applicant persisted in his attitude that he was entitled to the information regarding the relocation of the licence before submitting a proposal and he eventually filed the main application on 27 June 2006. It is clear that a deliberate decision had been taken not to

submit a proposal (for the licence).

18. On 19 October 2006 the first respondent published (in a local newspaper) a notice that public hearings were to take place on 31 October 2006 and 1 November 2006 in respect of the proposals of the third and fourth respondents. The first and second respondents thereupon refused to furnish an undertaking not to continue with the hearings or with the consideration of the proposals of the third and fourth respondents (pending the finalisation of the main application) and the applicant then approached the Court with the interim application.

REQUIREMENTS FOR INTERDICT

19. “It is trite law that in order to obtain an interim interdict an applicant has only to show:
 - a) *a right which, though **prima facie** established, is open to some doubt;*
 - b) *a well-grounded apprehension of irreparable injury;*
 - c) *the absence of ordinary remedy;*

and that the balance of convenience is in favour of granting interim relief”

(see **Video Rent and Another v Flamingo Film Hire** 1981 (3) SA 42 (C) at 44E)

RIGHT

20. It is not required of or appropriate for a Court in an application of this nature to consider the merits of the main application with a view to make a final and binding ruling in respect thereof (see **Mariam v Minister of the Interior and Another** 1959 (1) SA 213 (T) 218C-E and **Holtzhausen and Another v Gore NO and Others** 2002 (2) SA 141 (C) at 159C-D, and compare **Geyser v Nedbank Ltd and Others In re Nedbank Ltd v Gyser** 2006 (5) SA 355 (W) at 360A-E).
21. The crucial question for the purposes of the interim application was whether the applicant **prima facie** had a legal right which he was entitled to protect or enforce in the main application and which could be frustrated or prejudiced should the hearings take place or should any further steps be taken regarding the third and fourth respondents’ applications for the casino licence.
22. Mr Sibeko, who appeared on behalf of the first respondent, raised the

question whether the applicant had shown that he was, in his own name, entitled to the relief that he is claiming in the main application. This would obviously also have affected his **locus standi** in the interim application.

23. Mr Sibeko's point in this regard was that it appeared from the annexures to the applicant's founding affidavit in the main application that "*his*" attorneys had, in their correspondence, throughout stated that they were acting on behalf of "*Desert Dune Hotel and Casino*". In his founding affidavit in the interim application the applicant simply described himself as "*an adult businessman*". In reply, and in reaction to the first respondent's remarks regarding the applicant's **locus standi** (and the question whether he, in his personal capacity, had a right which had to be protected), the applicant referred to his founding affidavit in the main application, in which he had simply averred that he was in the process of establishing a company which would be named "*Desert Dune Hotel and Casino*".
24. Even then the applicant did not, however, state what his interest in the company was going to be and how he in his personal capacity could be affected by the events pertaining to the relocation of the third licence. It is, in any event, trite that an applicant should make out his case regarding, **inter alia, locus standi** in the founding affidavit (see **Eagles Landing Body Corporate v Molewa NO and Others** 2003 (1) SA 412 (T) at 423I-424H).
25. It is so that a copy of the founding affidavit in the main application was annexed to the applicant's founding affidavit in the interim application, but the applicant (in his founding affidavit in the interim application) never referred thereto in regard to his **locus standi** or in an attempt to show why he, in his personal capacity, had a right which had to be protected (see **Swissborough Diamond Mines v Government of the RSA** 1999 (2) SA 279 (T) at 324F-G). Even if he had, however, one would still have had to speculate about what exactly his interest in the company was going to be (and this was not cleared up in reply).
26. Although it might be so that the applicant's attorneys had been instructed to effect the establishment of a company by such a name, it is clear that such a company has not yet been formed. Insofar as the intention might have been to let the company submit a proposal for the licence, this would therefore in any event not have been possible (and is still not possible),

regardless of whether the information sought in the main application had been supplied before the closing date or not.

27. It was never explained why the attorneys would, since as long ago as in April 2002, have stated repeatedly that they were acting on behalf of Desert Dune Hotel and Casino, if they had known very well that no such legal entity existed. The question then is whether there was (and is) a firm or an association with this name (which has not yet been registered as a company) and, if so, what the applicant's interest therein is.

28. In reply the applicant also stated that he would in any event as an individual and a *"law abiding tax paying citizen of a democratic South Africa have a constitutional right"* to approach the Court to ensure that the Board acts *"in a transparent and fair manner"*.

29. Insofar as the applicant might in this regard have been relying upon the provisions of section 38 of the Constitution he would still have had to prove that, as an individual and in his personal capacity;

“(a) he has a direct and substantial interest;

(b) *in the right which is the subject-matter of this litigation;*

(c) *which is not merely a commercial or financial interest, but which constitutes a legal interest; and*

(d) *which could be prejudicially affected by the outcome of the litigation.”*

(see **Vandenhende v Minister of Agriculture, Planning and Tourism, Western Cape, and Others** 2000 (4) SA 681 (C) at 690I-691A and 694H-695I)

30. The applicant did not in my view make out a case that he as an individual and in his personal capacity had the required *"interest"* to have **locus standi**, or in fact to show which of his constitutional rights (as an individual) had been infringed upon or was being threatened.

31. The applicant in any event failed to show that his right (assuming that he had such a right) to approach the Court in the main application, or whatever rights he intended to enforce or protect in the main application, would be prejudiced if the hearings were continued or if any further steps were taken

in the consideration of the third and fourth respondents' proposals. Even if the Board should in the meantime grant the licence to either the third or the fourth respondent, the applicant would still have the right to proceed with the main application and could then apply for the setting aside of the grant of the licence (provided of course that he can make out a case that the process which had been followed in relocating the licence had rendered the Board incompetent to grant any licence).

32. As regards the merits of the main application the applicant's case seems to be that the relocation of the third licence to Kuruman would not have been competent on a proper reading of the directives as they stand, that an amendment of the directives themselves would therefore have been a prerequisite and that such an amendment would have had to be published (like the directives were).
33. When regard is had to the papers in the main application it is clear that there had been no interest at all in the casino licence for Colesberg and that a detailed investigation and recommendations had preceded the decision taken by the Executive Council to relocate the third licence to Kuruman. The findings that were made in the investigation (and the recommendations) have expressly been adopted as reasons for the decision to relocate the third licence.
34. It also appears from the papers in the main application that there had been a danger of the national government withdrawing the third casino licence (which it had originally allocated to this province), which would obviously have resulted in a loss of all the benefits of such a licence, not only to the provincial government, but also to the inhabitants of the Kuruman area.
35. In my view these facts **prima facie** necessitated the relocation of the licence. The relocation of the third licence to an area where it would best benefit the province and its inhabitants would certainly have been in accordance with "*national norms*" (see paragraph 7 (a) of the directives), which would apparently have entitled the second respondent to relocate the third licence without any amendment.

36. Mr Coetzee, who appeared on behalf of the applicant, could not refer me to any prescribed requirement that such a decision to relocate would have had to be published (let alone be published in the form of an amendment of the policy directives).
37. As regards the contention that it should have been brought to the notice of the public that the third licence had been relocated, Mr Sibeko drew my attention to the fact that, in the notice which had been published on 26 December 2005 (and in which proposals for the Kuruman licence were invited), the following was expressly stated:
- “11. **Maximum permissible number of casino licences to be issued in the Province in terms of policy directives and other related matters in the Province.**
- A maximum of 3 casino licences will be issued in the Northern Cape.*
- The following location has been identified as suitable for casino development.*
- In the Policy Directives for Gambling and related matters published under Premier's Notice 7 on (sic) 29 December 1997, Kimberley, Upington and Colesberg were identified as suitable for casino development. Due to the failure to attract investment in the Colesberg area, the Colesberg casino licence has been relocated to Kuruman including a surrounding 100 km zone.”*
38. This statement would have made it very clear to the public that the licence had been relocated. In my view the applicant has therefore, quite apart from the problem regarding his **locus standi** (in both the applications) and the question whether he in his personal capacity has a right to be protected, not made out a case that the fact that the 10 year period mentioned in paragraph 7 (a) of the directives had not yet expired had necessitated a formal and published amendment of the directives.
39. The applicant's case was in essence based upon the premise that he would have forfeited the R500 000,00 submittal fee (that the notice of 26 December 2005 required proponents to pay) if he had submitted a proposal and it later appeared that the licence had not validly been relocated.
40. Even if it had to be assumed, for the moment, that the process had been flawed (and even invalid) the question would still remain whether any later

acts and decisions (like for instance the granting of a licence) would also be invalid (compare **Oudekraal Estate (Pty) Ltd v City of Cape Town and Others** 2004 (6) SA 222 (SCA) at 244B-D).

41. The applicant did not even attempt to make out a case to the effect that, had he submitted a proposal and had the licence been awarded to him (or to Desert Dune Hotel and Casino), the award of the licence would have been invalid because of the flawed procedure followed in relocating the licence.
42. Even if it is to be assumed, however, that this would indeed have been the result, the contention that the submittal fee would in such circumstances be “*non-refundable*” was never substantiated. When perusing the contents of the notice of 26 December 2005 myself, the closest I could find to any provisions which could arguably have this result is paragraph III C of Part two of the notice, which reads as follows:

“All costs and expenses incurred by Proponents and their Participants relating to their proposals will be borne by the Proponents. The Northern Cape Gambling and Racing Board is not liable to pay such cost and expenses or to reimburse or to compensate Proponents and their Participants ***under any circumstances, including the rejection of any or all proposals or the cancellation of the RFP or the Project itself.***” (My emphasis)
43. In passing I have to say that I find it strange that the applicant would have been prepared to risk forfeiting a sum of R500 000,00 in the event of the cancellation of the request for proposals or the cancellation of the project itself, but not on the basis of the relocation of the licence proving to be fatally flawed.
44. Be that as it may, the question would be whether the phrase “*under any circumstances*” would justify such a forfeiture in circumstances where it turns out that the relevant authorities had themselves been instrumental in the fact that a licence could not have been granted validly.
45. I find it completely inconceivable that this could ever be so. It would mean that the party who had been responsible for the fact that a licence could not have been legally granted (but who had nevertheless invited proposals for

the granting of such a licence) would in effect benefit from its own failure to follow the correct procedure prior to such invitation. Such a result would indeed be absurd and such an interpretation of the words “*under any circumstances*” should therefore not be applied.

46. It is equally inconceivable that the parties to paragraph III C of the notice could have intended the phrase to also cover the case where the granting of a licence eventually turns out to have been invalid, and indeed because of the fact that one of them (the Board) had in effect never been competent to invite proposals for a licence in the Kuruman area (compare **Galloon v Modern Burglar Alarms (Pty) Ltd** 1973 (3) SA 647 (C)).
47. It would seem as though most of the information mentioned in the alternative claim in the main application is at this stage at the disposal of the applicant and it was in my view not explained, either by the applicant himself or in argument on his behalf, how such information (or in fact any outstanding information) is going to assist the applicant in any way.

IRREPARABLE INJURY

48. The applicant also failed to show that, should the hearings continue or further steps be taken regarding the consideration or granting of the licence, it would cause the applicant irreparable harm or injury.
49. Should he be able, either in the main application or at a later stage, to prove that the relocation of the licence to Kuruman is flawed to such an extent that such further steps could not have been validly taken he could apply for the review of such steps.

BALANCE OF CONVENIENCE

50. The “*harm*” of later having to approach the Court on review is by far outweighed by the income (in the form of levies and fees) which provincial government would inevitably forfeit through a delay in the granting of the licence and the job opportunities and economic benefits which would in the meantime have had to be put on hold; not even mentioning the harm which would have resulted should the national government have withdrawn the third licence.

CONCLUSION

51. It was for these reasons that I came to the conclusion that the applicant was not entitled to the relief claimed in the interim application.
52. The unfortunate fact that the letters by the applicant's attorneys were on a number of occasions not even responded to is, although deplorable, not relevant to the facts of the interim application and there was consequently no reason why the costs of the application should not follow the result.

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

For the applicant: **Adv W Coetzee**
Instructed by: **Duncan & Rothman, KIMBERLEY**

For 1st Respondent: **Adv L T Sibeko**
Instructed by: **Job Attorneys, KIMBERLEY**