

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case No: 11/2023

Heard: 29 January 2024

Judgment delivered: 26 April 2024

Reportable: YES / **NO**

Circulate to Judges: YES / **NO**

Circulate to Regional Magistrates: YES / **NO**

Circulate to Magistrates: YES / **NO**

In the matter between:-

DESERT PALACE HOTEL RESORT (PTY) LTD

APPLICANT

and

THE NORTHERN CAPE GAMBLING BOARD

FIRST RESPONDENT

DYMACURE (PTY) LTD T/A CRAZY SLOTS (PTY) LTD

NORTHERN CAPE

SECOND RESPONDENT

GOODFELLAS RESTAURANT

THIRD RESPONDENT

CORAM: WILLIAMS J ET STANTON J

JUDGMENT

Stanton J:

INTRODUCTION: -

[1] In this review application the applicant seeks that: -

1.1 The following decisions of the first respondent, the Northern Cape Gambling Board (*“the Gambling Board”*) be set aside: -

1.1.1 The decision to grant a gambling licence to the second respondent, Dymacure (Pty) Ltd (Pty) Ltd trading as Crazy Slots Northern Cape (*“Crazy Slots”*) to provide limited pay-out machines for play at the premises situated at Erf 3[...], Shop No. 1, [...] C[...] Street, Upington (*“the gambling premises”*); and

1.1.2 The decision to issue a gambling licence to Crazy Slots to provide for limited pay-out machines for play at the premises;

(“the decisions”)

1.2 The decisions be set aside and referred back to the Gambling Board for reconsideration; and

1.3 The Gambling Board be ordered to pay the costs of the application, alternatively that Crazy Slots and the third respondent, Goodfellas Restaurant (*“Goodfellas”*) be ordered to pay the costs of the application together with the Gambling Board in the event of them opposing the application.

[2] No relief is sought against Goodfellas and it was only cited for any interest it may have in the application.

[3] The applicant's grounds for review are: -

3.1 The licence was issued in contravention of Regulation 7(c) of the Northern Cape Gambling Regulations 2010 (*"the Regulations"*);

3.2 The presumption in section 5(3) of the Promotion of Administrative Justice Act, Act 3 of 2000 (*"PAJA"*) was triggered as the decisions were taken without good reason in that the Gambling Board failed to give reasons upon request;

3.3 The Gambling Board did not ponder the relevant considerations, but took irrelevant and unsubstantiated information into consideration, which resulted in the decisions being taken arbitrarily and capriciously and not being rationally connected to the purpose of the Northern Cape Gambling Act 2008 (*"the Act"*) and the Regulations; and

3.4 The Gambling Board was biased against the applicant.

[4] The essence of the applicant's case is that the Gambling Board incorrectly accepted that the gambling premises is situated more than 500 meters away from the Upington High School (*"the school"*) due to the fact that the Gambling Board did not measure the distance, and if it did, that it was measured with an incorrect method and from incorrect positions.

[5] It is common cause between the parties that in terms of Regulation 7(c) the Gambling Board does not have a discretion to grant any gambling licence if the premises from which the licenced activities will take place are, in the opinion of the Gambling Board, within 500 metres of a school or a place of worship.

[6] According to the applicant: -

- 6.1 The school, as measured by Mr HG van Zyl, a qualified and registered land surveyor is situated: -
- 6.1.1 341,56 meters, as the crow flies, between the closest points of the borders of the school and the gambling premises, the border being the border of the land on which the buildings are situated; or
- 6.1.2 461,75 meters as a person would walk by road between the closest points between the school and the gambling premises;
- 6.2 The Gambling Board did not consider the relevant consideration that the premises is situated within 500 meters of the school and took irrelevant and unsubstantiated information placed before them at the public enquiry, namely:-
- 6.2.1 The site inspection report compiled by Mr Sekamoeng on 10 March 2020 (*“the site inspection report”*);
- 6.2.2 The report to the Gambling Board, dated 19 April 2022 (*“the report”*); and
- 6.2.3 The licencing and compliance committee’s recommendations to the Gambling Board, dated 23 May 2022 (*“the recommendations”*);
- 6.3 The Gambling Board was biased towards the applicant as a decision was initially taken without a public hearing as required by the Act, and when the public hearing was later held at the urging of the applicant, the Gambling Board had no interest in genuinely addressing the issue of the distance from the school, elected not to summon any person to testify in regard to the distance, required no evidence of the actual distance and ignored the information of Mr

Van Zyl placed before them. Furthermore, the Gambling Board emphasised that the applicant is objecting to the application as it merely wishes to eliminate competition; and

6.4 As a result of the above, the decisions were taken arbitrarily and capriciously and were not rationally connected to the purpose of the Act and Regulations or the information tendered to the Gambling Board.

[7] Subsequent to the filing of the incomplete record, in respect of which the applicant decided not to file an application to compel, the applicant filed a supplementary affidavit in which the following additional averments are made:-

7.1 The site inspection report states that gambling operations will have no impact on the surrounding area, churches and schools. According to the report, Mr Sekamoeng did not specify having taken any measurements whether there are any churches or schools within 500 meters of the premises or that the premises complies with Regulation 7(c);

7.2 On 19 April 2022, the Acting Manager: Licencing and Investigation, in a letter addressed to the Gambling Board, stated that: *“Site inspection was conducted on the site (see attached site inspection report) and the following findings were made*

There was no school or church found within 500 m of the site.”;

7.3 According to the minutes of the public hearing conducted on 21 April 2022 (*“the minutes”*):-

7.3.1 The measurements taken by Mr Van Zyl were handed in together with his *curriculum vitae* and his registration certificate;

7.3.2 Crazy Slots handed in certain documents purporting to reflect two measurements, without the name or qualification of the person who took the measurement and without an explanation from where to where the two measurements were taken;

7.3.3 Mr Sekamoeng was present at the meeting and merely confirmed what is contained in site inspection report, without explaining that he measured the distance; and

7.4 Whilst the recommendations reflect that discussions took place pertaining to the agreed method and tools to take measurements, there is no confirmation to state that Mr Sekamoeng did in fact measure the distance.

[8] The Gambling Board opposed the application and on 05 April 2023 filed an answering affidavit, deposed to by Mr VG Mothibe, its Chief Executive Officer. The Gambling Board's grounds for opposing the application are that:

8.1 The Gambling Board did not contravene Regulation 7(c) as it measured the distance between the school and the premises with a measuring wheel and found it not to be within 500 meters of each other;

8.2 The measurements done by Mr Van Zyl were not done correctly as the Act does not require that the radius method should be used;

8.3 The measurements done by Mr Van Zyl were not done correctly as the Gambling Board uses a SABS measuring wheel measuring from the entry point of the proposed gambling site to the entry point of the church or school; and

8.4 The decision to grant and issue the licence was reasonable, justifiable and procedurally fair.

[9] Crazy Slots opposed the application on the basis that: -

9.1 The applicant filed the review application solely to prevent competition and to protect its own financial interests;

9.2 According to its own measurements, done by Mr A Pule, Crazy Slots's provincial general manager, using a measuring wheel from the main entrance of the school and from the corner boundary fence of the school to the gambling premises, the distance between the school and the gambling premises exceeds 500 meters;

9.3 The Gambling Board took relevant factors into consideration when it relied on the site inspection report and cannot be criticised for relying on the wheel as a measuring tool; and

9.4 The boundaries of the properties on which the premises are situated should not be used as the points to measure from, but on a proper interpretation of Regulation 7(c), taking a sensible business-like approach and the purpose of the legislation into consideration, the distance should be measured from the main entrance of the school to the main entrance of the Goodfellas Restaurant.

CRAZY SLOTS'S POINT *IN LIMINE*: -

[10] Crazy Slots also raised a point *in limine* that the requested relief cannot be granted as the licence was awarded to Goodfellas and not to Crazy Slots, and as such the relief should have been requested against Goodfellas. In support of its contention, it relies on the following: -

10.1 The applicant stated in its objection dated 15 April 2020 that it objects to the site application at "Erf 3[...], Shop number 1 "Good

Fellas Restaurant” Upington for Limited payout machines by Site owner Johan Ming Hui Lu.”;

- 10.2 The advertisement in the Government Gazette indicates that Goodfellas is the applicant for the licence;
- 10.3 In the application for the licence, the business owner of Goodfellas is described as Johan Ming Hui Lu;
- 10.4 The applicant, in its correspondence dated 16 February 2022, objected to the application at the premises for “*Good Fellas Restaurant*”.

[11] The fallacy of Crazy Slots’s argument is: -

- 11.1 The report states that in January 2020 the Gambling Board received an application from Crazy Slots on behalf of Good Fellas Restaurant;
- 11.2 In its answering affidavit, the Gambling Board explained that the “*Second Respondent applied “for and on behalf of the Third Respondent for a Site Operator Licence.”;*
- 11.3 The minutes provide that a site application was received from Crazy Slots on behalf of Good Fellas and it records that Mr A Pule of Crazy Slots attended the meeting as the *applicant for the licence*;
- 11.4 In its answering affidavit, the Gambling Board admits that Crazy Slots applied for the gambling licence to be issued at the gambling premises;
- 11.5 The recommendations state that the Gambling Board received an application from Crazy Slots on behalf of Good Fellas Restaurant; and

11.6 The Site Operators License Application was submitted by Crazy Slots.
(my emphasis)

[12] In my view, the license was therefore granted to Crazy Slots on behalf of Goodfellas. The point *in limine* is unmeritorious and stands to be dismissed.

THE APPLICATIONS TO STRIKE OUT: -

[13] The Gambling Board did not attach an affidavit by Mr Sekamoeng to its answering papers.

[14] On 15 August 2023, the applicant filed an application to strike all paragraphs in Mr Mothibe's answering affidavit that make reference to the measurement done by Mr Sekamoeng on the basis that, in the absence of a confirmatory affidavit by Mr Sekamoeng, it constitutes inadmissible hearsay evidence. In the alternative, the applicant requested that the matter be referred to oral evidence to enable Mr Sekamoeng to give evidence as to whether he had measured the distance between the gambling premises and the school, and if so, what that distance was, which method he had used, the points from which the measurements were done and whether it was done on the correct route ("*the striking out application*"). It is apposite to remark that no reference is made in Mr Mothibe's answering affidavit to Mr Sekamoeng being the employee who took the measurements, but rather that an "*inspector*" had attended to same.

[15] The Gambling Board only filed a notice of intention to oppose the striking out application, but did not file an answering affidavit. Crazy Slots, however, did, and whilst admitting that Mr Mothibe's evidence amounts to hearsay, it submitted that the Gambling Board made its decision to award the licence on information placed before it, including the site inspection report and the recommendations made therein and that the striking out application should be dismissed.

Mr Sekamoeng's confirmatory affidavit:-

- [16] On 22 January 2024, the Gambling Board filed a confirmatory affidavit deposed to by Mr Sekamoeng in which he merely states that he had perused Mr Mothibe's founding affidavit and that he confirms the contents thereof in so far as it pertains to him. He thus failed to confirm that he had measured the distance between the gambling premises and the school, what that distance was, which method he had used, the points from which the measurements were done and whether it was done on the correct route.
- [17] Mr ES Grobbelaar, on behalf of the applicant, argued that, in the absence of an application requesting condonation for the late-filing of the confirmatory affidavit, same should be struck out. Mr WJ Coetzee SC, on behalf of the Gambling Board, confirmed that he holds no instructions pertaining to the filing of the confirmatory affidavit or the striking out application. Mr M Smith, on behalf of Crazy Slots, submitted that the striking out application is of no consequence seeing that the Gambling Board had taken the decision based on the site inspection report and the recommendations made therein.
- [18] In the absence of a condonation application explaining the reason for the lateness and demonstrating good cause, Mr Sekamoeng's confirmatory affidavit was struck out.

Mr Mothibe's founding affidavit: -

- [19] Section 3(1)(c) of the Law of Evidence Amendment Act, Act 45 of 1998 ("the LEAA") provides: -

"Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless

(a) ...

(b) ...

- (c) *the court, having regard to –*
- (i) *the nature of the proceedings;*
 - (ii) *the nature of the evidence;*
 - (iii) *the purpose for which the evidence is tendered;*
 - (iv) *the probative value of the evidence;*
 - (v) *the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*
 - (vi) *any prejudice to a party which the admission of such evidence might entail; and*
 - (vii) *any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice."*

[20] It is trite that a Court should have regard to the collective and interrelated effect of all the considerations in paragraphs (i) to (iv) of section 3(1)(c) and any other factor that should, in the opinion of the Court, be taken into account. The section introduces a high degree of flexibility to the admission of hearsay evidence with the ultimate goal of doing what the interests of justice require.¹

[21] I agree with Mr Grobbelaar that the probative value of the evidence that the distance was measured by Mr Sekamoeng, how he measured it, from what points the measurement was taken, along which route he measured and

¹ Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security [2012] 2 All SA 56 (SCA) para 31.

what he found the distance to be, depends on the credibility of Mr Sekamoeng and not Mr Mothibe. In the absence of any application that the hearsay evidence should be admitted, addressing the factors set out in section 3(1)(c) of the LEEA, the evidence sought to be struck out is therefore inadmissible hearsay evidence; and the application to strike out is granted.

- [22] In view of the successful striking out application, it is unnecessary to deal with the applicant's alternative request that the matter should be referred for oral evidence with regard to the measurement of the distance.

WAS REGULATION 7(c) CONTRAVENED?

- [23] The application therefore stands to be determined on the remaining allegations contained in the answering affidavit and the content of the site inspection report, the report and the recommendations.

- [24] The Gambling Board's allegation that Regulation 7(c) was complied with is, however, not bolstered by the following: -

- 24.1 The site inspection that curiously refers to the gambling premises as "*Cnr Brug & Street, Hop 1, Upington*" and not to the gambling premises; and that records that: -

"4x. Impact on surrounding area, churches and Schools

None";

- 24.2 The report, which in part reads: -

"Site inspection was conducted at the site (see attached site inspection report) and the following findings were made

- *There was no school or church found within 500m from the site."*

24.3 In the final instance, the recommendation that states: -

“Site inspection was conducted on the site (see attached site inspection report) and the following findings were made

- *There was no school or church found within 500m from the site and the site was found to be compliant in terms of regulation 7c”*

[25] In view of the fact that the site inspection report refers to a different premises and does not contain any evidence that the distance was measured by Mr Sekamoeng, how he had measured it, from what points the measurement was taken, along which route he had measured and what the distance was determined to be, I can come to no other conclusion than that the Gambling Board did not measure the distance between the school and the gambling premises. On this basis alone, the application succeeds.

[26] In view of my finding above I am also persuaded that the Gambling Board ignored relevant factors, but took irrelevant factors into consideration.

SECTION 5(3) OF PAJA: -

[27] As I have already concluded that the decisions fall to be set aside, it is unnecessary to make a determination as regards the applicability of the provisions of section 5(3) of PAJA.

CONCLUSION: -

[28] The applicant is, in my view, entitled to the relief it seeks. Accordingly, the review must succeed and the decisions taken be declared unlawful; and set aside.

[29] As a general rule, a court will not substitute its own decision for that of the public authority, but will refer the matter back for a fresh decision. One must guard against an unwarranted usurpation of the powers entrusted to the public authority by the legislature.²

[30] The parties furthermore agreed that, if the applicant is successful, it would be just and equitable to remit the matter back to the Gambling Board, with or without direction.

COSTS: -

[31] There is no reason why costs should not follow suit, and no arguments to the contrary were made.

ORDER: -

In the result, the following order is made: -

1. The decision of the Northern Cape Gambling Board to grant a gambling licence to the second respondent to provide limited pay-out machines for play at the premises situated at Erf 3[...], Shop No. 1, [...] C[...] Street, Upington, is reviewed and set aside;
2. The decision of the Northern Cape Gambling Board to issue a gambling licence to the second respondent to provide for limited pay-out machines for play at the premises situated at Erf 3[...], Shop No. 1, [...] C[...] Street, Upington, is reviewed and set aside;
3. The matter is referred back to the Northern Cape Gambling Board to deal with in accordance with all applicable statutory and other requirements; and

² Bato Star fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others [2004] ZACC 15; 2004 (4) SA 490(CC) 514G-B (2004(7) BCLR 687 (CC).

4. The first and second respondents are ordered to pay the costs of the application, jointly and severally, the one paying, the other to be absolved.

STANTON J

I concur

WILLIAMS J

Obo the Applicant:	Adv E.S. Grobbelaar
On instruction of:	Morkel de Villiers c/o Engelsman Magabane Inc.
Obo the First Respondent:	Adv. W.J. Coetzee SC
On instruction of:	The State Attorney

Obo the Second Respondent:	Adv. M. Smit
On instruction of:	Cliffe Dekker Hofmeyr Inc. c/o Van de Wall Inc.