



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.



SIGNATURE

DATE: 30 May 2024

Case No. 2019/11734

In the matter between:

PHUMELELA GAMING AND LEISURE LIMITED

Applicant

and

**MEMBER OF THE EXECUTIVE COUNCIL FOR ECONOMIC
DEVELOPMENT, ENVIRONMENT, AGRICULTURE AND
RURAL DEVELOPMENT (GAUTENG)**

First Respondent

PREMIER OF GAUTENG PROVINCE

Second Respondent

GAUTENG GAMBLING BOARD

Third Respondent

and

4RACING (PTY) LTD

Intervener

JUDGMENT

WILSON J:

- 1 Until 1 December 2021, the applicant, Phumelela, held an exclusive licence to conduct horseracing totalisators and betting pools in the Gauteng province. The licence was granted by the third respondent, the Gambling Board. A totalisator is a technical term for a tote board, which is a device that tabulates the nature and number of bets placed on a particular horserace. As holder of the totalisator licence, Phumelela was in effect solely responsible for the conduct of horseraces in Gauteng and the bets that may be placed on them.

- 2 Organising horseraces is an expensive business. Until 1 April 2019, regulations 273 and 276 of the Gauteng Gambling Regulations, 1997 provided Phumelela with what was in effect a subsidy of its horseracing operations. Regulation 273 stated that there would be a “levy. . . payable for the benefit of the holder of a totalizator licence”. The levy was 6% of the value of each bet placed on a horserace with bookmakers in Gauteng. Regulation 276 required that half each levy must be paid over to Phumelela, in its capacity as the totalisator licensee. The third respondent, the Gambling Board, would collect the levy from bookmakers and then pay out half of the levy to Phumelela, less an administrative fee. The nett subsidy Phumelela received amounted to just over R77 million in 2017.

- 3 On 1 April 2019, the first respondent, the MEC, amended the Gambling Regulations. One of the amendments he made was to regulation 276. Its effect was to eliminate Phumelela’s share of the proceeds of the betting levy. Phumelela’s 50% share of the proceeds of the levy was reduced to zero. This meant that Phumelela could no longer rely on the betting levy to defray any of

its expenses in putting on horseraces. Phumelela sought to restrain the implementation of the amendment pending a review of the MEC's decision to amend regulation 276, but its urgent application to do so was not ultimately persisted with.

- 4 Phumelela did, though, persist with its review of the amendment under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). That review is now before me. If the review is successful, Phumelela seeks an order directing the respondents to pay to it the amount of money it would have received from its share of the betting levy had the regulation not been amended.
- 5 On 1 December 2021, the Intervener, 4Racing, took over the totalisator licence from Phumelela. It seeks leave to intervene in these proceedings. It attacks the rationality of the amendment. It, too, seeks an order that it be paid the amount of money which would have fallen due to it had the regulation not been amended.
- 6 The MEC and the Gambling Board oppose Phumelela's application, and they ask me to refuse 4Racing's application for leave to intervene. They say that 4Racing lacks a direct and substantial interest in the relief Phumelela seeks; that PAJA does not apply to reviews of decisions to amend regulations; that the MEC's decision to amend the regulations was nonetheless perfectly reasonable and lawful; and that, even if it was not, I should not order the repayment relief Phumelela seeks. In case I should find that the amendment to regulation 276 was unlawful, the MEC and the Gambling Board also bring a counter-application to declare the pre-amendment regulation

unconstitutional to the extent that it facilitates the payment of a share of the betting levy to the holder of the totalisator licence.

7 In my view, 4Racing is plainly interested in these proceedings, and its application for leave to intervene must be granted. I am also satisfied that the amendment to regulation 276 constituted unlawful administrative action that falls to be reviewed and set aside. I am not convinced by the constitutional attack on the pre-amendment regulation, and I have concluded that the counter-application must be dismissed. While I am reluctant to order the repayment relief, it seems to me that the decision of the Constitutional Court in *Casino Association of South Africa v Member of the Executive Council for Economic Development Environment Conservation and Tourism* 2024 (5) BCLR 611 (CC) (“*Casino Association*”) leaves me with no choice but to do so.

8 In what follows, I explain my reasons for reaching these conclusions.

The intervention application

9 It was argued that 4Racing has a “mere financial interest” in the outcome of Phumelela’s litigation. As such, it has no right to be joined to the proceedings (see, for example, *Standard Bank of South Africa v Swartland Municipality* 2011 (5) SA 257 (SCA) paragraph 9). I cannot agree. When it took over the totalisator licence, 4Racing acquired all of the rights and obligations of the licensee under the Gambling Regulations. The effect of the relief Phumelela seeks would be to bring about a fundamental change in the regulatory environment in which the licensee operates.

- 10 While success for Phumelela may well bring substantial financial benefits to 4Racing, it would only do so because 4Racing would acquire rights under the regulations that it presently does not have. In a line of cases stretching all the way from *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A), p 661 to *SA Riding for the Disabled Association v Regional Land Claims Commissioner* 2017 (5) SA 1 (CC), paragraph 10, the rule consistently applied is that a party may intervene as of right in proceedings where the relief claimed cannot be implemented without affecting their rights or legal interests. Phumelela's relief plainly affects 4Racing's rights and legal interests under the Gambling Regulations. The intervention application must be granted.

The review

The amendment constituted administrative action

- 11 The question of whether a decision to amend regulations constitutes administrative action under PAJA has in the past excited some controversy. In *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) ("*New Clicks*"), the Constitutional Court could not decide whether the making and amending of regulations generally constitutes administrative action. Nonetheless, it is clear from *New Clicks* that the making and amending of regulations can have an administrative character, even if it does not always have that character (see paragraphs 127 to 135).
- 12 For my purposes, however, the decision of the Supreme Court of Appeal in *City of Tshwane v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA) ("*Cable City*") places the issue beyond dispute. There, a unanimous Supreme Court of Appeal held that "the making of regulations by a Minister constitutes

administrative action” (paragraph 10). It does not matter that the court in *Cable City* was perhaps a little too optimistic in citing *New Clicks* as its authority, given the Constitutional Court’s equivocation on the issue in that case (see *Mostert NO v Registrar of Pension Funds* 2018 (2) SA 53 (SCA), paragraph 10). *Cable City* is binding on me, and I must apply it (see *Esau v Minister of Co-operative Governance and Traditional Affairs* 2021 (3) SA 593 (SCA), paragraph 84). Applying *Cable City*, it seems clear that, if the making of regulations constitutes administrative action, then making amendments to regulations must also be administrative action.

- 13 Moreover, even if I were not bound by *Cable City*, it seems obvious to me that the amendment of regulation 276 at issue in this case must be “a decision of an administrative nature” under section 1 of PAJA. The effect of the amendment was to deprive the totalisator licensee of a regulatory subsidy to which it was otherwise entitled. There was, and remains, only one licensee. A decision is administrative action if it is the exercise of a public power under an empowering provision that adversely affects the rights of any person and has direct and external legal effect (section 1 of PAJA). The MEC’s decision to amend regulation 276 was taken under an empowering provision (section 61 (4) of the Gauteng Gambling Act 4 of 1995). It had a direct and external legal effect on the licensee in that it withdrew the benefit of a levy-funded subsidy from the licensee. That withdrawal also plainly adversely affected the licensee’s rights. Given these key features of the decision, the amendment in this case was clearly administrative action under PAJA.

The substance of the review

- 14 Phumelela and 4Racing advanced a wide-ranging attack on the amendment. At its broadest the case was that the decision to effect the amendment was so unreasonable that no reasonable person could have taken it (see section 6 (2) (h) of PAJA). That argument rested on the proposition that taking the subsidy away from the totalisator licensee would spell the end of horseracing in Gauteng, because it would fatally undercut the licensee's financial capacity to stage horseraces on which bets could be placed. That, in turn, would drastically reduce if not eliminate the revenue regulation 276 generates for both the licensee and the provincial government, to the detriment of all concerned.
- 15 Such an outcome would plainly be perverse, but whether that outcome would eventuate was contested. The MEC and the Gambling Board both contended that horseracing would carry on more or less as it did before, that the totalisator licensee does not really require the subsidy that the betting levy generated for it before the regulations were amended, and that there was no principled basis on which the payment of a portion of the levy over to the licensee could be justified.
- 16 These are complex factual issues, but it seems to me that I cannot reach them in this case. This is so for two reasons. The first is that the procedure the MEC adopted in the amendment of regulation 276 was plainly unfair and irrational. The second is that there is no evidence whatsoever that the MEC applied his mind to the potential effects of removing the subsidy on horseracing in Gauteng or on the revenue stream that betting levy generates for the

provincial government. For these reasons alone, the amendment to regulation 276 must be reviewed and set aside. Having reached that conclusion, it is inherently undesirable for me to consider the substantive reasonableness of the amendment.

Procedural unfairness

17 The MEC chose to amend regulation 276 by means of a standard notice and comment procedure. The proposed amendment was published, together with a range of other draft amendments to the Gambling Regulations. Affected parties were given 30 days in which to comment on the them. Phumelela took the opportunity to comment on the draft amendments. It submitted extensive comments, including an economist's report which outlined what it said would be the disastrous effect of amending regulation 276 to remove the subsidy paid to the totalisator licensee from the betting levy. These submissions notwithstanding, the amendments were effected after the notice and comment period expired. There is no evidence that the MEC or the Gambling Board sought to engage with Phumelela on the substance of its representations or the factual claims that underpinned them.

18 The content of the right to procedural fairness is context-dependant. In some cases – perhaps most cases – of regulatory amendment, a simple notice and comment procedure will be enough to ensure procedural fairness. However, this case is exceptional. The amendment to regulation 276 could only directly affect one person: Phumelela. Phumelela was the only party authorised to implement the activity to which the regulation 276 levy was applied. The effect on Phumelela's operations was bound to be drastic. Phumelela told the MEC

that it would be catastrophic. In these circumstances, it was procedurally unfair to treat Phumelela as if it were just any member of the public commenting on an ordinary run-of-the-mill regulatory amendment. The MEC was required to do much more than he did in engaging with Phumelela's concerns, and with the material Phumelela placed before him. At the very least, the receipt of oral representations or some other form of direct engagement with Phumelela was required. None was undertaken. For these reasons, the amendment to regulation 276 was procedurally unfair (see section 6 (2) (c) of PAJA).

Procedural irrationality

- 19 The amendment was also procedurally irrational. In *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC), at paragraphs 33 to 37, the Constitutional Court made clear that a rational decision can only emerge from a rational process. A rational process is one which is rationally connected to the purpose for which the decision-making power is exercised (see *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd* 2023 (1) SA 1 (CC), paragraph 45). The purpose of the amendment was to ensure that the proceeds of the betting levy accrue entirely to the provincial government, and not to the totalisator licensee. It seems to me that a process that all but ignored Phumelela's submissions that the removal of the subsidy would debilitate the totalisator licensee's capacity to put on horseraces, and would by extension eliminate or severely reduce the value of the levy, could not be said to be procedurally rational. The MEC had to do more than receive the information as part of a notice and comment procedure. He had to engage with and have adequate regard to it. In other words, for the notice and

comment procedure to be meaningful, the information Phumelela presented should have been seriously considered (see section 4 (3) (b) of PAJA and *Public Servants Association of South Africa v Government Employees Pension Fund* [2020] 4 All SA 710 (SCA), paragraph 57). Given the complex factual background to Phumelela's submissions, this could not rationally be achieved unless Phumelela was engaged directly.

- 20 Given that Phumelela was not engaged directly, I do not see how the amendment to regulation 276 could be procedurally rational.

Failure of the MEC to apply his mind

- 21 There is no evidence before me that the MEC applied his mind to the material Phumelela sought to place before him. It is common cause that Phumelela's submissions and the reports on which they were based never made it to the MEC's desk. What happened instead is that Phumelela's submissions, together with those of other members of the public who responded to the notice and comment procedure, were reduced to a table in which summaries of the submissions were reproduced. That, I was told, was what served before the MEC.
- 22 The table is itself barely intelligible. It does not engage with the substance of Phumelela's submissions or the reports on which they were based. It would be virtually impossible for anyone reading the table to appreciate the seriousness and substance of what Phumelela had said in its submissions.
- 23 There is in any case no evidence before me that the MEC read the table, had regard to its contents, or weighed Phumelela's submissions against the

complex factual information set out in the report proffered in support of them. The MEC himself deposed to none of the affidavits of substance that were filed in opposition to the review application. He, in fact, failed to depose to an affidavit at all until a week before this application was heard. At that point he filed a confirmatory affidavit in which he purports to confirm the contents of the substantive affidavits filed in opposition to the review.

- 24 The MEC's confirmatory affidavit is more important for what it fails to confirm than for what it confirms. The affidavit does not say that the MEC read Phumelela's submissions. It gives no insight into the MEC's decision-making process, or into the weight he attached to the various factors relevant to his decision to eliminate the subsidy. In sum, it says nothing that demonstrates that the MEC applied his mind to anything relevant to the decision to amend regulation 276. Nor could this be inferred from the MEC's confirmation of the contents of the substantive affidavits opposing the review application. For this reason, too, the MEC could not be said to have "considered" the material Phumelela placed before him in response to the notice and comment procedure (as required by section 4 (3) (b) of PAJA). Nor could the MEC's decision be rationally related to that material (see section 6 (2) (f) (ii) (cc) of PAJA).

The review must succeed

- 25 For all these reasons, the decision to amend regulation 276 falls to be reviewed and set aside, because it was procedurally unfair, because it was procedurally irrational and because there is no evidence that the decision-

maker applied his mind to the material relevant to the decision placed before him, let alone that he gave it the serious consideration it required.

26 Taking a step back, it is hard to imagine a process more festooned with the rituals of fairness and rationality while being so obviously devoid of their content. A decision to remove a levy-funded subsidy that plainly had the potential to diminish the revenue that it was designed to augment was taken without any real engagement with the only person the decision could directly affect, and without the decision-maker so much as warranting that he gave the matter adequate thought.

27 In these circumstances, it was impossible for me to do what Phumelela originally asked me to do: consider the substantive reasonableness of the amendment to regulation 276. This is because the considerations in favour of and against the amendment were never isolated by the decision maker, who plainly failed to inform himself of the relevant considerations after appropriate engagement with the affected parties. A great deal is said to justify the amendment to the regulation in the MEC's and the Gambling Board's affidavits, but almost none of it can be traced back to the record. On the well-known authority in *National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 504 (SCA), at paragraphs 24 to 28, it is only the reasons that appear from the record that can be proffered in justification of the decision. In this case those reasons are thin indeed, and they do not disclose a fair or rational engagement with Phumelela's submissions. Without that sort of engagement with the information Phumelela placed before the MEC in response to the notice and comment procedure, it is impossible to

identify the range of reasonable decisions that were open to him on the facts. It is consequently impossible to decide whether the decision to amend regulation 276 could have been substantively reasonable.

- 28 For all these reasons, the amendment to regulation 276 must be reviewed and set aside. It is, of course, open to the MEC now in office to embark upon the amendment process afresh, to acquaint herself with the relevant material, and to engage fairly with interested parties. Once that is done, it is conceivable that the amendment will be passed again, and that it will survive a challenge based on reasonableness. The problem in this case is that, because of the defects in the process the Gambling Board and the MEC adopted, it is impossible to know whether or not the amendment can ultimately be justified.

The counter-application

- 29 It was initially difficult to discern the basis on which the counter-application was advanced. The affidavits in support of the counter-application repeat a wide range of policy considerations that were said to count against the allocation of half the betting levy to the totalisator licensee. It was submitted that there is no constitutional basis on which a portion of state revenue could be earmarked for a private entity.
- 30 Pitched at that level of generality, the submission cannot be correct. There is nothing in the Constitution that prevents the exercise of levy-raising powers for the purposes of funding a specific social or subsidy programme. For example, the Road Accident Fund's main source of income is a ringfenced levy on fuel. That arrangement has never been criticised as unconstitutional, and I see no basis on which it could be. Similarly, there is no reason why the

provincial government cannot, as it did until 1 April 2019, raise a levy on betting for the specific purpose of funding the horseraces on which the bets are placed. The mere fact that the provincial government chooses to licence a private entity to run the totalisator and organise the horseraces does not render the use of the betting levy constitutionally objectionable.

31 During argument, however, a much narrower basis for the counter-application emerged. The submission was that the payment of a share of the betting levy to the totalisator licensee is unconstitutional because it transgresses section 226 (1) of the Constitution, 1996. Section 226 (1) requires that “[t]here is a Provincial Revenue Fund for each province into which all money received by the provincial government must be paid, except money reasonably excluded by an Act of Parliament”. It was argued that regulation 276 in its unamended form is unconstitutional, because it provides for the betting levy to be paid to the totalisator licensee via the Gambling Board, rather than into the Provincial Revenue Fund.

32 The problem with this submission is that section 22 (1) (b) of the Public Finance Management Act 1 of 1999 (“the PFMA”) specifically provides that money received by a “provincial public entity” need not be paid into the Provincial Revenue Fund. The Gambling Board is such an entity. Once it is accepted that funds received by the Gambling Board need not be sent on to the Provincial Revenue Fund, section 226 (1) supplies no basis on which to argue that a regulation empowering or requiring the Board to pay some of its revenue to a totalisator licensee is constitutionally suspect. The effect of section 22 (1) (b) is that the proceeds of the betting levy are excluded, under

section 226 (1) of the Constitution, from the general requirement that provincial revenue be paid into the Provincial Revenue Fund. It was not argued that the exclusion in section 22 (1) (b) of the PFMA is not “reasonable” within the meaning of section 226 (1) of the Constitution. Even if it were, that would be the basis for a challenge to the PFMA, not the Gambling Regulations.

33 Accordingly, there is no merit in the counter-application. It must be dismissed.

Remedy

34 Section 8 of PAJA empowers me to make any order that is “just and equitable”, including an order suspending the effect of my order setting the amendment aside, or limiting the retrospective impact that it would otherwise have.

35 Given the conclusions I have reached, there can be no quibble with the appropriateness of an order reviewing and setting aside the amendment to the regulation 276. The effect of that relief would be that 4Racing would begin to receive half of the betting levy raised under the Gambling Regulations from the date of my order. Mr. Ohannessian, who appeared together with Mr. Ben-Zeev for the Gambling Board and the MEC, asked that I suspend the effect of any order reviewing and setting aside the amendment for a period of six months. There is, however, nothing on the record that would justify such an approach. Ordinarily, the power to suspend the effect of an order reviewing and setting aside an unlawful administrative action would be exercised if the immediate invalidation of an administrative action would cause significant disruption or hardship (see, for example, *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC), paragraph 96). Neither the MEC nor the

Gambling Board identified any specific, let alone significant, disruption or hardship that would be caused by invalidating the amendment prospectively.

36 What remains is to consider whether, the amended regulation having been set aside, and the *status quo ante* having been restored, I should order the respondents to pay Phumelela and 4Racing the amounts to which they would have been entitled to date under regulation 276. To put it another way, the question is whether the effect of my order should be retrospective.

37 The starting point is that the consequences of unlawful administrative action must generally be corrected or reversed (*Allpay (No 2) Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (4) SA 179 (CC), paragraph 30). But for the unlawful administrative action in this case, Phumelela and 4Racing would have received 50% of the betting levy raised on bets placed on horseracing in Gauteng since 1 April 2019. Reversing the unlawful administrative action means awarding Phumelela and 4Racing what would have been due to them if the unlawful administrative action had never taken place. This is what is ordinarily required by the rule of law, which “must never be relinquished” in fashioning just and equitable relief (*Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC), paragraph 85).

38 It follows from this that “just and equitable relief” is ordinarily relief that effectively reverses the unlawful administrative action, and which vindicates the rule of law. It seems to me that this can only mean that Phumelela and 4Racing must be paid what they were due under the unamended regulation.

- 39 The question is accordingly whether the MEC and the Gambling Board have identified any consideration that would justify departing from the general rule. I do not think that they have. It has been said in the affidavits that the money collected from the betting levy since the amendment has now been paid into the Provincial Revenue Fund, and that it has been applied to a range of other unspecified government programmes. It has not been said which programmes the money has been applied to. Nor has a convincing case been made that any specific programme or programmes would be placed under threat if I ordered the repayment relief.
- 40 Nor has it been demonstrated that the Gambling Board or the MEC lacks the resources to pay 4Racing and Phumelela what was due to them under the unamended regulation. Indeed, in their affidavit in answer to Phumelela's application for interim relief, the MEC and the Gambling Board stated that interim relief restraining the implementation of the amendment was unnecessary, because Phumelela could claim payment of its share of the betting levy if its review was ultimately successful. That affidavit was deposed to in April 2019. The MEC and the Gambling Board have had five budgetary cycles in which to plan for the contingent liability created by the repayment relief Phumelela pursues. I was given no insight into what, if anything, has been done to plan for that liability, but it has not been suggested that the liability cannot be met.
- 41 To put things in perspective, the MEC and the Gambling Board say that the value of Phumelela's claim is roughly 10% of total provincial revenue raised

on betting levies and taxes. I do not think that this is a trifling amount, but nor do I think that it is self-evidently beyond the respondents' means to pay it.

42 In *Casino Association*, the Constitutional Court ordered the repayment of unlawfully collected gambling taxes to the casinos that had paid them. In ordering repayment, the unanimous court referred specifically to the need to reverse the effect of the unlawfulness in that case. I do not think it would have been an answer to the claim for repayment in that case that the authorities had already spent the taxes that they had collected. I cannot see any reason why it constitutes an answer to the claim for repayment in this case. Any immediate difficulties that may be caused by an order for repayment can be dealt with by extending the deadline by which the amounts due must be paid. That should be more than sufficient to allow the respondents to calculate their liability and allocate the resources necessary to meet it.

43 In dealing with the *Casino Association* case, Mr. Ohannessian urged me to draw a distinction between the repayment of unlawfully collected taxes and the back payment of an unlawfully redirected, levy-funded subsidy. A distinction there may be, but a material difference there is not. In both the *Casino Association* case, and in this case, the provincial authorities have appropriated money without any legal basis to do so. In *Casino Association*, the unlawful appropriation was an unconstitutional tax. In this case it is the termination of a levy-funded subsidy effected by a procedurally unlawful and irrational amendment. What matters is that appropriations were unlawful, not that one ended a subsidy and the other created a new tax.

- 44 I have, finally, considered and weighed the fact that it may be bad policy to collect a levy from the general public that is ringfenced for the benefit of a private entity. I have also had regard to the fact that the repayment I intend to order be made to Phumelela will not be applied directly to the expense of putting on horseraces, which is what the regulation 276 levy was originally intended to do. At best, it will be applied to the losses Phumelela sustained as a result of the amendment to regulation 276.
- 45 However, neither of these considerations tips the balance against ordering repayment. Whatever the soundness of the policy embodied in regulation 276 in its original form, the regulation was plainly rational. It sought to plough back half the proceeds of the betting levy into the very activity that allowed the revenue to be generated in the first place. That may be a good thing. It may be a bad one. But it is not inherently unlawful, and if the MEC wished to change the arrangement, he was bound to go about doing so in a fair and rational manner.
- 46 The unlawful termination of the subsidy paid to Phumelela under regulation 276 no doubt formed part of its motivation for relinquishing the totalisator licence. It seems to me to be a weak argument against paying Phumelela what is now due to it that the very unlawfulness it has sought to reverse means that it is no longer in the business of organising horseracing.
- 47 Moreover, regulation 273 of the Gambling Regulations (which the MEC never amended) specifically provides that the levy is “payable for the benefit of the holder of a totalizator licence”. There is no requirement that the licensee’s share of the levy be applied in any particular way, and accordingly no legal

constraint on Phumelela receiving back-payments under the regulation, so long as they are applied “for [its] benefit”. That the MEC now considers this arrangement to be bad policy does not make it unlawful. Nor does it excuse the MEC from going about changing the regulation in a lawful manner, or from being required to correct the consequences of the failure to do so.

Costs

48 Phumelela sought its costs on a punitive scale in the event that it was successful. It was argued that the MEC and the Gambling Board had misconducted themselves in this litigation, principally by taking technical points for the sole purpose of delaying the litigation, by advancing strident attacks on Phumelela’s good faith, and by adopting the stance that repayment relief was available to Phumelela when opposing the application for interim relief, only to reverse its position by arguing that repayment would be inappropriate when opposing the main review application. To this must be added the MEC’s failure to put up a version at all in response to the review application, other than, on the eve of the hearing, to “confirm” the contents of affidavits deposed to by others.

49 All of this was unfortunate. It was certainly indicative of just how weak the MEC’s and the Gambling Board’s case on the merits turned out to be. However, I do not think that I can be satisfied that the technical points the MEC and the Gambling Board took (for example in their unsuccessful opposition to 4Racing’s intervention and to the amendment by which Phumelela sought to introduce repayment relief) were taken only to delay the proceedings. Nor do

I think that the remaining conduct was so poor as to warrant a punitive costs order. An ordinary costs order, including the costs of two counsel, will suffice.

Order

50 Accordingly –

50.1 4Racing is granted leave to intervene in these proceedings.

50.2 The decision of the first respondent to amend Regulation 276 of the Gauteng Gambling Regulations, 1997 ("Regulation 276") is reviewed and set aside.

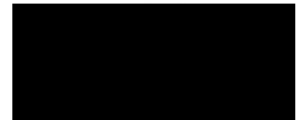
50.3 It is declared that the amendment to Regulation 276 is invalid, unconstitutional and of no force or effect.

50.4 The respondents are directed to pay the applicant the total amount of the levy that is payable in terms of Regulation 276 in the form it took before the amendment was made, for the period from 1 April 2019 to 30 November 2021.

50.5 The respondents are directed to pay the intervener the total amount of the levy that is payable in terms of Regulation 276 in the form it took before the amendment was made for the period from 1 December 2021 to 30 May 2024.

50.6 The respondents are directed to pay interest on the sums envisaged in paragraphs 50.4 and 50.5 above at the prescribed rate of interest.

- 50.7 The sums identified in paragraphs 50.4 to 50.6 must be paid on or before 1 December 2024.
- 50.8 The counter-application is dismissed.
- 50.9 The applicant's and the intervener's costs in Part B of this application, in the counter-application and in the application for leave to intervene, including the costs of two counsel, are to be paid by the first and third respondents jointly and severally, the one paying the other to be absolved.



S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 30 May 2024.

HEARD ON: 6 May 2024

DECIDED ON: 30 May 2024

For the Applicant: A Cockrell SC
A Friedman
Instructed by Fluxmans Inc

For the First and Third Respondents: T Ohannessian SC
O Ben-Zeev
(Heads of argument drawn by O Ben-Zeev)
Instructed by Ka-Mbonane Cooper

For the Intervener: A d'Oliveira
L Phaladi
Instructed by Truter Jones Inc