



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

Case number: 41790/2019

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
21 August 2025	
DATE	SIGNATURE

In the matter between:

PHUMELELA GAMING AND LEISURE LIMITED

Applicant

and

GAUTENG GAMBLING BOARD

First Respondent

M.B. MOKOENA N.O.

Second Respondent

GAUTENG OFF-COURSE BOOKMAKERS' ASSOCIATION

Third Respondent

SOUTH AFRICAN BOOKMAKERS' ASSOCIATION

Fourth Respondent

HOLLYWOOD SPORTSBOOK GAUTENG (PTY) LTD

Fifth Respondent

HOLLYWOOD SPORTSBOOK EASTERN CAPE (PTY) LTD

Sixth Respondent

HOLLYWOOD SPORTSBOOK LIMPOPO (PTY) LTD

Seventh Respondent

HOLLYWOOD SPORTSBOOK WESTERN CAPE (PTY) LTD

Eight Respondent

HOLLYWOOD SPORTSBOOK MPUMALANGA (PTY) LTD

Ninth Respondent

HOLLYWOOD SPORTSBOOK KWAZULU-NATAL (PTY) LTD

Tenth Respondent

JUDGMENT

WINDELL J

Introduction

[1] This is a review application. The applicant, Phumelela Gaming and Leisure Limited ('Phumelela'), is a public company that administered the sport of horseracing and operated as a totalizator in Gauteng between 2002 to 2021 in terms of a race meeting license. The first respondent is the Gauteng Gambling Board ('the Board'), a juristic person established in terms of section 3 of the Gauteng Gambling Act 4 of 1995 (the Gauteng Gambling Act).

[2] On 29 May 2019, the Board found Phumelela guilty of contravening Condition 10 of its race meeting licence, and imposed a fine of R5 million, half of which was suspended for two years, as a sanction ('the impugned decisions'). In making both these findings, the Board relied on the recommendation of a disciplinary committee ('the DC'), appointed by the Board in terms of section 14(2) of the Gauteng Gambling Act, chaired by the second respondent, Mr Mokoena.

[3] Phumelela paid the fine on 28 June 2019, expressly stating that the payment was made without prejudice. On 27 November 2019, Phumelela instituted the present review application in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), seeking, inter alia: (1) an order reviewing and setting aside the Board's decision; (2) an order substituting that decision with a finding of not guilty; and (3) an order reviewing and

setting aside Condition 10 of its licence. The Board opposed the application in its entirety, objecting in particular to the relief seeking substitution. It contended that, should the review succeed, the Court ought not to substitute the Board's decision, but rather remit the matter to the Board for reconsideration.

[4] Since instituting the review, Phumelela has been placed under business rescue in 2020 and, in 2021, pursuant to the business-rescue plan, transferred its horseracing operations to 4Racing (Pty) Ltd. It thus no longer holds a licence issued by the Board, which accordingly no longer exercises disciplinary jurisdiction over it. In light of these developments, the parties are in agreement that, on the unusual facts of this case, if the review was to be successful, a remittal would not constitute a competent remedy.

[5] Currently, this litigation is being pursued by the business rescue practitioner (BRP) of Phumelela, Mr Evans. In August 2024, Phumelela formally applied to amend its notice of motion. In the amended notice, the relief sought has been narrowed to an order reviewing and setting aside the Board's decision and directing the repayment of the R2.5 million fine to Phumelela ('the repayment relief'). The Board opposes both the proposed amendment and the repayment relief now sought.

[6] The third and fourth respondents, the Gauteng Off-Course Bookmakers' Association ('GOBA') and the South African Bookmakers' Association ('SABA') respectively, were admitted as amici curiae during the disciplinary proceedings. The fifth and sixth respondents, private entities forming part of the 'Hollywood Group' and conducting business as bookmakers, were similarly admitted as amici curiae. The seventh to tenth respondents are also members of the Hollywood Group. The amici

participated fully in the hearing, leading extensive evidence on their interpretation of Condition 10 and made oral and written submissions. None of these parties are opposing the present review application.

Background

[7] When Phumelela was first granted its race-meeting licence in 2002, Condition 10 obliged it to provide visual broadcasts for betting purposes, but only on a cost-recovery basis approved by the Board. Later that same year, section 91(9) of the Gauteng Gambling Act came into operation (31 December 2002).

[8] Phumelela was of the view that this new section materially altered the legal framework, rendering Condition 10 redundant and commercially restrictive, since the Act now gave bookmakers a separate legal avenue to obtain broadcasts, independent of the license condition. That is why, in 2011, nearly a decade after section 91(9) came into effect, Phumelela applied for the removal of Condition 10. The application, however, was later abandoned in 2013.

[9] On 23 January 2014, GOBA lodged a complaint with the Board against Phumelela concerning the Tellytrack service, a 24-hour television channel broadcasting horse racing events. The channel was jointly managed by Phumelela, Gold Circle (Pty) Ltd, and Kenilworth Racing (Pty) Ltd, and at the time operated as a commercial channel carrying both local and international content at considerable cost. GOBA alleged that Phumelela had breached Condition 10 of its race-meeting licence by refusing to supply Tellytrack to bookmakers at cost price. Phumelela disputed this, contending that on a proper interpretation of Condition 10 it was only obliged to provide visual broadcasts of races

held at Turffontein Racecourse in Johannesburg, as that was the only racecourse subject to the jurisdiction of the Gauteng Gambling Board. It argued further that it could not be required to supply the Tellytrack channel at cost price, since the channel predominantly consisted of international content falling outside Condition 10.

[10] On 15 August 2014, the Board consolidated Phumelela's application to remove Condition 10 and the GOBA complaint into a single hearing. When Phumelela attempted to withdraw its application on 8 October 2014, the Board refused the withdrawal, postponed the hearing, and issued an interim pricing directive. This directive was confirmed in writing on 27 October 2014.

[11] On 30 October 2014, Phumelela instituted review proceedings challenging the interim pricing directive issued by the Board. The review was initially dismissed by the High Court (per Wright J). However, on 22 September 2017, the Full Court upheld Phumelela's appeal, setting aside the directive on the ground that Phumelela had not been afforded a fair hearing prior to its issuance.¹

[12] While that appeal was pending, the Board issued a further directive. It refused Phumelela's application to amend Condition 10. It also resolved to initiate disciplinary proceedings under section 14(2)(a) of the Gauteng Gambling Act. The purpose was to investigate, in terms of section 37(2)(a), whether Phumelela had failed to comply with any licence condition or had contravened a provision of the Act.

¹ Case number A5082/2015 delivered on 22 September 2017 (per Victor, Matojane and Crutchfield JJ)

[13] This culminated in the issuance of a formal charge sheet on 18 November 2016. Phumelela was accused of breaching Condition 10 of its race-meeting licence. The ensuing disciplinary process—during which the *amici curiae* participated—focused primarily on the interpretation and application of Condition 10. It included a pre-trial conference, the amendment of charges, and hearings held between December 2017 and June 2018.

[14] The DC, in its preliminary recommendations of 31 August 2018, expressly adopted the bookmakers' interpretation of Condition 10: namely, that Phumelela had a continuing obligation to make the Tellytrack channel available to bookmakers, but only at cost-based pricing approved by the Board. On this interpretation, Phumelela breached its licence conditions when it withdrew access and imposed new commercial fees without prior approval.

[15] Following section 37 representations by Phumelela, the DC confirmed its stance in its final recommendations of 23 April 2019, suggesting a fine of R10 million (R5 million suspended). The Board adopted the DC's findings and, on 29 May 2019, found Phumelela guilty and imposed a fine of R5 million on Phumelela, half of which was suspended.

[16] Both parties filed supplementary affidavits addressing developments that arose after the launch of the review. These affidavits focused primarily on whether Phumelela's repayment claim has prescribed, whether Phumelela may amend its notice of motion to introduce the repayment relief; and whether, even if the claim has not prescribed, this Court should decline to grant the repayment relief in the exercise of its remedial discretion.

No objection was raised to the filing of these affidavits, and they were accordingly admitted.

Issues for Determination

[17] The principal issues arising for determination in this matter are:

1. Whether the claim for repayment relief has prescribed under the Prescription Act 68 of 1969 ('the Prescription Act').
2. Whether the review was instituted and prosecuted without unreasonable delay, with particular regard to the fact that the repayment relief was introduced only five years after the review proceedings commenced.
3. Whether Phumelela ought to be granted leave to amend its notice of motion so as to include the repayment relief.
4. Whether the Board failed to apply its mind to the DC's recommendations and acted irrationally or unlawfully, and/or whether the Board's decisions are reviewable due to procedural unfairness and a failure of justice by the DC.
5. If the impugned decisions are set aside, whether the repayment relief constitutes just and equitable relief under section 8 of PAJA.

Prescription: Did the repayment relief prescribe?

[18] The applicant seeks leave to amend its notice of motion to include the repayment relief. This claim was raised for the first time in Phumelela's heads of argument filed in March 2024. Phumelela submitted that, as it no longer fell under the Board's jurisdiction, the matter could not be remitted to the Board or its DC for further action. Accordingly, if the review succeeds, the only just and equitable remedy would be to set aside the impugned decisions and compel the Board to repay the fine. Phumelela argued that the

Court could competently grant this repayment relief under section 172(1) of the Constitution, even though it had not been sought in the original notice of motion.²

[19] On 14 August 2024, the Board filed a supplementary affidavit in which it raised two principal objections. First, it disputed that Phumelela could competently seek repayment relief for the first time in its heads of argument. Secondly, it argued that even if such relief could, in principle, be claimed, Phumelela is precluded from doing so in this case because the claim has prescribed. On 12 September 2024, Phumelela filed an affidavit formally seeking to amend its notice of motion. The amendment was intended to introduce the claim for repayment relief, delete the substitution relief initially sought, and remove prayer 5 (the review of Condition 10), as Phumelela no longer pursued that relief.

[20] It is trite that if the repayment claim has indeed prescribed, there would be no need to consider the application to amend. In *Imperial Bank Ltd v Barnard and Others NNO*,³ Mpati P held that an application for amendment should be allowed unless brought in bad faith or it causes prejudice that cannot be cured by a costs or postponement order. Mpati P cited, as an example of such prejudice, an amendment that seeks to introduce a prescribed claim. Since prescription is directly in issue in this matter, it is thus appropriate to address that question first.

[21] Section 12(1) of the Prescription Act provides that, subject to subsections (2), (3) and (4), prescription begins to run when the debt becomes due. In terms of section 12(3),

² Section 172(1) of the Constitution and section 8 of PAJA require this Court to adopt a 'just and equitable' remedy, if it upholds the review.

³ 2013 (5) SA 612 (SCA) para 8 with reference to *Four Tower Investments (Pty) Ltd v Andre's Motors* 2005 (3) SA 39 (N) para 15; *Dumasi v Commissioner, Venda Police* 1990 (1) SA 1068 (V) at 1071B; and *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C) at 369F-I.

a debt is not deemed due until the creditor, in this instance Phumelela, has knowledge of the identity of the debtor and of the facts giving rise to the debt. A creditor is deemed to have such knowledge if it could have acquired it by exercising reasonable care.

[22] The Board's position is that Phumelela's claim for a refund constitutes a debt which has prescribed. It argues that prescription began to run either on 28 June 2019, when the fine was paid, or, at the latest, on 27 November 2019, when the review proceedings were instituted. On the first approach, the debt was extinguished by prescription on 29 June 2022. On the second, the debt prescribed on 28 November 2022, as three years had then elapsed without Phumelela serving any process on the Board claiming repayment, as contemplated by section 15(1) of the Prescription Act.

[23] At the outset, Phumelela disputed that the repayment relief constitutes a 'debt' for the purposes of the Prescription Act. It nevertheless advanced an alternative argument: if it is a debt and prescription is applicable, it could only have begun to run from the date on which a court were to declare the fine unlawfully imposed.

[24] For present purposes, it is sufficient to consider only the first question raised by the Board, namely whether the repayment relief falls within the meaning of a 'debt' under the Prescription Act. The resolution of this issue will determine whether the claim is susceptible to prescription at all.

[25] The Constitutional Court in *Njongi*⁴ left open the question whether a claim for repayment arising from an unlawful administrative act qualifies as a 'debt' for these

⁴ *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) para 42.

purposes. However, the Supreme Court of Appeal (SCA) in *Petersen and Others v SASSA (Petersen)*⁵ recently addressed this question. In that case, the South African Social Security Agency (SASSA) sought to review and set aside its own decision to procure protection services for its officials; to declare the contract with the security agency, Vuco Security Solutions CC (Vuco), unlawful; and, to obtain just and equitable relief requiring the appellants to repay, with interest, the amounts paid to Vuco.

[26] The appellants raised a prescription defence against SASSA, arguing that its claims constituted ‘debts’ which had prescribed in 2017 under the Prescription Act. Unterhalter JA rejected this argument and held as follows:

‘[21] The confusion in the appellants’ treatment of this issue arises because SASSA brought its review and described its relief as the repayment to SASSA of what was paid by it to Vuco. That is not the correct characterisation of the relief sought by SASSA in the review. SASSA sought to review and set aside the decision of Dr Petersen on behalf of SASSA to have SASSA procure services from Vuco. This review, as I have analysed it, is not a debt in terms of the Prescription Act, but an application to seek the exercise by the courts of their public law powers. Apart from reviewing and setting aside the decision of Dr Petersen, SASSA has sought just and equitable relief that would require repayment by the appellants. The power of the courts to give such relief is to be found in s 172(1)(b) of the Constitution. The exercise of that power by a court is also not a debt under the Prescription Act. Once the power is exercised, as occurred at the instance of the high court, the order of the high court to pay an amount of money is a judgment debt that may fall within section 11(a)(ii) of the Prescription Act. But that is not a matter I need to decide because the period of prescription for a judgment debt is thirty years. If the orders of the high court sounding

⁵ 1106/2023; 1139/2023; 1053/2023) [2024] ZASCA 173; 2025 (3) SA 153 (SCA) (12 December 2024). See also *SA Broadcasting Corporation (SOC) Ltd v Motsoeneng* 2024 JDR 3246 (GJ).

in money are judgment debts in terms of the Prescription Act, they have assuredly not been extinguished by prescription. For these reasons, the defence of prescription relied upon by the appellants must fail.’

[27] Although the review in *Petersen* was framed as a legality review and not a PAJA review, that distinction is of no consequence. The central principle is that repayment relief, when sought as a remedy in review proceedings, does not constitute a ‘debt’ for purposes of the Prescription Act. It follows that the defence of prescription must fail. To characterize such relief as a ‘debt’ would unduly limit the courts’ wide remedial discretion to grant just and equitable relief under section 172(1)(b) of the Constitution.

Was there an undue delay in launching and prosecuting the review?

[28] Section 7(1) of PAJA provides that proceedings for judicial review under section 6(1) must be instituted without unreasonable delay and, in any event, not later than 180 days after the conclusion of any internal remedies, or, where no such remedies exist, from the date on which the applicant became aware of the administrative action and the reasons for it.

[29] Phumelela paid the fine on 28 June 2019 and launched the review application five months later, on 27 November 2019. It is therefore common cause that the review was instituted within the 180-day period prescribed by PAJA. The Board nevertheless contends that there was an unreasonable delay both in the institution and in the subsequent prosecution of the review.

[30] In support of the first argument, the Board relies on the following events. Phumelela sent a letter to the Board on 1 July 2019 after it paid the fine. The letter, written

by Phumelela's then General Manager: Legal and Compliance, Ms Natasha Kasangana, and addressed to the Board's erstwhile CEO, Mr Steven Ngubeni, attached proof of payment of the fine and stated:

'Please note that payment of the fine was made without prejudice to any of Phumelela's rights, including the right to claim a repayment of this amount, should it successfully apply for the reviewing and setting aside of the Board's decision pertaining to the fine.'

[31] Phumelela then addressed a further letter to the Board on 16 August 2019. In that letter, Phumelela stated clearly that the Board's decision to find it guilty of contravening its race meeting licence was invalid and subject to review under section 6(2) of PAJA. It gave notice that it intended to institute a review application as soon as possible but, in any event, within the 180 days prescribed by PAJA. By the end of August 2019, therefore, Phumelela knew that the impugned decisions were invalid, that it had paid the fine pursuant to those decisions, and it had already warned the Board that it would seek a refund if it successfully reviewed and set aside the decisions.

[32] On 27 November 2019, Phumelela instituted the review application, advancing seven grounds of review. The founding papers did not include any claim for repayment of the fine. That omission does not affect the timeliness of the review itself. It does, however, become material when considering the application to amend the notice of motion and the question of whether repayment constitutes a just and equitable remedy.

[33] The Constitutional Court has emphasised that the 180-day period in PAJA marks the maximum period within which a review must ordinarily be brought (*Khumalo and*

*Another v MEC for Education, KwaZulu-Natal*⁶ and *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*⁷). Similarly, in *Opposition to Urban Tolling Alliance v SANRAL*,⁸ the SCA confirmed that, ordinarily, a review brought within 180 days will not be regarded as unduly delayed.

[34] In principle, a court may still find a delay to be unreasonable even within the 180-day period, but such cases will be rare. One such instance was *4 Africa Exchange (Pty) Ltd v Financial Sector Conduct Authority and Others*,⁹ where a delay of four months was considered unreasonable because of the severe prejudice to the licence holder. By contrast, in *Business Unity South Africa v Minister of Higher Education and Training*¹⁰ the Court rejected the contention that a delay of less than 180 days was unreasonable, as no sufficient prejudice had been shown. The principle that emerges from the cases is that the 180-day period is a benchmark of reasonableness: a delay of less than that will generally be considered unreasonable only where prejudice to the respondent or an affected third party is demonstrated.

[35] In this case, there are no exceptional circumstances that could render a review instituted within four months ‘unreasonably delayed’. On the contrary, the application was brought well within the statutory timeframe and only after explicit notice to the Board. The correspondence of 1 July and 16 August 2019, in which Phumelela reserved its rights and signaled its intention to challenge the Board’s decisions, does not transform the

⁶ 2014 (5) SA 579 (CC) para 45.

⁷ 2019 (4) SA 331 (CC) paras 49–52.

⁸ 2013 (4) SA 639 (SCA) para 26.

⁹ 2020 (6) SA 428 (GJ).

¹⁰ 2016 JDR 0004 (LC) paras 54 to 74.

prompt institution of proceedings into an unreasonable delay. Rather, it demonstrates diligence and transparency, as the Board was expressly informed that its decision would be taken on review.

[36] As far as the subsequent prosecution of the review is concerned, there was, self-evidently, a lag between the institution of proceedings and the hearing of the matter. Although the parties differ on the cause of this lag, any delay must be assessed in context.

[37] A substantial reason why the matter only recently became ripe for hearing was the protracted dispute about the adequacy of the rule 53 record. The Board first furnished a record in May 2020, but from June 2020 onwards Phumelela repeatedly complained that it was incomplete. That dispute persisted until 2023, when it was finally resolved, allowing the filing of the supplementary founding affidavit, answering affidavit and reply.

[38] The dispute arose because the initial record furnished by the Board consisted only of the material that had been before the DC. Although that component was voluminous—comprising extensive evidence and argument, with transcripts running to thousands of pages—it contained nothing to indicate the Board’s own deliberations before making the impugned decisions. That deficiency was never cured and will be considered later in this judgment.

[39] In addition, the BRP only became aware of the review proceedings in August 2022, more than two years after the application had been launched. By then, Phumelela was already under business rescue and its senior executives (who had previously managed the litigation) were no longer available. From 2020-2022, the BRP’s time and resources were consumed by the adoption and implementation of the business rescue plan, which

took priority. Once the BRP discovered the existence of the review, he acted promptly: he instructed new attorneys (Fluxmans), pursued the incomplete rule 53 record through a rule 30A notice, and ensured that the outstanding pleadings were filed.

In any event, PAJA does not regulate delays in the prosecution of a review once it has been instituted, nor does such delay bear any doctrinal connection to the 180-day rule. A few single-judge decisions (for example, *New GX Enviro Solutions*¹¹) have considered prosecution delays in review proceedings, but generally only in the context of costs. The governing principles applicable to delayed prosecution of proceedings, whether by action or application, were clarified by the SCA in *Cassimjee v Minister of Finance*,¹² which set out the relevant rules and explained that, in certain circumstances, such delay may warrant dismissal of the matter:

‘There are no hard and fast rules as to the manner in which the discretion to dismiss an action for want of prosecution is to be exercised. But the following requirements have been recognised. First there should be a delay in the prosecution of the action; second the delay must be inexcusable and third the defendant must be seriously prejudiced thereby. Ultimately the enquiry will involve a close and careful examination of all the relevant circumstances, including, the period of the delay, the reasons therefore and the prejudice, if any, caused to the defendant. There may be instances in which the delay is relatively slight but serious prejudice is caused to the defendant, and in other cases the delay may be inordinate but prejudice to the defendant is slight. The court should also have regard to the reasons, if any, for the defendant's inactivity and failure to avail itself of remedies which it might reasonably have been expected to do in order to bring the action expeditiously to trial.’

¹¹ *City of Tshwane Municipality v New GX Enviro Solutions and Logistics Holdings (Pty) Ltd* 2021 JDR 1299 (G) at para 47.

¹² 2014 (3) SA 198 (SCA) para 11.

[40] What also emerges from the SCA's decision in *Cassimjee* is that, in the constitutional era, and having regard to section 34 of the Constitution, which guarantees the right of access to courts and fair civil proceedings, the dismissal of a matter for delay in prosecution is a drastic step. It must be justified not merely by the passage of time, but by circumstances that render the continuation of the proceedings an abuse of process.

[41] The Board's complaint falls far short of this standard. The lag is explained by procedural disputes and the realities of business rescue, not indolence. Whatever delay there may have been in the prosecution of the review, it cannot remotely be described as 'inexcusable' or as amounting to an abuse of process. This is not a case where a litigant, fully aware of pending proceedings, simply failed to take them forward. On the contrary, once the BRP became aware of the review, he acted expeditiously in instructing attorneys and in pressing for completion of the record and the exchange of pleadings. For this reason alone, the Board's contention on undue delay cannot succeed.

[42] An equally insurmountable obstacle for the Board is its failure to demonstrate any prejudice arising from the manner in which the proceedings were prosecuted. As made clear in *Cassimjee*, absent both inexcusable delay and prejudice, the threshold for striking out is not met. On the facts, neither requirement is present. It follows that the objection based on delay in either the institution or prosecution of the review is without merit.

Should the amendment of the notice of motion be allowed?

[43] As explained earlier, after the launch of the review Phumelela went into business rescue and transferred its race-meeting licence to another entity. As a result, it is no longer subject to the Board's jurisdiction. The BRP has explained that Phumelela's

interest in the relief sought has therefore shifted. It no longer has a legal interest in prayer 5 of the notice of motion — namely, the setting aside of Condition 10 of its race-meeting licence. Likewise, given its exit from the industry, it no longer pursues the substitution remedy envisaged in prayer 3.

[44] In the answering affidavit the Board contended that the review is therefore moot, but that point was not seriously pursued during argument. Phumelela maintains that it retains a legal interest in the outcome because it seeks repayment of the fine it contends was unlawfully imposed. It is submitted that if the Board's decision is set aside, there would be no lawful basis for it to retain the fine (subject to the question of remedy considered below). I agree. The matter is not moot for so long as Phumelela retains an interest in setting aside the impugned decisions. The issue that remains is whether, in light of the developments outlined above, Phumelela should be granted leave to amend its notice of motion to include repayment relief expressly.

[45] On 27 September 2024, the Board filed its response opposing the proposed amendment. Its primary objection was directed at the inclusion of the repayment relief. The Board argued, in the first instance, that the repayment relief ought to have been sought when the review application was launched in 2019. It maintained that Phumelela was always aware that such relief could only properly be introduced by way of a rule 28 amendment. The explanation offered for the delay in seeking the amendment, the Board contended, was neither candid nor consistent with Phumelela's conduct in other proceedings. In this regard, it pointed to a separate matter in which Phumelela, when

challenging a Board decision affecting totalisator licence holders, followed the prescribed rule 28 procedure and successfully obtained an amendment in 2022.¹³

[46] The legal principles governing amendments are well established. Amendments are not a matter of right; they require the court's indulgence. However, absent prejudice, an amendment should generally be allowed even if delayed. In *Man in One CC*¹⁴ Mthimunye AJ considered the consequences for a party seeking an amendment after a seven-year delay and reaffirmed the general approach:

'The respondents have argued that a party seeking an amendment at a late stage does not do so as a matter of right, but is seeking an indulgence from the court and there is no justification to do so after a seven-year delay. It has however been held that in the absence of prejudice to an opponent, an amendment may be granted at any stage before judgment, despite such delay and however careless the mistake or omission may have been (*Krogman v Van Reenen* [1926 OPD 191]). It is also my view that although the trial has commenced, the parties are not 'deep' into the trial in that it was on its first day and the applicant was leading evidence in chief from its first witness when it sought a postponement for purposes hereof. In *Trans- Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another* [1967(3) SA 632 (D) at 642H] the court held that:

'In my judgment, if a litigant has delayed in bringing forward his amendment, this in itself, there being no prejudice to his opponent not remediable in the manner I have indicated, is no ground for refusing the amendment.'

¹³ Case number 2019/11734.

¹⁴ *Man in One CC v Zyka Trade 100 CC* 2022 JDR 0704 (FB) para 14.

[47] The Constitutional Court in *Affordable Medicines Trust v Minister of Health*¹⁵ reaffirmed that the decisive consideration is the interests of justice. An amendment will ordinarily be granted unless it is sought in bad faith, causes irreparable prejudice, or places the parties in a position where they cannot fairly proceed as if the original pleading had been amended from the outset. This principle equally applies to amendments of a notice of motion.

[48] The BRP, Mr Evans, explained that he was not involved when the review was launched in 2019, nor were Phumelela's current attorneys. His understanding was that repayment was not a priority at that stage, given that the central issue concerned the long-standing dispute with bookmakers over the interpretation of Condition 10 of Phumelela's race-meeting licence. As long as that dispute remained unresolved, repayment was of secondary importance.

[49] When Phumelela later entered business rescue, Evans deposed to a supplementary founding affidavit in July 2023 dealing only with the record. Although repayment relief might appropriately have been added then, its omission was due to the assumption that repayment would automatically follow if the fine was set aside. In its replying affidavit Phumelela made plain that it maintained the proceedings to secure repayment. The omission to seek a formal amendment earlier was not wilful but the result of a mistaken belief that it was unnecessary.

¹⁵ *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at para 9. See also *Summer Season Trading 63 (Pty) Ltd v City of Twane* 2021 JDR 0291 (GP).

[50] When counsel later prepared Phumelela's heads of argument, repayment relief was addressed and a draft order including it was circulated. Once the Board raised prescription in a supplementary affidavit, Phumelela considered it prudent to regularise the position by formally seeking an amendment to its notice of motion.

[51] The Board's objections do not fall within the recognised grounds for refusing an amendment. Phumelela has acknowledged its oversight, and no prejudice has been shown. The Board has had full opportunity to advance arguments on both prescription and remedy. This is not a case contemplated in *Affordable Medicines* where the parties cannot be restored to the position they would have been in had the amendment been made earlier.

[52] The amendment sought thus satisfies the applicable legal standard. It is necessary to properly frame the relief that Phumelela now seeks, and it ensures that the notice of motion reflects the true issues. The parties are well aware of those issues and no prejudice arises. In these circumstances, leave to amend the notice of motion is granted.

The merits of the review

[53] The only administrative decisions with external legal effect that directly impacted Phumelela's rights are those taken by the Board.¹⁶ Although Phumelela sought to review the DC's findings in its notice of motion out of caution, I find that the DC's role was advisory only. Its recommendations have no independent legal effect, being subsumed

¹⁶ The definition of 'administrative action' in section 1 of PAJA, is any decision taken which adversely affects the rights of any person and which has a direct, external legal effect.

within the inquiry into the lawfulness of the Board's decisions. The review must therefore focus squarely on the Board's decisions.

[54] The central basis for review is that the Board failed to apply its mind and abdicated its responsibility by merely endorsing the DC's recommendations. These grounds which are long recognised in administrative law and codified in PAJA, provide a direct and sufficient route to the primary relief sought, namely the setting aside of the Board's decisions on guilt and sanction.

[55] While a decision-maker may seek and consider recommendations or advice, it must still make the final decision itself. That obligation carries a duty to engage independently with the merits. If it merely adopts a recommendation without critical evaluation, it fails to apply its mind and unlawfully abdicates responsibility.¹⁷ PAJA codifies this principle in section 6(2)(e)(iii) (failure to take relevant considerations into account) and section 6(2)(i) (otherwise unlawful conduct, which includes abdication).

[56] It is not disputed that the Board was entitled to appoint the DC in terms of section 14(2)(a) of the Gauteng Gambling Act, which empowers the Board to appoint such committees to perform the functions in section 37(2), namely to investigate alleged breaches of licence conditions and to make recommendations. But it is equally well established that a provision of this nature does not absolve the Board of its statutory responsibility. The recommendations of a disciplinary committee are advisory only. The

¹⁷ *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 40; *Hayes v Minister of Finance and Development Planning, Western Cape* 2003 (4) SA 598 (C) 623-4.

ultimate decision must be made by the Board, exercising its own discretion, informed by the relevant considerations.

[57] This principle serves two purposes. First, it ensures that the entity entrusted by the legislature with the decision-making power — here, the Board — is the entity that actually makes the decision. Second, it allows the decision-maker to correct any defects in the recommendations before adopting them. That is why the Gauteng Gambling Act expressly empowers the Board to remit matters for further investigation if the recommendations are deficient.¹⁸ The corollary is that if the Board merely rubberstamps the recommendations, without any evidence of independent consideration, it acts unlawfully by failing to apply its mind and by passing the buck to another body not entrusted with the statutory power.

[58] The rule 53 record provides no evidence that the Board applied its own mind to the recommendations of the DC. On the merits, the record suggests the Board simply endorsed the DC's findings. On sanction, it departed from the DC's recommendation, but here too the record is silent: there is no explanation of why the Board did so. The only inference from the available material is that the Board simply adopted the recommendation of a different sub-committee, the Technical Committee, rather than applying its own mind. In law, this is no different from rubberstamping the DC. Both the DC and the Technical Committee exist to assist the Board, not to substitute for it.

[59] The Board has offered little substantive justification for the impugned decisions. Its answering affidavit, running to almost 150 pages, is devoted largely to two themes.

¹⁸ Section 14(2)(g) of the Gauteng Gambling Act.

The first is a series of preliminary objections which, for the reasons already given, are misconceived and serve only as diversions from the central issues. The second is an extended defence of its interpretation of Condition 10 of the race-meeting licence — the very provision that gave rise to the disciplinary proceedings and, ultimately, the impugned decisions. Yet this debate is now academic, since the Board itself accepts that the dispute about the proper meaning of Condition 10, and the relief in prayer 5 of the notice of motion, is moot.

[60] What is striking is that the Board says virtually nothing in defence of the actual decisions under review. It does not meaningfully engage with the charge that it failed to apply its mind, nor does it address the allegation that it abdicated its responsibility by merely adopting the DC's recommendations. The Board's answering affidavit seeks to deny this by invoking 'staged' processes and the involvement of the Technical Committee. Yet no contemporaneous record of any deliberations has been produced, despite repeated requests dating back to June 2020. The absence of a proper record cannot be cured by after-the-fact assertions or confirmatory affidavits lacking detail. As the courts have repeatedly emphasised, the rule 53 record is the contemporaneous memorial of what the decision-maker actually considered, and reasons formulated *ex post facto* cannot substitute for it.

[61] But, even if the absence of any record of the Board's deliberations were not decisive, the defect could in principle have been clarified in the answering papers. The Board was repeatedly requested, since June 2020, to explain what material its members considered when making the impugned decisions. Yet its answering affidavit is bereft of any such explanation. The deponent to the affidavit had no personal knowledge of the

Board's deliberations, and the supposed confirmatory affidavit of Mr Lukhwareni (who was present at the Technical Committee) is wholly uninformative: it merely offers blanket confirmation without identifying what he actually recalls or what factors were considered. This type of vague and ex post facto assertion cannot substitute for the contemporaneous reasons that rule 53 requires.

[62] The result is that there is simply no evidence that the Board engaged independently with the DC's recommendations, either on the merits or on sanction. On the contrary, the manner in which it sought to rely on Mr Lukhwareni's confirmatory affidavit underscores the irrationality and obscurity of the process. This failure goes to the heart of the duty to apply one's mind and confirms that the Board abdicated its statutory responsibility.

[63] The Board thus failed to consider the merits independently and failed to provide any reasoned basis for its sanction decision. In doing so, it breached its duty to apply its mind as required by section 6(2)(e)(iii) of PAJA and committed the reviewable irregularity of acting 'otherwise unlawfully' under section 6(2)(i). On this ground alone, the decisions fall to be reviewed and set aside.

Just and Equitable relief

[64] Where administrative action is found to be unlawful, section 8(1) of PAJA empowers the court to grant any remedy that is just and equitable. This wide discretion mirrors section 172 of the Constitution, which obliges a court to declare invalid any law or conduct inconsistent with the Constitution and to grant appropriate relief. Phumelela

seeks an order setting aside the impugned decisions. The natural consequence of such an order is to restore it to the position it would have occupied but for the invalid action.

[65] The principle is clear. Once an administrative decision is declared invalid, restitution is the default position. Phumelela contends, correctly, that the only effective means of vindicating its rights is repayment of the fine. Because it has now exited the gambling industry and falls outside the Board's jurisdiction, it cannot pursue redress through a fresh disciplinary process. Repayment is therefore the only meaningful outcome.

[66] While setting aside the impugned decisions is generally the default remedy, it remains subject to judicial discretion. Courts have occasionally declined to set aside unlawful administrative acts where exceptional considerations, such as disruption of vital public services, disproportionate cost to the public purse, or insurmountable practical difficulties, militate against it.¹⁹ The Board invoked delay in the introduction of the repayment relief as a factor against granting it. However, delay is not in itself a bar to just and equitable relief; its only relevance is whether prejudice or unfairness can be shown, and none has been demonstrated here.

[67] The only ground for opposing repayment relief that remains is the Board's contention that repayment is inseparable from substitution. It is submitted that unless Phumelela is formally cleared of the alleged breach, repayment would be unjust. On this

¹⁹ *Administrative Law in South Africa*. Cora Hoexter and Glenn Penfold Third Edition page 774.

reasoning, Phumelela remains 'charged' with misconduct, and because no fresh disciplinary proceedings are now possible, the relief sought should be refused.

[68] This argument misconceives both PAJA and constitutional principle. Once the impugned decisions are reviewed and set aside, they cease to exist in law. There is no basis for the fine to stand. Restitution follows unless prejudice is shown. Neither PAJA nor the Constitution requires a further finding of innocence before repayment may be ordered. Section 172(1)(b) expressly authorises the court to fashion an order appropriate to remedy the consequences of unlawful conduct.

[69] Because substitution is now impracticable, repayment is the only effective way to vindicate Phumelela's rights. Phumelela paid a fine imposed under decisions that are now declared unlawful, and once those decisions fall, so too does the legal foundation for the Board to retain the money. An organ of state that has coerced payment on the strength of an invalid decision cannot justify keeping the proceeds. To hold otherwise would allow the Board to profit from its own unlawful conduct, undermining the corrective principle and offending the rule of law. The just and equitable order is therefore to set aside the impugned decisions with retrospective effect and to direct repayment of the fine.

[70] In the result, the following is made:

1. The decision of the first respondent ('the Board') taken on 29 May 2019 to find the applicant guilty of contravening condition 10 of its race-meeting licence is reviewed and set aside.

2. The decision of the Board taken on 29 May 2019 to impose a fine of R5 000 000, half of which was suspended for a period of five years on condition that the applicant was not found guilty of the same or a similar offence, is reviewed and set aside.
3. The Board is ordered to refund the fine paid by the applicant to the Board together with interest at the prescribed rate calculated from 29 May 2019.
4. The Board is to pay the applicant's costs, including the costs of counsel, to be taxed on Scale C.



L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 21 August 2025.

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Date of hearing:

29 April 2025

Date of judgment:

21 August 2025