IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO. : 1036/2018

Heard on : 19 April 2018

Date delivered : 23 May 2018

In the matter between:

EMFULENI RESORTS (PTY) LTD

And

THE CHAIRPERSON EASTERN CAPE GAMBLING AND BETTING BOARD First Respondent

THE EASTERN CAPE GAMBLING AND BETTING BOARD Second Respondent

GEC GAMING (PTY) LIMITED Third Respondent

K2014000230 (PTY) LIMITED Fourth Respondent

VUKANI GAMING EASTERN CAPE (PTY) LIMITED Fifth Respondent

JUDGMENT

MAJIKI J:

INTRODUCTION

[1] On the date of hearing of the application the applicant sought an order in terms of Part A of the application. It had approached court on urgent basis seeking an order interdicting the first and second respondents from issuing type D independent site operator licence to the third respondent. The said licence would be permitting the third respondent to offer gaming on limited pay-out (LPM) machines at gambling premises to be situated at the Baywest Mall, Baywest Boulevard, Hinters Retreat, Port Elizabeth (Baywest). In the event that the said licence would be issued before the above relief is granted, it sought to interdict the third respondent from offering limited pay-out machines for gaming at the aforesaid premises. These orders would be sought pending the application in Part B.

[2] In part B of the application which would be moved in due course, the applicants indicate that it would seek the review and setting aside of the decisions taken by the second respondent to grant licences to LPM operators in the jurisdiction of Nelson Mandela Bay Municipality (NMBM) and convert type B licence to type D licences.

[3] In the counter application the first and second respondents (the respondents), would have sought an order for the stay of the application in Part A pending the delivery of judgment in an application brought by Vukani Gaming, Eastern Cape (Vukani) interdicting issuing of Independent Site Operator (ISO) gaming licenses to nine respondents, including the third and fourth respondents, in the present application. At the time of the hearing, the judgment in that matter had been handed down, the counter application was therefore not pursued.

[4] Vukani, therein had initiated a process challenging the Request for Proposals (RFP) in terms of which the LPM licence applications were solicited by the second respondent. Vukani thereafter brought an urgent application seeking to interdict the second respondent from issuing licences pending the finalisation of the process it had initiated challenging the RFP. The application for an urgent interim relief was dismissed, the registrar was directed to facilitate the process of case flow management of the review application so that its hearing could be expedited.

[5] The present application is opposed by the first and second respondents on whose behalf an answering affidavit was filed. Mr Moorhouse for the third respondent indicated that the argument on behalf of the third respondent would be on the points of law only, on the papers before court. I shall refer to the first and second respondents as respondents herein.

[6] The applicant sought no substantive relief against the third and fourth respondents, and indicated that it would seek a cost order in the event of them opposing the application. A relief against the third respondent not to offer limited pay out machines for gaming at the premises to be situated at Baywest would have been sought in the alternative, only in the event that licence had already issued before the interdict against the issuing of licence is granted.

[7] The issue for determination in this application is whether the applicant has made out a case for the granting of an urgent order interdicting the second respondent from issuing a licence to the third respondent and or from interdicting the third respondent from offering limited payout machines for gaming, pending the review application.

[8] At present all LPM's operated in the Eastern Cape operations operate their sites pursuant to agreements with route operators. The RFP now allow for existing site operators already operating in terms of agreements with route operators, to apply to convert their licences to ISO licences. Further, it allows for permission to be granted by the second respondent for entities to open new premises by issuing ISO licences to them (as is the case with the third respondent).

[9] The applicant avers that it is the holder of a casino licence entitling it to operate the Boardwalk Casino and Entertainment World in Summerstrand, Port Elizabeth (the Boardwalk casino). It is seeking to interdict the issuing of licences because according to the applicant, LPM's are gambling machines which have maximum permissible payout, they may be operated outside casinos. The slot machines (which are used inside casinos) are also gambling machines but do not have maximum permissible payout. From the perspective of a person who plays the machine, one may not discern the difference between LPM and a slot machine. They look the same, they offer the same type of game and are generally made by the same manufacturers. A player may just think it is a slot machine with a modest jackpot and not realise that an LPM is designed to have a limited payout. The decisions to grant licences permitting LPM machines are irrational, unproceedural and unreasonable.

[10] The applicant submits that it has a *prima facie* right and a triable case on review. It is important for the interdict to be granted because it will suffer irreparable harm if the relief is not granted, and it has no alternative remedy.

[11] The respondents on the other hand deny that there are no apparent distinguishing features between a casino machine and LPM. They also aver that the second respondent's decisions to issue RFP and roll out additional LPM's is procedurally and substantively sound. Furthermore, the threshold for restraining the exercise of a public power is higher than the one of a triable case on review. Therefore the applicant has not shown that it has a *prima facie* right to entitle it to interdictory relief.

BACKGROUND

[12] Section 4 of the Eastern Cape Gambling and Betting Act 5/1997 empowers the second respondent to, amongst others, oversee gambling activities in the province and exercise powers and perform such functions and duties as they may be assigned to the board in terms of the Act or any other laws in particular to:

12.1 invite applications for licences in terms of the Act and

12.2 consider and dispose of applications for licences in such a manner and at such a time and place as it may from time to time determine.

[13] In June 2015 the second respondent commissioned a study to determine the socio-economic and environmental impact of LPM's in the gambling sector in the province and whether or not to increase the number of LPM's. The GDP and population data from statistics South Africa were used. Despite the fact that both models indicated that Nelson Mandela Bay Municipality (NMBM) was oversaturated the study, based on the GDP mode and an allocation model of 2000 licences, concluded that NMBM could still be awarded 60 LPM licences. The study showed that LPM's

contribute 9.6 to total gambling taxes, for every 10 LPM's, 34 jobs were created, amongst others. Eventually, it was recommended that the second respondent should continue to roll out 6000 LPM machines across the province. Based on these findings a decision to revise the second respondent policy document on LPM was adopted, in line with the recommendations of the study. One of the findings of the study was that a total of 13505 jobs would be created if all 6000 licences were issued.

[14] The interested parties, including the applicant were invited to submit representations on the revised policy. Various other interested parties made submissions, the respondent named two, which supported LPM's. The applicant did not comment. On 16 September 2016 submissions were considered by the compliance and the monitoring committee and amendments were effected to the draft policy and presented to the second respondent for its consideration. On 28 September 2016 a consultative session was held. Further amendments were made to the policy, those amendment amongst others, removed the previously proposed 74 kilometre radius rule between casinos and LPM's. On 26 May 2017 the revised policy was approved by the second respondent.

[15] On 7 June 2017 the second respondent issued draft request for proposals and invited interested parties to make representations before the final RFP was issued. However, there was no proposal to permit licencing of LPM's in Boardwalk casino. Boardwalk casino and Wildcoast Sun in Port Edward are owned by Sun International. Sun International commented but not in relation to Boardwalk, as it was not affected. It explained that Wildcoast sun, which was then affected, would suffer if licences would be issued. The second respondent reserved its right to amend, modify or withdraw the draft RFP, amongst others. All

submissions received were categorised and collated into comments and responses table. A bidder's conference was held and additional representations were received. That resulted in a range of changes to the final RFP, which changes included one relating to the municipalities where licences would be issued. On 29 August 2017 the board approved the final RFP. On 7 September 2017 it was issued and on 11 September it was published in the Provincial Gazette. The notice stated that a final RFP for ISO licences had been made available from 5 September and applications were invited for applications for ISO licences, 400 LPM's would be rolled out in the first phase.

[16] Already on 14 November 2017 the application for review of the decision to issue final RFP had been launched by Vukani. Sun International communicated with the parties in the application.

[17] On 21 February 2018 the applicant's attorneys wrote to the second respondent's attorneys and stated that:

17.1 It is also impacted by the Board's decision to issue and publish the RFP and will also be impacted by any decisions of the Board to issue any ISO licences pursuant to any applications received in response to the RFP.

17.2 It has a direct and substantial interest in any Court order that may be issued in both the review and the interdict applications issued by Vukani

17.3 The issues for determination between Vukani and the Board in the review and interdict applications are *"inextricably*

linked to any issues that would need to be determined by a court" in any related matter between the applicant and the Board.

17.4 It intends to make an application to intervene in the review and interdict applications as co-applicant.

[18] On 22 February 2018, the applicant's attorneys forwarded a letter to the second respondent's attorneys and suggested that in order to avoid multiplicity of proceedings relating to RFP for ISO licence operation, the applicant should be joined in Vukani application. The second respondent should continue with its adjudication process which it has already started and in respect of which it has already incurred costs relating to travel, site inspection and accommodation but it should not issue ISO licences pending the outcome of review application. This communication was also sent to Vukani's attorneys.

[19] On 27 November 2017 the second respondent published a notice in the Provincial Gazette, advising that there were applications received from ISO licences. Interested parties were invited to submit representation by 27 December 2017. On 20 December 2017 the Sun International submitted representations, those included comments on behalf of the applicant as the final RFP included the Boardwalk casino catchment area. On 09 February the second respondent advised that the bidders' comments would be sought on the said submissions and bidders' responses would be forwarded to the applicant within seven (7) days of their receipt. On 16 February 2018 Sun International submitted further representations along with economic consultant's report. On 23 February 2018 Sun International with its legal and economic team and its officials attended public hearings held by the

second respondent. The applicant contends that it made representations as to why the licences should not be granted.

[20] At the said hearings the second respondent enquired if Sun International objected to any type B and C licencing processes as some applications related only to change of ownership. Sun international said it did not object to such.

[21] On 26 February 2018 Sun International communicated to the second respondent about its position, in particular that, it objects to processes that relate to applications involving conversion of licence rights into ISO licences (type D) from any other type of LPM site operator licence. Those would ultimately increase the number of LPM's in the province. The applicant's attorneys were also furnished with second respondent's attorney letter, essentially advising that it rejects the proposals in the latter of 21 February 2018 from Vukani's attorneys. However, deliberations and awards in respect if NMBM, Sarah Baartman and Buffalo City Municipalities were held back for second respondent's
internal reasons.

[22] On 27 February Sun International's attorneys wrote to the second respondent's attorneys. In particular, they requested clarity in respect of the meaning of its communication that the deliberations and awards at the three municipalities were held back for the second respondent's internal reasons. Sun International raised serious concerns relating to possible award of ISO licences in those municipalities and had already indicated its intention to join Vukani review proceedings. However, if it was not necessary to litigate with the second respondent that would be markedly

preferred. It stated that it would therefore be crucial to obtain clarity on the following:

"(a) to what extent the award of any ISO licences in the relevant municipalities (i.e. NMBMM and SBDM) been *"held back"?* In other words, is it the case that your client may still award licences in those municipalities pursuant to the current ongoing process that is a function of the Request For Proposal (**"RFP")** dated September 2017?

(i) if so, by when will such awards be made?;

(ii) if not, has your client decided not to award licences in those municipalities pursuant to the September 2017 RFP?;

(b) if your client is still uncertain as to whether it will or will not award licences in the relevant municipalities pursuant to the September 2017 RFP, by what date will your client have reached a final decision in this respect?; and

(c) if your client is in a position to give an unequivocal assurance that it has not, and will not, issue ISO licences in the relevant municipalities, then we ask that your client kindly indicate this via your offices immediately."

[23] On 28 February 2018 a response from the second respondent's attorneys was furnished along the following lines:

> *"The second respondent resolved not to deliberate or make awards regarding those municipalities due to the nature of the objections raised at the hearings; the nature of the objections necessitated further internal consultations including obtaining a legal opinion and "The deliberations on these areas has been held over to our client's Board meeting which is due to be held on 23rd March 2018 wherein a decision will be reached in respect to these areas."*

[24] On 6 March 2018 Sun International's attorneys indicated that in the light of the delay in the decision in respect of the areas relevant to its casinos, it would no longer be necessary to intervene in the Vukani application. Further the letter stated that Sun International was "*prepared to allow your clients to proceed with their internal deliberations and processes in relation to the proposed ISO licencing process on the understanding that your clients will under no circumstances decide to issue any licences to any ISOs in the above municipalities prior to 23 March 2018"*. The second respondent's attorneys should undertake to communicate any decisions taken by the second respondent to issue ISO licences in respect of the said municipalities no later than 23 March 2018.

[25] On 4 April the second respondent's attorneys sent two letters to Sun International's attorneys. The first letter confirmed that at the hearing of Vukani matter the second respondent undertook not to issue licences until judgment was handed down, which was expected in two weeks' time from 20 March 2018. The meeting of 23 March 2018 was postponed to 29 Mach 2018. At the meeting of 29 March 2018 decisions to grant licences were made but the actual issuing of licences was held over pending the judgment

in the Vukani matter. The second letter enclosed letters to successful applicants dated 29 March 2018 advising them of their success. The third and fourth respondents were granted licences.

[26] This seems to be the common background of how the issues that led to the present application unfolded between the parties.

APPLICANT'S CASE

[27] The applicant in its review application in part B of this application contends that, the second respondent failed to consider highly relevant information when it took the decisions sought to be reviewed. This consisted of the second respondent's own reports, submissions and information placed before it by Sun International. The applicant has its own grounds for review which show the second respondent decisions are irrational, unprocedural and unreasonable, the second respondent failed to comply with rule 59, 62(b) and is inconsistent with some empowering legislation, among others. The second respondent's decision is reviewable in terms of sections 6(2)(a)(i) 6(2)(e)(iii), 6(2)(c)(ii)(cc), 6(2)h and 6(2)(c) of the Promotion of Administrative Justice Act 30 of 2000, (PAJA).

[28] The grounds for review, subject to what will emerge upon supply of rule 53 record can be summarised as including;

FAILURE TO COMPLY WITH LEGISLATION

The applicant complains that the second respondent has not complied with the requirements of regulations 59(3) relating to increase of the number of LPM's to above 2000. Regulation 59(3) states that the second respondent may only increase LPM to above 2000 if:

- satisfied that such will not lead to over – saturation of a limited gambling -machines in the province;

- it has considered, both in regard to existing limited gambling machines and such further machines as may exceed 2000 –

the economic and environmental impact; the impact on problem of gambling and any other information it considers relevant. The second respondent acted in conflict with regulation 59(3) by ignoring the finding of over-saturation.

FAILURE TO HAVE REGARD TO INFORMATION BEFORE THE SECOND RESPONDENT

[29] In the commissioned study to guide the second respondent's decision whether to roll out more LPM in the province, it used outdated statistics. Sun International invested R1.1 bn at Boardwalk after Boardwalk casino was granted exclusivity. The study found that NMBM is over-saturated. It should have been allocated 351 LPM's, it has 570. There are several municipalities without LPMs.

[30] RFP published on 11 September 2017 states that the second respondent's LPM policy is relevant to the applications under consideration by second respondent. The policy confirms that the second respondent is to exercise its functions in terms of the principles of legality, fairness, reasonableness, openness and transparency, The policy emphasizes principles meant to guide the decision process under licencing regime; need to promote tourism; creation of sustainable employment opportunities in the province; enhancement of neighbourhoods and the environment and provision of entertainment facilities to

members of the public. Also to be considered by the impact assessment are turnovers, tax contribution and multiplier effect which could be used for determining net effect in rand and emotional value caused by social ills caused by gambling once computed. The draft version of the policy provided that, in case of licences that are granted which permit the holder to expose more than five LPM's for play, the licenced premises shall not be located within 75 kilometres radius of a licenced casino.

[31] After the second respondent subsequently amended the RFP to include Boardwalk catchment area, Sun International's further representations indicated that Boardwalk casino would suffer if LPM's were rolled out within that catchment area. The gambling revenue would be displaced, LPM's would eat out on the casino revenue. The applicant has operated the Boardwalk casino for over 15 years and has invested heavily in the property and surrounding community.

[32] The applicant invested in order to be given exclusive rights as envisaged in section 41(2)(e) of Eastern Cape Act. The applicant paid significant money for exclusivity. LPM's are unfair, destructive and undermine the exclusivity paid for.

VIEWS OF THE APPLICANT'S ECONIMIC LEGAL EXPERTS

[33] The consultants confirmed what the impact assessment found that there was over-saturation in the area, that LPM's are similar to slot machines, from a customer perspective and that Boardwalk is already losing total revenue and profits despite the re-investment. No further assessment was conducted between the time the draft RFP and final RFP were issued. They also submitted that the second respondent in amending the approach reflected in the draft policy had clearly not done so in a reasoned and rational manner; that there is sufficient evidence to show an alarming link between proliferation of gaming machines in

the Boardwalk encatchment area and the financial misfortunes of Boardwalk, these have and will continue to impact on employment; that the decision to roll out LPM's has a negative effect on tourism whilst Boardwalk casino constitutes a tourist attraction.

IMPUGNED DECISIONS

[34] To issue licences for 40 LPM's 18.5 km from Boardwalk casino is to permit an LPM mini casino to be opened at in the heart of Boardwalk catchment area. The decision that relates to conversion of fourth respondent's has the effect that implies that, the fact that the route operator no longer operates 40 LPM's within 50 kilometres of Port Elizabeth City hall, makes it likely that further 40 LPM/s could be rolled out in that area.

REQUIREMENTS OF AN INTERDICT

[35] *Prima facie* right
According to the applicant even without it being in receipt of the rule 53 record. It has shown that there are reasonable grounds and it has made a substantial case for review.

BALANCE OF CONVENIENCE AND IRREPARABLE HARM

[36] According to the applicant the balancing exercise favours it, if the review application is successful after the interdict had been refused, it will be more prejudiced than the respondents, if the review ultimately fails after the granting of the interdict in Part A. The interests of justice require that Part A be granted. During argument Mr Motau, for the applicant, submitted that the respondents have not answered the issue relating to prejudice. Furthermore, since the judgment in Vukani had been handed down, there would be nothing stopping the second respondent from issuing the licences. If the third respondent invests in

the premises subsequent to the issue of licence, as expressly invited by the second respondent to prepare the premises for operation, it may be too late to reverse that. The dismantling of the effects of the decisions cannot be done without causing prejudice to the entities that invested in an effort to give effect to decision under review. No prejudice would be suffered by the second and third respondents if further processes are halted until the review application is finalised (even on expedited time frames)

NO ALTERNATIVE REMEDY

[37] If the licences are issued, there applicant would have no alternative remedy, either in a damages claim or full redress in review. The second respondent has not acted corruptly in issuing the RFP. Further, even if the applicant is successful in review, there is a risk that it may be impossible to reverse the consequences of the second respondent's decisions at a later stage.

URGENCY

[38] The applicant sought the urgent relief because it does not know what the third respondent's intentions are in relation to the opening of its premises. It is in the interests of all the parties to preserve status quo as soon as possible, to avoid unnecessary expenditure on premises whilst review application is pending.

[39] If Part B is successful, the licencees could reasonable argue that the impugned decisions should not be set aside because of all the expenditure they would have incurred in preparing their premises for operation.

RESPONDENT'S CASE

[40] In its response the second respondent first sets out about ten objectives for introducing legal gaming in the province and reasons for the amendments. I do

not wish to repeat same here at this stage. The respondents go further to explain their version as to processes that the second respondent undertook in order to reach the decisions made on 29 March 2018. The respondents highlight their attack about the defect in the applicant's case and finally argue that the applicant has not made out a case for the grating of the interdict.

[41] As regards the making of the decisions, according to the respondents, on the basis of the request on behalf of the applicants that it should be advised of any decisions taken, to issue ISO licence in the affected municipality by 23 March 2018, the second respondent was of the view that the applicant appreciated that the second respondent could make decisions relating to the granting of licences, even if it did not necessarily issue same.

[42] The second respondent remained committed to its undertaking not to issue the licences pending the delivery of judgment. On 29 March 2018 it had deliberations in relation to NMBM, Sarah Baartman and Buffalo City Municipalities and granted licences to the relevant bidders, but the issuing of licences is still pending as per undertaking. This was communicated on 4 June 2018. This is the date and the communication which the applicant says triggered the need for the present application. It says it became aware for the first time that the second respondent decided to issue two licences to third and fourth respondents on that date.

[43] As regards urgency the respondents say its deliberations and the decisions it took on 29 March 2018 do not breach the undertaking not to issue licences. Vukani stated that it was seeking a temporary restraining order against the second respondent's issuing ISO licences pursuant to RFP. It said the second respondent should continue with the adjudication process it has already started, but not issue ISO licences pending the outcome of the review application. The applicant on the other hand said that the internal deliberations and processes could continue in relation to the proposed ISO licencing process but second

respondent should under no circumstances decide to issue licences prior 23 March 2018 on the specified municipalities. Between 6 and 20 March 2018, which the applicant says created urgency in the matter, even on 11 April 2018 upon receipt of application papers herein, and 16 April 2018 the second respondent re-iterated to the applicant that it would not issue licences.

[44] On the reading of the respondents' papers, it is apparent that its view is that up to 19 April 2018 when judgment was delivered there was no urgency for the applicant to move the application. The applicant was part of the communication about the undertaking made, it even reconsidered its position not to intervene in Vukani application after the second respondent clarified its undertaking. It always knew that decisions relating to the granting of licences could be made. It took it even further by saying if any decisions to issue licences is made by 23 March 2018 it should be advised. The decisions were taken on 29 March 2018 but no licences were issued. There was nothing new when the applicant was advised on 4 April 2018 that the decisions to grant licences had actually been made. Judgment could have even been handed down much earlier in the Vukani application.

[45] As regards the applicant's case on review in particular, the contention that, the second respondent failed to comply with regulation 59(3) when it issued the RFP and it failed to satisfy itself that additional 2000 LPM's would not lead to oversaturation of LPM's in the province, does not have regard to the totality of what was covered by the study. The study concluded that based on GDP model NMBM could still be awarded 60 LMP licences whilst Buffalo City could absorb 198 licences, based on current regime of 2000 licences. Further, that

- the second respondent should consider opening up the market to independent site operators so that an oligopoly is not the end product once all licences have been awarded;
- the board should continue to roll out 6000 LPM machines across the province,

- the board needs to reflect upon main methods based on either equitable population method or a GDP/GVA economic based model or even a hybrid based on a combination of the low model;
- 4800 (80%) of the number of machines could be awarded according to GDP GVA economic model and 1200 (20%) of the machines could be awarded at the board's discretion, amongst others.

Therefore, additional licences could still be allocated to NMBM and Buffalo City Municipality without exceeding the 2000 threshold and under the existing regime. The second respondent also went through an extensive consultative process and considered the applicant's representations. It was guided by policy when making the decisions.

[46] Regulation 59)4) is not implicated, the second respondent is not rolling out more than 2000 LPM's. Finally, the second respondent in its discretion elected to use a hybrid method, which allowed it to roll out additional LPM's without leading to oversaturation. The 70/30 split was decided after testing different scenarios ranging from 10% population and 90% economic to 90% population and 10% economic.

[47] With regard to prima facie right, that would entitle the applicant to interdictory relief, the decision to issue RFP was taken pursuant to a thorough and comprehensive process aimed at achieving the objectives of the Act and RFP. The decisions are procedurally and substantively sound. They are therefore not liable to review.

[48] As regards irreparable harm, no harm could ensue as no licences would have been issued. That the process would not be reversible, once successful bidders commence with their preparations and proceed to open their premises, would not happen. They would not have been issued with licences as yet. Furthermore, the court determining the review, if an appropriate case is made, could set aside the impugned decisions and any consequent decisions, including

the issuing of licence, if same had subsequently been issued. It is speculative to explore on how the reviewing court would exercise its discretion.

[49] The study found that additional LPM's could be rolled out, there would be no oversaturation, therefore no harm would be suffered by public , more so that second respondent was conservative and decided to roll out 400 instead of the 6000 which could potentially be rolled out, without harm to the public. Therefore the applicant cannot suffer any harm, in particular in the light of compelling considerations underlying the need for a licenced gambling operation in the province.

[50] The applicant has an alternative relief in the review application. Again, what the reviewing court would order after the determination of the review cannot be speculated on.

[51] The balance of convenience favours the refusal of interim relief. Any delay in issuing ISO licences is a delay in the generation of jobs and revenue for the provincial fiscus 13505 jobs could be created if all 6000 licences were issued. RFP's main objective and the issuing of ISO licences are to develop the province and to advance previously disadvantaged individuals. The granting of the interdict would prejudice the second respondent and the public which benefits in the second respondent's programmes.

[52] In respondents' view correspondence prior to 6 March 2018, stating that the applicant no longer wished to intervene in the Vukani proceedings indicates that the applicant was part of Vukani application. The launching of this application constitutes proliferation of disputes.

[53] In answer, the respondents denied that there is no difference between LPM and slot machines. All issues raised by the applicant were dealt with during the public hearings. The averments relating to exclusivity have no relevance in

the present application. However, the roll out of LPM's has no effect on applicant's rights to operate a casino because LPM's are not casinos, the applicant's rights are not to the exclusion of gambling activities. The respondents deny that LPM's are likely to impact the applicant's revenue.

[54] The respondents aver that the applicant has not made out a case for the granting of the interdict. Counsel for the third respondent aligned himself with the submissions made by the respondents on the legal points.

[55] The circumstances placed by the applicant for urgency are that it acted quickly after the second respondent's advices of 4 April 2018. What I have to agree with the respondents about is that, at the time the application was launched there were no new facts on which urgency could have arisen. Certificate of urgency was signed on 10 April 2018. Up to the 6 March 2018, the only issue the applicant did not agree with was the issuing of licences. That had not happened. All what happened on 29 March 2018 was what the applicant should have expected could still have happened, on 23 March 2018. Contrary to what the applicant suggests that now that the judgment in Vukani was handed down, the urgency is greater because licences may be issued anytime, the expedited review therein, which covers even the aspects raised herein, will have an effect of resolving most of the issues that are said to be of concerning urgency.

[56] Furthermore, if the applicant was prepared to have its guard down until the Vukani judgment, there could not be anything warranting a different consideration at the time of the launching of this application as a basis for a ground to seek urgent relief. As for the third respondent opening premises or spending on preparation of the premises, they would not do that without licence being issued to them. If they did so, whilst there are pending applications, similarly the respondents are entitled to speculate that the reviewing courts would consider that the licencees chose to act with full knowledge of the pending court challenges, and make an appropriate order, including that of damages

without being overly considerate to the licencees. Nonetheless, I would not base my views for existence or non-existence of urgency on any speculative considerations.

[57] It is my view that apprehension of irreparable harm, prejudice, balance of convenience favouring the applicant and the review not proving alternate remedy, the facts on which the applicant bases those would be speculative for the same reasons I have just articulated. Without a finding of irreparable harm the applicant's *prima facie* right would be impacted on. More about *prima facie* right still has to be said though.

[58] It is trite that in an application for interim relief the applicant has to establish that is has a *prima facie* case, even if open to doubt. In matters with a pending review application I must be mindful of the fact that I need not to delve into the terrain and responsibilities of the reviewing court. Ordinarily, it would suffice to determine whether the applicant has a triable case on review, as the applicant submitted. The applicant has raised a number of failures and flaws on the part of the second respondent in the process leading to and that of making the decisions to be reviewed. Equally, the respondents explained fully why in their view the decisions were appropriately made. Nevertheless, in the circumstances of this case, it may be of no real moment to make a finding as to whether a *prima facie* right would have been found to be proven.

[59] **In National Treasury and Others v Opposition to Urban Tolling Alliance and Others** 2012 (6) SA 223 (CC) at paragraph 44 and 47 the court referred with approval to the judgment in **Gool v Minister of Justice and Another** 1955 (2) SA 682, with regard to the circumstances when the court should grant temporary interdict where the case is concerned with restraint of the exercise of statutory power, it was held that such an interdict is not to be readily granted. More than what common law states that, it should be granted only in exceptional cases and when a strong case for that relief is made out, the courts

must also refrain from entering the exclusive terrain of other functionaries. Temporary restraint against exercise of statutory power well ahead of adjudication of claimant's case may be granted only in the clearest of cases and after careful consideration of separation of powers harm.

[60] Consequently, I am of the view that the applicant has not made out a case for the granting of the interim relief in Part A of the application.

In the result,

1. The application for the granting of an interdict is hereby dismissed.

2. The applicant is hereby ordered to pay the costs of the application.

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B MAJIKI
JUDGE OF THE HIGH COURT

Counsel for the applicant : Mr Moorhouse

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