REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

2/05/2017
DATE

SIGNATURE

CASE NO: **45777/2014**

In the matter between:

SUNSHINE ENTERTAINMENT CC t/a	First Applicant
'THE NEW MAROELA HOTEL'	
VUKANI GAMING GAUTENG (PTY) LTD	Second Applicant

and

THE GAUTENG GAMBLING BOARD	First Respondent
THE ACTING CHIEF EXECUTIVE OFFICER	Second Respondent
OF THE GAUTENG GAMBLING BOARD	

JUDGMENT

OPPERMAN J

INTRODUCTION

[1] This is an application brought by the first applicant ('**Sunshine Entertainment**') and the second applicant ('**Vukani**') to review and set aside a decision taken by the first respondent ('**the Board**') on 10 July 2014, refusing two applications for licences to operate 'limited payout machines' ('**LPMs**') at the New Maroela Hotel in Pretoria North. The first application is referred to as a 'Type A' application for a licence to operate 5 LPMs, and the second application is referred to as a 'Type B' application for a licence to operate 20 LPMs.

[2] The Board's reasons for refusing both applications are contained in a single letter. The Board advanced the following reasons in its letter for refusing both applications:

> "We regret to inform you that your applications by Sunshine Entertainment CC t/a The New Maroela Hotel at Erf 1803, 228 Ben Viljoen Street, Pretoria North were declined based on inter alia the following reasons:
>
> That there is a TAB agency and a pub, both with five LPM's (sic) each on the same erf which may lead to proliferation.
>
> That the applicant failed to show genuine commitment to BBBEE by ensuring that at least 51% of ownership required is by previously disadvantaged (sic). The applicant merely put Mrs Fikile Elizabeth Kgarajoae, a bar attendant as a 51% shareholder without her being made aware of the implications of being a shareholder and in order to obtain a licence without a genuine intention to have a proper BBBEEE shareholder."

[3] The Board therefore relied on two reasons in respect of both applications. The first reason was that both applications would apparently lead to *"proliferation"*. The second reason was that Mrs Fikile Elizabeth Kgarajoae's ('**Mrs Kgarajoae**') ownership of 51% of the shares in Sunshine Entertainment meant that it had failed to show *"a genuine commitment to BBBEE"*.

FACTUAL BACKGROUND

The RFP

[4] The Board is a creature of statute. It has no powers beyond those that are conferred on it by the legislative framework that comprises the National Gambling Act, 7 of 2004, the Gauteng Gambling Act, 4 of 1995 and the regulations promulgated under those statutes. When it calls for applications for licences pursuant to an invitation to applicants ('**the RFP**') (as it did in this case), it is bound to act in accordance with the provisions of the RFP.

[5] It has been held in the procurement law context that the prescripts of an administrative process are legally binding.[1] This is to ensure the fairness, optimality and integrity of the process.[2] The same principle must apply in the context of licencing applications.

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[1] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC) ("AllPay 1") at para 38; *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA) at para 4; *Minister of Social Development and Others v Phoenix Cash & Carry-Pmb* CC [2007] 3 All SA 115 (SCA) at para 1.

[2] At para 40 of *AllPay1* the Court expressed the underlying purpose of this approach:

> "...*insistence on compliance with process formalities has a three-fold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences*".

Type A licence applications

[6] Section 2 of the RFP regulates the process of the application for, and the adjudication of, *"Gaming Machine Licences"*, which are licences for sites for 5 machines or less (referred to as 'Type A' licences).

[7] Section 2.1 sets out the evaluation criteria for Type A licence applications. The evaluation criteria are described in greater detail in sections 2.1.1 to 2.1.7 of the RFP. Section 2.1.7 explains the other factors that the Board may rely on in evaluating Type A applications. These include the proximity of the site to religious institutions, schools, or premises where under age persons, may be present. None of the stated evaluation criteria refer to BBBEE or to *"proliferation"*.

Type B licence applications

[8] Section 2.2 sets out the evaluation criteria for Type B licence applications, being applications for more than 5 but less than 40 LPMs. There is a degree of overlap with the criteria for Type A licences. It also makes no reference to *"proliferation"*.

[9] However, in terms of section 2.2.4, Type B licence applications are evaluated with reference to the *"National Minimum Licensing Criteria"*. Section 15.1 of the National Minimum Licensing Criteria reads as follows:

> **"Ownership of the sites**
> The applicant must show commitment to broad based BEE by ensuring that at least 51% of ownership of the site is acquired by blacks.

> This must be in place at application stage or prior to operation of the site. Should the application not have a BEE structure in place at the time of the application, a detailed plan, with a motivation from the PLA [Provincial Licensing Authority], must accompany the application with details of the proposed BEE inclusive of the agreements and proposed implementation dates for consideration by the Board"

[10] In other words, an applicant is required to demonstrate a commitment to black economic empowerment by ensuring that, either when applying for a site licence, or before operating a site, a black person owns a 51% stake in the 'site', which is understood to mean 51% in the business operating the LPMs for which the licence application is made.

Mrs Kgarajoae's interest in Sunshine Entertainment

[11] Mrs Kgarajoae holds a 51% interest in Sunshine Entertainment, the applicant for both the Type A and Type B licences.

[12] She is a manager at the New Maroela Hotel and has been working there for approximately 22 years. She started working there as a cleaner, thereafter progressing to work as a cashier and ultimately in management.

[13] Mrs Kgarajoae explains that she has a very good relationship with the Karabis family, who acquired the hotel in 2006. In 2010, Mr Theofanis Karabis ('**Mr Karabis**') explained to her that he wanted to form an entity (ultimately Sunshine Entertainment) for purposes of operating LPMs at the hotel, and in order to meet the empowerment criteria for licence applications he offered Mrs Kgarajoae an interest in the entity. Mrs Kgarajoae goes on to explain that Mr Karabis approached her to become a member of Sunshine Entertainment after having discussed the matter with his family, and that

he had approached her because of her long service to the hotel. It was discussed that she would assume management responsibility for the LPMs when site operator licences were granted. None of these allegations are disputed.

[14] It is also not in dispute that Mrs Kgarajoae and Mr Karabis gave legal effect to this arrangement. Mrs Kgarajoae became a 51% member in Sunshine Entertainment, and the parties concluded an association agreement.

[15] The association agreement expressly records the parties' membership interest (with Mrs Kgarajoae reflected as a 51% member, and Mr Karabis as a 49% member), provides that management of the business is vested in its members, and provides for profit distributions to be made to members.

[16] Mrs Kgarajoae has explained that at the time that she signed the association agreement she did not understand that she held the majority of the members' interest in Sunshine Entertainment. She assumed it to be 50%. Her misunderstanding of the nature of her interest is perfectly understandable. She is not legally trained, and only had the benefit of secondary schooling.

The evaluation of the licence applications

[17] The licence applications have a long history. On 7 March 2012, Vukani, on behalf of Sunshine Entertainment, made a Type B application to the Board for licences allowing Sunshine Entertainment to operate 40 LPMs at The New Maroela Hotel. (Vukani did so as the holder of a 'route operator licence', which enables it to supply LPMs to holders of 'site operator licences').

[18] Pursuant to this the Board took the view that its policy as regards Type B licences was that only 10% of the number of LPMs allocated to Vukani could be utilised for this type of licence. According to the Board, this meant that the application for 40 LPM licences had to be revised to fewer LPMs. This caused Vukani to amend the Type B application during July 2013 to make application for a licence for 20 LPMs.

[19] Vukani became concerned about the Board's delay in dealing with the Type B application. Thus, on 25 October 2013 it submitted a Type A application on behalf of Sunshine Entertainment for a licence to operate 5 LPMs.

[20] On 10 April 2014 the Board conducted separate interviews with Mrs Kgarajoae and Mr Karabis. The Board states in its answering affidavit that the discussions with Mrs Kgarajoae *"revolved around [her] involvement in Sunshine Entertainment and her holding of an interest in the business of Sunshine Entertainment"*. She was apparently questioned *"as to her role in the business"*; *"her understanding of the agreement"* (being the association agreement referred to before), and *"why she was brought into the business of Sunshine Entertainment"*.

[21] Both she and Mr Karabis were asked to make a note summarizing what was discussed at the meetings. The Board states in its answering affidavit that Mrs Kgarajoae recorded that she *"would only become a partner in the business when the LPMs arrive"* and that *"when she was given the majority member's interest in the business it was not explained to her why she was given the said interest"*. The Board

also states that Mr Karabis was quite *"open"* in explaining that Mrs Kgarajoae was given an interest in the business to meet the National Minimum Licensing Criteria.

[22] It is common cause that at no stage during these interviews was it ever put to Mrs Kgarajoae or Mr Karabis that the Board regarded her involvement in Sunshine Entertainment as untoward, or evidencing of a lack of genuine commitment to BBBEE. Mrs Kgarajoae has expressly said that although she did not understand that she would be a majority member in Sunshine Entertainment, she knew she was becoming a member given her longstanding service to the hotel.

[23] Moreover, the association agreement read with the Companies and Intellectual Property Commission report on Sunshine Entertainment, makes it clear that as a matter of law she was as a fact a 51% member, and would be entitled to profit distributions as and when licences for the LPMs were granted. Had the Board asked to see these documents this would have been made clear.

[24] The fact that Mr Karabis was forthright about involving Mrs Kgarajoae as a basis to comply with the National Minimum Licensing Criteria should come as no surprise to the Board, and could certainly not have been a valid basis to find that Sunshine Entertainment had not evidenced a *"genuine commitment"* to BBBEE.

[25] Pursuant to an interlocutory application brought by the applicants against the Board, the Board produced an *"Investigation Report"* in respect of Sunshine Entertainment's applications. The report states that it was prepared on 10 June 2014, and was reviewed and signed off on 11 June 2014. It was prepared by Mr Njabulo

Ntshembeni, who was one of the individuals who interviewed Mrs Kgarajoae and Mr Karabis.

[26] The report comments on various aspects of Sunshine Entertainment's operations (for example its credit history, tax clearance status and the like). It also reports on its members, recording that there are no adverse findings in respect of Mrs Kgarajoae and Mr Karabis, and that both have '*key employee licences*'. In addition, it notes that there were no public objections to the application.

[27] It then records the following under the heading *"OTHER MATTERS OF INTEREST OR CONCERN"*:

> **8.1) LPMs already in the premises**
> Le Domaine Tab Agency - 5 LPMs
> 2 Greeks and a Boertjie CC t\a The New Maroela Hotel - 5 LPMs
>
> **8.2) 51% Shareholding**
> Mrs Elizabeth Fikile Kgarajoae owns 51 % of the CC **but it appears like she was given this shareholding so as to sidestep the RFP which provides that at least 51% of ownership of the site should be acquired by blacks**.
>
> An interview was conducted with Mr Karabis and Mrs Kgarajoae about the authenticity of the partnership as Mrs Kgarajoae did not contribute anything to the business. Mrs Kgarajoae mentioned that she does not know how the business operates as she is working as a bar tender at the bottle store which is owned by Mr Karabis. She was just told that she will be a member and signed a membership agreement.
>
> **Mr Karabis mentioned that Mrs Kgarajoae was chosen because when they were applying for 40 machines Vukani Gaming Gauteng (Route Operator) advised them that they need 51 % of previously disadvantaged individuals (PDI) in the**

business and she was chosen among other employees because of her dedication to the company".

(Emphasis added.)

[28] It is not clear how the report could find that Ms Kgarajoae's interest in Sunshine Entertainment appeared to be a means to *"sidestep"* the requirements of the National Licensing Criteria. This finding is particularly puzzling for two reasons: first, Ms Kgarajoae was as a matter of law a 51% member of the entity applying for the licence (and in law entitled to participate in the entity to that extent); and (ii) in view of the fact that the report also notes that Mr Karabis was open about the fact that she was made a member in order to achieve the 51% requirement of the National Minimum Licensing Criteria, and because of her dedication to the hotel.

[29] The report concludes with a *"RECOMMENDATION"* which reads as follows:

We recommend refusal of the license due to the following:

The applicant **attempted to commit fronting** by appointing a previously disadvantaged individual (PDI) to meet 15.1 of the National Minimum Licensing Criteria which states:
The applicant must show commitment to broad-based BEE by ensuring that at least 51% of ownership of the site is acquire by blacks.
There is TAB agency and a pub, both with five LPMs each, on the same erf. (The businesses have different liquor and business licenses).
There **will also the proliferation of gambling in the same area**.

(Emphasis added.)

[30] On 23 June 2014 (i.e. after the production of the investigation report), the Board

convened a public hearing in relation to various LPM applications, including the Type A and Type B applications submitted by Sunshine Entertainment. A transcript of a portion of the hearing relevant to Sunshine Entertainment's applications is attached to the applicants' supplementary founding affidavit.

[31] The transcript is striking for the reason that at no stage during the hearing did anyone from the Board put it to the applicants' representatives that a finding had been made that Sunshine Entertainment had *"attempted to commit fronting"*, or that granting the applications would lead to *"proliferation"*.

[32] The Board's response to this in its answering affidavit is to assert that the applicants' representatives could have addressed these issues at the hearing had they wished to do so. This argument is untenable. The applicants could not have been expected to address findings contained in a report about which they had no knowledge. A fair process demanded that these findings were put to them for their response before an adverse finding could be lawfully made.

[33] Pursuant to the public hearing the Board rendered its decision on 10 July 2014.

GROUNDS OF REVIEW

[34] It is trite that the Board's decision constitutes "administrative action" and is accordingly reviewable under the Promotion of Administrative Justice Act, 3 of 2000 ('PAJA').[3] The Board's decision falls to be reviewed and set aside on any one or more of the following grounds, all of which I find impugn the decisions taken:

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[3] See *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA).

Type A application - relying on an incorrect requirement

[35] The Board's decision to refuse the Type A application (being the application for 5 LPMs) on the basis of a *"lack of genuine commitment to BBBEE"* is procedurally unauthorised. The RFP contains no requirement that an application for a Type A licence comply with the National Minimum Licensing Criteria. This is only a requirement for the grant of a Type B licence. In refusing the Type A application for this reason the Board acted for a reason not authorised by the RFP and accordingly unlawfully.[4]

[36] Its decision in this regard is also reviewable on the basis that it was materially influenced by an error of law (insofar as it may have believed the National Minimum Licensing Criteria to apply to Type A applications); was irrational; or that it was vitiated on the basis that it took into account an irrelevant consideration.[5]

Type A and B applications - Fronting - Procedural Fairness

[37] The decision to refuse both the Type A and Type B applications on the basis that Sunshine Entertainment *"failed to show a genuine commitment to BBBEE"* (premised on the finding in the investigation report of *"attempted fronting"*) was manifestly procedurally unfair.

[38] It is well established that procedural fairness, and the demands of *audi alteram partem*, are required to safeguard the interests of individuals subjected to the exercise of public power, and to improve the quality and rationality of decision

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[4] Section 6(2)(e)(i) of PAJA codifies this ground of review, providing that a decision is reviewable if taken for a reason not authorised by an empowering provision.
[5] Sections 6(2)(d); 6(2)(f)(ii); and 6(2)(e)(iii) of PAJA found these grounds of review.

making.[6] The Constitutional Court has stressed the importance of a fair procedure that allows a party to be heard. In *De Lange v Smuts NO* it held as follows:[7]

> "Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because, in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance".

[39] This principle is particularly apposite in a case such as the present where the decision-maker has information (in this case the report) which tends towards a particular view, and upon which an adverse inference may be drawn. In *Logbro Properties* the Supreme Court of Appeal held that a decision stands to be set aside where the party in question is not afforded the opportunity to make representations on issues that may lead to an adverse decision being taken against them.[8]

[40] This is precisely such a case where procedural fairness demanded that the Board disclose to the applicants that it intended to refuse the applications on a serious basis, namely 'fronting'. This is an extremely adverse finding to make against a potential licensee. It in effect directly accuses the applicant of dishonest conduct. The Board had every opportunity to put its views in this regard to the applicant, including during the public hearings conducted on 23 June 2014 at a time when it was in possession of the investigation report.

[41] Indeed, the Rule 53 record (which includes a transcript of the public hearing)

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[6] See the judgment of Goldstone, J in *Janse Van Rensburg NO v Minister of Trade and Industry NO* 2001 (1) SA 29 (CC).
[7] 1998 (3) SA 785 (CC) at para 131.
[8] *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA) at pars 25-26.

evidences that at no stage did the Board advise the applicants that it considered Ms Kgarajoae's interest in Sunshine Entertainment to be a sham. Had it done so, and afforded the applicants the opportunity to address the Board's concerns, they could have, for example, furnished the Board with evidence that she was indeed a lawful majority member of the close corporation, and had rights in terms of an association agreement to manage the business and share in its profits. These documents do not appear in the Rule 53 record, evidencing that they were as a fact not considered by the Board at all.

[42] During argument much emphasis was placed on the fact that Ms Kgarajoae's ownership was limited to an entitlement to share in the profits generated by the LPMs and ought to have included an entitlement to share in the profits generated by the bar. This is so as the National Gambling Board's minimum criteria[9] requires that the running of the LPM business was to have been incidental to the running of the restaurant/bar, accordingly Sunshine and/or Vukani were required to ensure that Mrs Kgarajoae had 51% ownership of the site. '*Site*' is not defined. How this concept is to be distinguished from '*the entire business operations*' as provided for in clause 3 of the National Gambling Board's minimum criteria is also not clear. It is unnecessary to make a finding in this regard as, on a factual level, this criticism appears to be incorrect. Ms Kgarajoae stated that her ownership is linked to the proposed bar and restaurant as well as the proposed LPM operation. She said:

> 'My ownership links to the proposed bar and restaurant as well as the proposed LPM operation. The fact that I do not derive a benefit from an operational bar on the site, held by an entirely different company, is not a fact that the Board can permissibly rely

[9] Clauses 15.1 and 15. 2 read with clause 3

upon to conclude that my interest in the business is a front. Moreover, for the sake of clarity, I point out that Sunshine Entertainment trades as the New Maroela Hotel for the purposes of the identification of the enterprise. Moreover, for the avoidance of any doubt, the LPMs on the site will constitute the secondary business on the site, and moreover, I will be entitled to share profits in respect of the LPMs operation, the proposed bar and restaurant, the existence of which, remains contingent on Sunshine Entertainment's application being granted.'

[43] Because of the uncertainty of the criteria, it ought, at the very least, to have been canvassed with Ms Kgarajoae and Mr Karabis at the public hearing and the Board's failure to do so was procedurally unfair. The decision accordingly falls to be impugned on this basis too.

Type A and B applications – Proliferation - Procedural Fairness

[44] The Board's refusal of both applications on the basis that they would lead to *"proliferation"* was for the same reasons also procedurally unfair and accordingly reviewable.[10] The RFP contains no reference to *"proliferation"* or the criteria that the Board would use to judge whether or not an application would cause proliferation, whatever the term may mean. There is no indication whatsoever in the RFP, or otherwise from the Board, that the Type A application (seeking a licence for 5 LPMs) could result in proliferation.

[45] Moreover, in relation to the Type B application, the applicants reduced the number of LPMs for which an application was made at the instance of the Board. In these circumstances a fair hearing demanded, at the very least, that the Board advise the applicants as to what it had in mind when it thought that one or either of the applications could lead to *"proliferation"* and why it held this view, and it should

[10] Also on the basis of section 6(2)(c) of PAJA.

have invited the applicants to make representations on this issue.

Type A and B application - Fronting - regard to irrelevant matter and disregard of relevant matter

[46] The Board's decision to refuse both applications on the basis that Sunshine Entertainment engaged in 'fronting' (i.e. that Ms Kgarajoae's involvement was a sham) was premised on a brief interview with her and Mr Karabis in which neither of them disclosed anything that warranted such a finding.

[47] Critically, the Board did not have regard to the fact that as a matter of law Ms Kgarajoae is a 51% member of the company, and has full participation rights and management control. It did not have regard to these facts (or the association agreement) when taking its decision. Instead, it placed reliance on the fact that she did not appreciate the nature of her interest in the close corporation, that she had been given her interest (as opposed to paying for it) by the Karabis family, and that Mr Karabis had told the Board's representatives in his interview that she was offered the interest in order to comply with the National Minimum Licensing Criteria.

[48] On the latter point (the former having been addressed above) there is no requirement in the National Minimum Licensing Criteria stipulating that one must pay for an interest in a company to qualify as a 51% shareholder or member for BBBEE purposes. This would be absurd, and contrary to the very purpose of empowerment, which (as in this case) may entail extending a benefit to someone who would otherwise not be able to afford to pay for it.

[49] These are self-evidently not rational, reasonable or justifiable grounds for the

Board to have reached the drastic conclusion that Ms Kgarajoae's interest in Sunshine Entertainment was a sham. The Board's decision is accordingly reviewable on the basis that it took into account irrelevant considerations, and failed to take into account relevant ones, and was irrational and/or unreasonable.[11]

[50] The test for rationality contemplates a rational connection between the decision and the evidence that served before the decision-maker.[12] In this case there was clearly no such rational connection. The investigation report at its highest put it as follows *"... it **appears like** she was given this shareholding so as to sidestep the RFP which provides that at least 51% of ownership of the site should be acquired by blacks"* (emphasis supplied). But, as already stated, this inference in the investigation report was drawn without regard to any objective evidence, and the Board's reliance on it was accordingly fundamentally flawed.

[51] By acting in this manner the Board clearly also acted unreasonably in the sense contemplated by the Constitutional Court in *Bato Star* where it was held that a reasonableness review under section 6(2)(h) PAJA entails a simple test, *"namely, that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach".*[13] What is reasonable is bound up in the facts of each case.[14] The decision to refuse the license applications on the basis of an '*appearance*' that Sunshine Entertainment had engaged in fronting was

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[11] Sections 6(2)(e)(iii), 6(2)(f)(ii) and 6(2)(h) of PAJA founds these grounds of review.
[12] See the decision of Froneman, DJP in the Labour Appeal Court in *Carephone (Pty) Ltd v Marcus NO & Others* [1998] ZALAC 11 (1 September 1998) at para 37, and the acceptance of this test in PAJA cases by the Supreme Court of Appeal in *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA) at para 21.
[13] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism & Others* 2004 (4) SA 490 (CC) at para 44.
[14] See *Free Market Foundation v Minister of Labour & Others* 2016 (4) SA 496 (GP) at 96ff.

one that no reasonable decision maker could have reached.

Type A and B application - Proliferation - regard to irrelevant matter and disregard of relevant matter

[52] The Board's refusal to grant the applications on the basis of *"proliferation"* is unlawful for the same reasons. It was irrational and/or unreasonable, and it failed to take into account relevant considerations.

[53] The reasons letter from the Board records that both applications were refused because *"there is a TAB agency and a pub, both with five LPM's each on the same erf, which may lead to proliferation"*. In an attempt to bolster this reason, the Board in its answering affidavit refers to a map, which it contends evidences that *"there are already 50 or so LPMS operating within a 5 kilometer radius of the hotel"*.

[54] But this is not a reason that appears in the Board's letter, and it appears nowhere from the Rule 53 record. (Indeed, the map relied upon by the Board is not included in the Rule 53 record). The Supreme Court of Appeal has expressly held that it is impermissible to rely on new reasons that appear for the first time in answering affidavits.[15]

[55] The true reason, namely that *"proliferation"* may occur *"on the same erf"*, is nonsensical. In the first instance, there is no evidence in the Rule 53 record about *"proliferation"* (and no explanation of it in the RFP). The investigation report demonstrates that as a fact the closest other LPM site is 8km from the hotel, and outside of the 5km radius that the Board regards as being ordinarily a cause for

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[15] *National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at para 24.

concern.

[56] Furthermore, the report also refers to LPM sites which were *"under investigation"* at the time that the report was compiled, meaning that these sites could not have been taken into account when the Type A and Type B were assessed.

[57] The reason that both applications should be refused on the basis that *"proliferation"* may result *"on the same erf"* is also misplaced insofar as the evaluation criteria of the RFP (both in relation to Type A and Type B licences) are premised on the Board having regard to the proximity of LPM sites to one another. In other words, *"proliferation"*, however it is to be understood, appears to be about the density of LPM sites, and not about an increase of the number of LPMs on any particular site.

CONCLUSION

[58] The Board relied on two reasons in respect of both applications A and B. The first reason was that both applications would lead to *"proliferation"*. The second reason was that Ms Kgarajoae's ownership of 51% of the shares in Sunshine Entertainment meant that it had failed to show *"a genuine commitment to BBBEE"*.

[59] The Board's refusal of both applications for the reasons discussed hereinbefore was unlawful, unreasonable and procedurally unfair. However, it need only be shown that one of these two reasons is flawed for the Board's decision to refuse both applications A and B, to be set aside. This is because a 'bad' reason (even when given with other good reasons) cannot provide a rational connection to the ultimate decision. The Supreme Court of Appeal has recently held as follows:

"It is a well-established principle that if an administrative body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated."[16]

[60] The applicants sought the reviewing, setting aside and remittal of the Board's decision for reconsideration. An order of substitution was also sought. It is accepted that due to the effluxion of time an order of substitution is no longer feasible, and accordingly only reviewing, setting aside and remittal relief is persisted with.[17]

ORDER

[61] The following order is granted:

61.1 The first respondent's decisions of 10 July 2014:

61.1.1 refusing the first applicant's application brought in terms of the Gauteng Gambling Act, 4 of 1995 ('**the Act**') for licences to operate 20 limited pay-out machines at The New Maroela Hotel, 228 Ben Viljoen Street, Pretoria North ('**the premises**'); and

61.1.2 refusing the first applicant's application brought in terms of the Act for licenses to operate 5 limited pay-out machines at the premises, are set aside and remitted to the first respondent for reconsideration.

61.2 The first respondent is ordered to pay the costs of this application.

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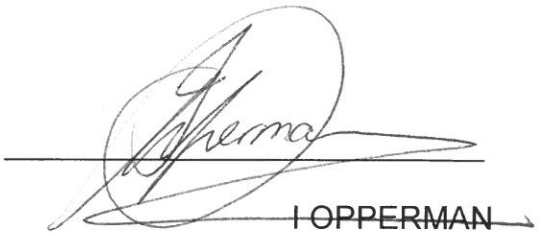
[16] See *Westinghouse Electric Belgium Societe Anonyme v Eskom Holdings SOC Ltd & Another* 2016 (3) SA 1 (SCA) at para 44 and 45, relying on *Patel v Witbank Town Council* 1931 TPD 284 at 290 and *Rustenberg Platinum Mines Ltd (Rustenberg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) at para 34.

[17] Consistent with *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC) at para 47-49.



I OPPERMAN

Judge of the High Court

Gauteng Local Division, Johannesburg

Heard: 24 April 2017

Judgment delivered: 2 May 2017

Appearances

For Applicants: Adv K Pillay

Instructed by: Edward Nathan Sonnenburgs

For Respondent: Adv G Wilks

Instructed by: PM Mpapele Attorneys