REPUBLIC OF SOUTH AFRICA

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

CASE NO: 28058/2017

(1) REPORTABLE: ~~YES~~ NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ NO
(3) REVISED ✓

27/10/17

Date: **WHG VAN DER LINDE**

In the matter between:

Vivabet (Pty) Ltd **Applicant**

and

Gauteng Gambling Board **Respondent**

JUDGMENT

Van der Linde, J:

Introduction and background

[1] This is an urgent application for an interim interdict to prevent the respondent from reopening the process for the issuing of bookmakers' licenses in four towns under its jurisdiction: Carltonville, Dobsonville, Daveyton and Mamelodi. The respondent had in fact refused to grant the applicant licenses in those four instances, at least so contends the applicant, and had communicated that fact to the applicant.

[2] The applicant then launched an application under case no. 14863/2017 to review and set aside that refusal. The three sets of affidavits have been exchanged and the matter is ripe for hearing.

[3] The immediate trigger for this interim application, originally brought as one of urgency, was the respondent's letter of 26 July 2017. In that letter the respondent declined to give an undertaking that it would not proceed with the processes related to the invitations of 10 July 2017 in relation to the unallocated bookmakers' licences. The applicant thus launched this application, giving notice that it would apply on 15 August 2017 for an order that, *"... pending the determination of the Court in the review application under case co. 14683/2017, the respondent is interdicted from proceeding with the process of inviting, processing and consideration of applications for bookmakers' licences."*

[4] In the founding affidavit the applicant indicated that it would ask the respondent for an undertaking not to consider and issue the licences prior to the hearing of the urgent application on 15 August 2017. It said that if the undertaking were declined, the applicant would have to anticipate the hearing date. That gave rise to a letter from the respondent on 1 August 2017 in which it said: *"... our client will not make a decision on or before 25 August 2017. A decision will in all likelihood be taken during the course of September 2017 or October 2017."*

[5] No undertaking was given, however, and the applicant then launched what it called an *"extremely urgent"* application under case no. 28398/2017 to obtain a court order to freeze the respondent's new process pending the main review application. That application came before Makume, J on 3 August 2017 who, on the respondent's concession some way into the argument, made an order that pending the present application, *"... the respondent undertakes not to take any decision in respect of the awards of bookmakers' licences".* My colleague also enrolled this application for the week of 29 August 2017 and reserved costs.

[6] When in the week on 29 August 2017 this matter came before Molahlehi, J on 31 August 2017, the parties by agreement removed the matter from the roll – so as to enrol it on the ordinary roll – and agreed that costs be reserved. Along this path then the matter eventually came before me on 23 October 2017, laden with two reserved costs orders.

[7] Apart from the costs then, which each party asks be awarded to it, the applicant thus now asks for an interdict in the terms recited above; the respondent asks that the application be dismissed.

The parties' positions

[8] The applicant's central argument in this interim application is that if the respondent were to proceed and grant the four licenses to a third party, the applicant's main review application will have been rendered moot. This is because once those licenses have been awarded, according to the argument, the respondent will not be able again to award them afresh to the applicant. In this sense then the applicant will, according to the argument, suffer irreparable harm.

[9] The respondent's opposing position is that it was free and in fact obliged to carry out its statutory mandate. The mere fact that the applicant has applied to review its decision of last year to refuse the four licenses to the applicant, does not of itself in law restrain the respondent from performing is function. Here it relies on the judgment of the Chief Justice in Tshwane City v Afriforum and Another.[1]

Discussion

[10] In a sense, both parties are right. The respondent is right, in the sense that for it to be stopped doing what it will otherwise do, i.e. issue licenses afresh in respect of the four towns concerned, a court order is required.

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[1] 2016 (6) SA 279 (CC) at [72] ff.

[11]The applicant is right, in the sense that once fresh licences have been awarded, prejudice will be suffered if the court down the line were to set aside the initial refusal to grant the licences to the applicant. This will arise if the court decides, in the circumstances of the case, not to refer the matter back to the respondent to consider afresh the question of the licences in respect of those four towns, but decides itself to award the licences to the applicant.

[12]In that scenario, the persons to whom the respondent will in the meantime have purported to have awarded the licences will be prejudiced, because they might very well have arranged their affairs in the meantime on the basis of having been successful.

[13]Of course, if the applicant is right, and if the initial refusal decision was unlawful, then the question arises as to whether in law the respondent has the power to revoke the initial refusal decision, and to consider the matter afresh, as it now purports to do. Here the parties are sharply divided. The applicant argues that the respondent is functus officio, but the respondent submits that nothing stops it from revoking a decision; after all, if it has the power to make a decision, it has the power - logically - to revoke it.

A prima facie right?

[14]Traditionally an interim interdict is granted when the applicant establishes a prima facie right, although open to some doubt; a well-grounded apprehension of irreparable harm of the interdict is not granted; no adequate alternative remedy; and that the balance of convenience favours the relief sought. In this case the three requirements other than a prima facie right were not really pressed by the respondent and, in my view, rightly so.

[15]The argument turned on whether the applicant had shown a prima facie right, although open to doubt, and specifically on two aspects: first, that the applicant had not in its founding affidavit in this application properly disclosed such a right, since the applicant was not entitled – on the strength of Swissborough Diamond Mines (Pty) Ltd and Others v

Government of the Republic of South Africa and Others[2] - simply to refer to some other legal process in support of its case in this proceeding. It is obliged actually to incorporate whatever it wishes to rely on in those other proceedings explicitly into this proceeding, and to assert expressly what it seeks to make of it in the present matter.

[16] The second aspect is that the reasons for the decision were given back on 23 June 2016, and the main review application was not brought within 180 days of that date. There is no condonation application.

[17] The respondent's submissions also raise, as I see it, the question whether the respondent had the power to have revoked the initial impugned decisions; because if it did, then the applicant's prospects of success in the main application are non-existent. I will address that issue presently; but first, it is necessary to say something about the threshold for interim interdicts.

[18]It seems to me that the Constitutional Court[3] has ultimately approved the approach of Holmes, J (then) in Olympic Passenger Service (Pty) Ltd v Ramlagan,[4] which decided that *a prima facie right although open to some doubt* conveys that the strength of the right is allowed to fluctuate from strong to weak. If strong, the other requirements for an interim interdict may be weak, and vice versa.

The Swissborough principle

[19]Dealing first then with the respondent's two points on the issue of a prima facie right. Swissborough was of course not concerned with an interim interdict pending a main application in which the affidavits had all been exchanged, and which was ripe for hearing. It was concerned with a discovery application in a pending trial action. Joffe, J held:[5]

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[2] 1999 (2) SA 279 (T).
[3] South African Informal Traders Forum and Others v City of Johannesburg and Others, 2014 (4) SA 371 (CC) at [25].
[4] 1957 (2) 382 (D) at 383 D; and see after that Erikson Motors (Welkom) Ltd v Protea Motors, Warrenton and Another, 1973 (3) SA 685 (A) at 691; Ferreira v Levin, NO and Others; Vryenhoek and Others v Powell, NO and Others, 1995 (2) SA 813 (W).
[5] At 324 F – G.

"Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met."

[20]The Swissborough principle cannot, with respect, be stressed enough. Civil litigation is about the court deciding the issue(s) which the parties have decided it wishes to place before the court. It does so thorough definition in the pleadings and affidavits, and matters not thus defined are legally irrelevant to the cause before the court.

[21]But consider what has occurred here. The main application is ripe for hearing. The affidavits are complete. In those, the parties have expressly defined the issues that will come before the court hearing the main review application. The papers in that matter are voluminous; according to the applicant, they run to 586 pages.

[22]When in such a case an applicant in an urgent application simply makes the nub of the applicant's case in short-hand form, and refers for adumbration to the main application, I do not believe that the process is lacking in definition. Indeed, if in such a case, the applicant embarked on a regurgitation of the material fully canvassed in the main application, this would open the applicant to criticism that it was producing unnecessary and wasteful paper. It follows that I do not believe the first point was well-taken.

Reasons: 23 June 2016 or 14 November 2016?

[23]The second point concerns the reasons and the date these were provided. It seems uncontested that the reasons provided initially were of the generic type. The respondent's submission was rather that like it or not, those were the reasons, and the applicant was duty-bound to have brought its review application with 180 days of those reasons being furnished.

[24]Nowadays the interpretative function, whether one is reading a contract or a statute such as s.7(1) of the Promotion of Administrative Justice Act 3 of 2000, is pulled together in three

words: text, context, and purpose.[6] Undoubtedly the purpose of the 180 days provision is to enable the applicant for review to know what the basis was of the decision that it intends reviewing. In this case the respondent twice wrote to the applicant saying that the reasons for the refusal of the applications were *"mainly"* those to be set out, and then actually set out, in the letter of 14 November 2016.

[25]Of course, it might be that the respondent actually viewed those reasons of 14 November 2016 simply as adumbrations of the reasons furnished earlier on 23 June 2016. But that would be speculation. Certainly, the 14 November 2016 letter does not say so. And it is difficult to reject the applicant's submission that the 23 June 2016 letter was intended as a generic, one size fits all, letter. It follows that in my view the second point raised by the respondent is also not well-taken.

Functus officio?

[26]That brings me to the third point, which is whether the respondent had the power itself to revoke its impugned decision, and to re-start the license-granting process. Apparent support for the respondent's position is to be found in s.10 of the Interpretation Act 33 of 1957 (emphasis supplied):

"10 Construction of provisions as to exercise of powers and performance of duties
(1) When a law confers a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.
(2) Where a law confers a power, jurisdiction or right, or imposes a duty on the holder of an office as such, then, unless the contrary intention appears, the power, jurisdiction or right may be exercised and the duty shall be performed from time to time by the holder for the time being of the office or by the person lawfully acting in the capacity of such holder.
(3) Where a law confers a power to make rules, regulations or by-laws, the power shall, unless the contrary intention appears, be construed as including a power exercisable in like manner and subject to the like consent and conditions (if any) to rescind, revoke, amend or vary the rules, regulations or by-laws."

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[6] Compare Really Useful Investments NO 219 (Pty) Ltd v City of Cape Town and Others (8102/2014) [2015] ZAWCHC 35 (27 March 2015) at [21].

[27]But that power of evocation refers, of course, to the power to make *"rules, regulations or by-laws."* Here we are not dealing with that kind of power, and the common law rule of functus officio applies: once a decision has been made, the decision-maker is discharged from his/her official function.[7] Hoexter[8] points to the judgment of Navsa, J (then) in Carlson Investments Share Block (Pty) Ltd v Commissioner, South African Revenue Service[9] where his Lordship said:[10]

"In my view, the Chandler and Katnich cases supra place the functus officio principle in proper perspective. As we saw, in the discussion of the functus officio principle in Baxter's Administrative Law (supra) the general principle is that finality of administrative decisions is to be favoured. However, our law and comparable legal systems recognise that statutes may provide how and F when a decision is to be finalised and may provide for revisiting of a particular administrative decision in the public interest and in the interests of justice."

[28]At all events, the Supreme Court of Appeal has now put the issue beyond debate. It has held that once an administrator has taken a decision, that is the end of its power unless, as a matter of express or implied statutory provision, it is specifically granted the power of revocation.[11] And here there is nothing in the statute empowering the respondent that grants it that power. On reflection, therefore, in my view the applicant's submission concerning the respondent being functus officio is correct.

[29]Where that does leave the applicant is by no means self-evident. If the respondent never had the power to revoke, it also does not have the power the issue licenses afresh. Then the new licenses ought not to stand in the way of the applicant if it is successful in the main review application.

[30]However, it is foundational to our administrative law that decisions by the administration stand until they are set aside.[12] And so these new decisions that the respondent is intent on

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[7] See generally Cora Hoexter, Administrative Law in South Africa, 2nd ed, Juta & Co, 2012, p276 ff.
[8] Op cit.
[9] 2001 (3) SA 210 (W).
[10] At 232.
[11] The Manok Family Trust v Blue Horison Investments 10 (Pty) Ltd, (220/13) [2014] ZASCA 92 (13 June 2014) at [13] ff.
[12] Oudekraal Estates (Pty) Ltd v City of Cape Town and Others, 2004 (6) SA 222 (SCA) at [26].

taking will indeed have legal force, at least until they are set aside. In consequence, unless this interim order sought is granted, the applicant will be prejudiced in a real sense.

A prima facie right, otherwise?

[31]So, apart from the respondent's two submissions and the point about revocation, has the applicant established a prima facie right? The founding affidavit in the main review application relies on a substantial gamut of bases availed in s.6 of PAJA (the Promotion of Administrative Justice Act, 2001) to impugn the decisions to refuse the licences.

[32]On the facts, the case asserted in the founding affidavit is three-fold. First, it is that the respondent acted irrationally and unreasonably, as is evidenced by its failure forthwith to have provided reasons for its decisions. Ultimately it did of course provide these, but the length of time it took to do so, coupled with promises to respond "soon", and then not responding, justifies the inference, at a prima facie level, that reasons were not immediately evident. After all, if the respondent was too busy to deal with the matter, which is the other conceivable explanation for the inordinate delays, it could have dropped a short letter saying it was too busy then to deal with the matter. It did not.

[33]The second basis on which the four decisions are attacked, is that they were irrational and unreasonable for questioning the quality of the applicant's BBBEE compliance. But in truth there is no substance, contends the applicant, in this. The applicant's credentials are in one respect on par with the required threshold, and in the two other respects, they surpass the threshold.

[34]The applicant points to the exchanges that occurred at one of the meetings, when it was sought to embarrass the deponent - whose skill is technical and not legal or accounting - by questions related to balance sheet insolvency and subordinating of a shareholders' loan account. Assuming for the moment that the questions were themselves rational and technically accurate, the deponent's explanation is that he is not qualified to deal with those issues, and never was. He never represented otherwise, and the very concept of skills

transfer was that the white indirect shareholder and director was the person qualified to deal with the specific line of questioning.

[35]The applicant says that the questions were not aimed at obtaining answers to them, but rather at seeking to illustrate that one of the applicant's directors, a black male, was not as proficient legally and accounting-wise as was the questioner. The deponent experienced this treatment as aimed at belittling him, and for that reasons asks a special costs order.

[36]The third basis on which the refusals are attacked is that the respondent erred when it reasoned that the black participants in the applicant were in fact employees of the white participant. There was no factual basis on which to reach this conclusion, asserts the applicant.

[37]The applicant need not at this stage persuade the court that its version is, or its submissions are, correct. All it need do is establish a prima facie right, even if open to some doubt. As I have pointed out, the enquiry is concerned with the strength of the applicant's case. And the stronger the balance of convenience favours the applicant, the weaker its case is permitted to be. In my view the balance of convenience is strong, and thus the case need not be strong. That is a low threshold, one which the applicant clears readily in view of the considerations set out above.

[38]It follows that the requirements for an interim interdict have been met. That being so, this court has a discretion whether or not to grant an interim interdict. I believe that it is in the interests of justice that the applicant's substantive review application should be afforded the opportunity properly and meaningfully to be presented to the court. There has been no delay in processing that application, and so the applicant is not deserving of any indirect or collateral punishment.

[39]Moreover, this is the applicant's first venture into the bookmaking industry, and having spent the considerable amounts of money required to have its applications considered, I believe it is deserving of the opportunity properly to challenge the respondent's decisions.

Costs

[40]The central submission on behalf of the respondent here was that it was entitled in law to proceed along its own perception of its statutory obligations, and that until stopped by a court order, is was not obliged in law to do so. I have indicated that in my view that submission is sound, at least as far as it goes. But the respondent, in those circumstances, does of course do so at its own risk.

[41]The respondent was able, all along, to give the undertaking sought, pending the main review application. That application was not being delayed, and it cannot be said – nor was it – that the applicant did not at all times seriously pursue the application. It follows that the legal costs related to the urgent application, both the present application and the application that came before Makume, J, were unnecessarily incurred.

[42] In the result I make the following order:

i. Pending the determination of the Court in the review application under case co. 14683/2017, the respondent is interdicted from proceeding with the process of inviting, processing and consideration of applications for bookmakers' licences;

ii. The respondent is directed to pay the costs of this application under case no. 28058/17, as well as all costs that have hitherto been reserved, including the costs reserved under the application brought under case no. 28395/17.

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Judge, High Court
Johannesburg

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Date judgment: 27 October, 2017