REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) Reportable: No
(2) Of interest to other judges: Possibly

6/3/19 — DATE

SIGNATURE

Case No.: 14863/17

In the matter between:

Vivabet (Pty) Ltd — **Applicant**

and

Gauteng Gambling Board — **Respondent**

JUDGMENT

Vally J

[1] This is an application to review and set aside a decision of the respondent (the Board) refusing the applicant (Vivabet) four licences to operate a bookmaking business (the impugned decision). This is the fundamental dispute between the parties. Ideally it would, apart from the issue of costs, be the only issue before Court, but as has so often occurred in matters before this Court a number of sub-issues arose all of which concern

the processes by which the matter was brought before Court. And so, there are two other issues to be determined in this matter. They are:

(i) Whether the application which was brought in terms of the *Promotion of Administrative Justice Act, 3 of 2000* (PAJA) was brought within the time limit prescribed in s 7 of this statute;

(ii) Whether the respondent was correct on 14 May 2014 to demand that a full record be placed before Court before the matter could be adjudicated.

History of the matter

[2] On 22 April 2015 an Extra-ordinary Provincial Gazette No 145 was published. Therein the respondent advertised a decision to invite applications for forty (40) bookmaker's licences in various parts of the Gauteng Province. The invitation was made in terms of s 19(1) of the Gauteng Gambling Act (GGA). It was pointed out in the Request For Proposal (RFP) that:

> "... the Board upholds and promotes the principles enshrined in the legislation pertaining to Black Economic Empowerment and as such, will seek to ensure commitment, adherence and compliance to BBBEE legislative provisions.
> In addition to the other elements of BBBEE requirements, the following minimum requirements are obligatory:
>
> - The applicant shall have a minimum of 51% shareholding by previously disadvantaged individuals of which 60% shall be held by locals. Further 30% of the 60% shall be held by black women and youth. This level of BBBEE shareholding shall be maintained throughout the tenure of the licence.
> - Applicants who are existing participants in the gambling industry shall from inception attain level 2 in terms of the Codes of Good Practice contained in the BBBEE Act.
> - New entities are expected to attain level 2 in terms of the current Codes of Good Practice contained in the BBBEE Act within 12 months from the date of operation."

[3] The RFP informed all invitees that the respondent intended to achieve a number of objectives through the issuance of the licences, one of which was the promotion of the ideals of BBBEE.

[4] On 26 June 2015 the applicant submitted four (4) applications for bookmakers' licences. They were in respect of premises situated at Dobsonville, Mamelodi, Daveyton and Carltonville. There were many other applications for premises situated at other venues, but only the applicant sought licences for these four premises. The contents of the four applications were almost identical, including the shareholder profile of the applicant, the management arrangements, and the business structure. It was only the staffing structures and the addresses of the sites that were different.

[5] On 17 August 2015 the respondent appointed a firm of chartered accountants to probe all the applications, including those of the applicant. The applicant, together with all other applicants for licences was requested to co-operate fully with the chartered accountants while they were executing their mandate. On 24 March 2016 the applicant received a letter from the chartered accountants informing it that it would receive notice in due course of an oral hearing, and that at the hearing it would be required to address certain issues of concern with regard to its application. The issues of concern identified were, *inter alia*:

> "**CRITICAL CONCERN** Three of the six key persons did not provide tax clearance certificates in their own names, however, all tax submission [sic] appear to have been made as per the ITA 34s provided.
>
> **CRITICAL CONCERN**

- The applicant has only committed to the minimum B-BBEE threshold.
- Meeting only the minimum threshold means that in the event of a shareholder stepping out, the applicant may no longer be in compliance with the B-BBEE requirements related to the application.
- **The Memorandum of Incorporation** [MOI] **of the applicant provides for the minority white shareholder to appoint at least 50% of the directors and will in addition appoint the chairperson, who has a deciding vote. The white minority shareholder will therefore be able to outvote the black majority.**

CRITICAL CONCERN No commitment has been made to participate in social upliftment projects in Gauteng.

CRITICAL CONCERN The applicant included communication confirming the availability of the proposed site from the landlord, however in an independent verification conducted in November 2015 we were informed that the site has subsequently been earmarked for and [sic] FNB branch." (Bold in original.)

[6] On 29 March 2016 the applicant responded in writing to each of the concerns by way of a letter to the chartered accountants. The relevant portions of its response were as follows:

[6.1] On the issue of three of the key persons not providing tax clearance certificates in their own names, it said that two of them, who are black females, earn an annual income that fell below the threshold for the submission of tax returns. As for the third individual, a white male, its failure to submit his tax clearance certificate was an administrative oversight.

[6.2] With regard to the concern that it only met the minimum threshold of BBBEE it said:

"We respectfully fail to see how meeting the Board's requirements, as set forth in the RFP (which we have done),

> can be regarded as inadequate in any respect, or could amount to, a critical concern.

[6.3] As for the concern of it losing its BBBEE status should any black shareholder step out it said:

> "We respectfully submit that there is no basis for this conclusion. In this regard, we draw your attention to the fact that the [MOI] stipulates that the BBBEE ownership percentage must be adhered to should any party propose selling its shares."

[6.4] With regard to the concern of the white minority having ultimate control of the Board of Directors, it said:

> "Although the RFP contains no express requirements in this regard, we record that in the event that the licence applied for is granted, the applicant would be amenable to amending the [MOI] to the effect that a shareholder shall be entitled to appoint one director for each equity stake of 33% in the relevant company and 2 directors for each equity stake of or above 34%. The net effect of this will be that the Bokamoso Trust [a black shareholder] will be entitled to appoint two directors to the Board, while the remaining BEE shareholder will be entitled to appoint one, and the minority white shareholder will be entitled to appoint two directors.
>
> Accordingly, the minority white shareholder will not be in a position to control the decisions taken at Board level." (Underlining added.)

[7] The response was signed by a Mr Andre Gründlingh (Mr Gründlingh) in his capacity as the director of the applicant. He is the shareholder who according to the MOI is entitled to appoint 50% of the directors as well as the chairperson of the Board who has a casting vote. In effect, the whole business venture is the brainchild of Mr Gründlingh. He is also the sole financier of the entire venture.

[8] On 4 April 2016 an oral hearing was conducted by the respondent where the applicant was afforded an opportunity to present its case and deal with any concerns, including those raised in the letter of the chartered accountants of the respondent. Further hearings to the same effect were held on 11 and 19 April 2016. At the hearings the issue of Mr Gründlingh's control of the applicant was raised. Each time it was raised the response given was a reiteration of what it said in its letter quoted here in [6.4], i.e. that the applicant will amend its MOI should it succeed in securing the licences. It is clear from the transcript of these proceedings that the issue of the BBBEE status loomed large in the minds of the Board. When one of the employees of the applicant, Mr Caswell Rakgabeletsi (Mr Rakgabeletsi), who is also a director and who is the deponent to its founding and replying affidavits, testified he was questioned about certain technical aspects of the application and was unable to answer these questions. In fact, Mr Gründlingh stepped in to answer them on his behalf. The questions focussed on matters such as the shareholding; the trustees of the trust that holds some shares in the applicant; the monies that Mr Gründlingh had advanced to the applicant and which were recorded in the financial accounts of the applicant as loans; whether the applicant was technically insolvent even before it had commenced operations and the appointment of directors of the applicant. Mr Rakgabeletsi's difficulty in answering the question was interpreted by the respondent to mean that, apart from having no influence in the intended business, he also had no knowledge of the business at all.

[9] The respondent only awarded thirty-four (34) of the forty (40) available licences. All four of the applicant's applications were unsuccessful. To this effect the applicant was informed by way of four letters on 23 June 2016. As the contents of each of the letters is identical we need only concern ourselves with one of them. The relevant parts of the letter read:

> "Reasons for rejection of your application include, where applicable, the following:
>
> - The proposed site is no longer available to the applicant;
> - No evidence of appropriate local authority consent was provided;
> - Proposed site was not advertised in the Government Gazette;
> - No appropriate evidence provided to confirm that the applicant had secure the proposed premises;
> - Arrangement for use of premises not adequately substantiated;
> - In respect of applicant that applied for the same premises only the stronger application in terms of the Board's interpretation of the objectives of the Board could be and was awarded;
> - The Board raised possible fronting concerns that were not adequately mitigated by the applicant during the evaluation process and subsequent hearing, and
> - Prevention of monopolisation of the industry in respect of multiple applications by the persons and beneficiaries." (Underlining added.)

[10] The applicant was not satisfied with the decision as well as the reasons furnished. Its view was that the reasons were "*generic*" and not specific to its application. For support of this view it relied on the words underlined in the above quotation, i.e. "*Reasons ... include, where applicable*". On 28 June 2016 it addressed an email to the respondent requesting reasons for the refusal to award it the licences. Its request went unheeded. On 19 July 2016 it addressed another email to the respondent seeking reasons. Again, its request for reasons went unheeded. On 10 August 2016 it sent a third email repeating its request for reasons. On 23 August 2016 it received an

acknowledgement of its email of 10 August 2016 together with a message saying that the respondent would respond to its request "*soon*". Nothing happened until 24 October 2016. On that date the applicant's attorney addressed a letter to the respondent informing it that 90 days had expired since it was asked to furnish the reasons. However, it was afforded a last opportunity to furnish the reasons by 2 November 2016, failing which the applicant would launch judicial review proceedings. No response was received by 2 November 2016. Then on 7 November 2016 its attorneys received a letter from the respondent informing them that a response together with transcripts of the hearings would be provided by 14 November 2016. The response containing the reasons was finally furnished on 16 November 2016 together with a transcript of the hearings. The reasons furnished were:

> "The reasons for not granting your application herein is mainly premised on the quality of BBBEE in your application particularly the following:
>
> - Black shareholders and management who represented the licensee at the hearing were unaware or uncertain of some their roles or participation in the applicant. For example, when asked about funding issues, black shareholders were unable to offer answers and has to rely solely on Mr Gründlingh.
> - The Black persons who are to serve on the executive or management of the applicant are currently employees of Mr Gründlingh. The relationship between them and Mr Gründlingh appears to be unequal: Mr Gründlingh dominated the presentation and was the only one who could answer questions posed by the Board."

[11] On 2 May 2017 the applicant launched the present application for judicial review of the decisions on refusing the four licences. The application was brought in terms of Rule 53 of the Uniform Rules of Court (rule 53). The applicant founds its cause of action in the following allegations, all of which are

derived from s 6 of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA):

[11.1] the respondent was not authorised by s 30, the empowering provision, of the Gauteng Gambling Amendment Act, 2001 (GGA) to examine the quality of the applicant's BBBEE claim – s 6(2)(a)(i) of PAJA;

[11.2] the respondent adopted an approach that was procedurally unfair – s 6(2)(c) of PAJA - in that it made a decision on the quality of the applicant's BBBEE without giving the applicant a fair opportunity to respond thereto. Expanding on this claim it says that the impugned decision was "*belatedly taken*" in order to find justification for it. This, according to it also means that the decision was "*taken arbitrarily and capriciously, as contemplated in s 6(2)(e)(4) of PAJA*", and that it is "*otherwise unconstitutional or unlawful, as contemplated in s 6(2)(i) of PAJA*";

[11.3] the decision was influenced by a material error of law in that it wrongly adopted the view that it was empowered to examine the quality of the applicant's BBBEE 's status – s 6(2)(d) of PAJA;

[11.4] the decision was taken because relevant considerations, namely, the persons who represented the applicant at the hearing were not employees of the applicant and the fact that the MOI had been

amended to ensure that the black shareholders had gained control of the Board of Directors, were not considered – s 6(2)(e)(iii) of PAJA;

[11.4] the impugned decision was not rationally connected to the purpose for which it was taken – s 6(2)(f)(ii) of PAJA;

[11.5] the exercise of the power to award the licences or the performance of the respondent in exercising the power was "*so unreasonable that no reasonable person could have*" so exercised it in that manner – s 6(2)(h) of PAJA.

General note

[12] Taking note of the grounds of review relied upon by the applicant it is clear that the applicant chose to look at s 6(2) of PAJA and then decided that it could rely on almost every ground listed in the sub-section. This approach is not unusual. It tends to be adopted by applicants generally in this area of law. Any ground listed in PAJA that may even have a remote possibility of being applicable is added to the list of grounds the applicant would rely upon. The court is then left with the task of deciding which one is applicable on the facts. This, in my view, is not a healthy development. Applicants must be clear, coherent and unambiguous about which ground they wish to rely upon and why. They must make out a case for each ground they wish to rely upon.

Issues collateral to the main dispute between the parties

[13] In response the respondent made an issue of the fact that the application was launched on 18 October 2017. It claimed that the application fell outside the time period prescribed in s 7 of the PAJA for the launching of the application. Section 7(1) provides that a review proceeding should be brought within 180 days from the date the applicant for the review was notified of the administrative action. In this case the applicant was informed of the administrative action on 24 June 2016. Not accepting the action as being applicable to its applications it engaged the respondent in correspondence seeking reasons specific to its applications. The respondent ultimately furnished these on 7 November 2016. Whether one accepts 24 June 2016 or 7 November 2016 as the date when the applicant was informed of the reasons for the decision, the application was still brought outside the prescribed period of 180 days. Hence, it is necessary to adjudicate the issue raised by the respondent.

[14] The matter was called in the opposed motion Court on 14 May 2018. Both parties came prepared to finalise the matter. At that point the respondent's lead counsel came to realise that the full record of the hearings before the respondent were not presented to Court. These are part of the record that was prepared in terms of the provisions of rule 53. There is no dispute that the record was prepared. A few minutes before the matter was called the respondent's lead counsel informed the applicant's senior counsel that he intended to make an issue of the fact that the full rule 53 record was not placed before the Court and that the

respondent believed that it and the Court would be prejudiced as a result thereof. This came as a complete surprise to the applicant's senior counsel and he took umbrage at the conduct of his colleague. The respondent's lead counsel had nothing to say in his defence on this. In any event, the applicant's senior counsel took the view that there was complete compliance with the provisions of rule 53, even though the full record of the hearings before the respondent was not placed before Court. It pointed out that in the Practice Note filed by the lead counsel for the respondent it was stated that the Court need not read any portion of the full record that was already placed before the Court in the form of annexures to their respective papers. Nevertheless, the respondent's lead counsel persisted in the view, insisting that the full rule 53 record be placed before Court as he intended to refer to certain parts of that record which were not part of either party's papers. In consequence, the Court postponed the matter *sine die,* ordered the parties to file supplementary heads of argument dealing with what by now became a fresh dispute between the parties – whether it was necessary to place the full rule 53 record before Court – and reserved the issue of the costs occasioned by the postponement. Thereafter the full record consisting of over three thousand pages was placed before me. The parties filed supplementary heads of argument on this issue and presented oral argument supporting their respective positions.

[15] In the result, I will deal with the delay issue first, then the issue concerning the rule 53 record and then finally the merits of the

application. The issue of the reserved costs of the postponement of 14 May 2018 will be dealt with as part of the issue dealing with the rule 53 record.

The delay issue

[16] It is common cause that the applicant was informed on 24 June 2016 that its applications for the four licences were unsuccessful. It is also common cause that it was furnished with reasons for the lack of success. However, upon receipt of this notice, it elected to seek comprehensive reasons for the decision as it was of the view that the reasons furnished on 24 June 2016 were not specific enough. These were only furnished on 7 November 2016. Hence, in response to the challenge that the application is out of time it said that the date from which the clock commenced running was 7 November 2016. It pointed out that as soon as it received the notice of its lack of success on 24 June 2016 it engaged the respondent and sought reasons specific to its applications rather than the "*generic*" ones, which according to it was furnished to all unsuccessful applicants for licences. There is no evidence before this Court that the reasons furnished on 24 June 2016 were "*generic*" and applicable to all applications that were unsuccessful. However, there is evidence that the respondent elected to furnish separate reasons on 7 November 2016. The respondent in its answer to the challenge as a whole relies on these reasons to support its case that there was no reviewable irregularity on its part. Since the respondent wishes these reasons to be taken into account, it cannot be allowed to

hold the applicant to the reasons of 24 June 2016. If the respondent wanted to rely on that date it should not have furnished fresh reasons, which though in substance they were similar to the ones furnished on 24 June 2016, nevertheless were provided and are relied upon by the respondent. Further, if the respondent had no desire to furnish these reasons it should have made it clear to the applicant that it had nothing further to add to the reasons furnished on 24 June 2016. Instead of doing this and standing by those reasons it led the applicant to believe that it would be furnishing the reasons "*in due course*". Hence, on its own version, the reasons of 24 June 2016 were not the ones that the applicant could rely on. On this logic, the date from when the clock began to run was 7 November 2016, for it is only then that the applicant could be said to have become aware of what the respondents were treating as their true or main reasons for refusing the applications.[1] Accepting that the clock began ticking on this date the application should have been brought by 6 May 2017. It was brought on 2 May 2017 and is therefore within the prescribed 180 days. The respondent's contention to the contrary is misplaced and rejected.

The rule 53 record

[17] In terms of rule 53 a party (an applicant, obviously) seeking to review the decision or proceedings of an inferior court, a tribunal or an administrator should call upon the relevant official to despatch to the registrar of the court a copy of the record of the decision or proceedings

[1] See: *Cape Town City v Aurecon South Africa (Pty) Ltd* 2017 (4) SA 223 (CC) at [41]; *Camps Bay Ratepayers' and Residents' Association v Harrison* 2011 (4) SA 42 (SCA) [57]

sought to be reviewed and set aside (rule 53(1)). The registrar shall inform the applicant of the despatch and make the record available to the applicant (rule 53(2)). The applicant "*shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the review to be made and shall furnish the registrar with two copies and each of the other parties with one copy thereof,*" (rule 53(3), underlining added). Sub-rule 53(3) requires the applicant to furnish the registrar with the record that "*is necessary for the purposes of the review*", but sub-rule 53(1) provides for "*the relevant official*" to despatch the full record of "*the decision or proceedings sought to be reviewed.*" Read together these sub-sections lead to a single conclusion – the registrar would have the full record of the decision or proceedings as well as another record, which is drawn from the full record and is therefore a sub-set of the full record.

[18] The creation of this second record begins with the applicant who after receiving the full record is endowed by the provisions of sub-rule 53(3) to place before the court only those *portions* that are necessary for the review. But is does not end there. Initially our courts adopted the view that sub-rule 53(3) operated for the benefit or advantage of the applicant only,[2] but with the advent of *SACCAWU,*[3] it is read to operate to the advantage of the respondent too. In other words, while sub-rule 53(3) offered the applicant a right to have recourse to any portion of the full record to advance its case, the common law has accepted that the same

[2] *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 660E-H
[3] *SACCAWU v President, Industrial Tribunal* 2001 (2) SA 277 (SCA) at [7]

right should be accorded to the respondent. Hence, the next step in the creation of this second record lies at the feet of the respondent, which in its response is entitled to supplement this second record with any *portions* of the full record it wishes to rely upon for its defence, but which has not been included therein by the applicant. The second record (i.e. the *portions* extracted from the full record by the applicant and the respondent), though a duplication of part of the full record, is the one that is "*necessary for the purposes of the review*". The underlying logic for this approach is the fact that often the full record is voluminous and contains numerous documents that are not relevant at all for the determination of the issues raised in the review. Nevertheless, the full record would have already been compiled – it is the first record. In terms of rule 53(1) it would have been lodged with the registrar. Save for preparing an index and paginating it, nothing needs to be done to make it useful for the court. In my view, it should be paginated and an index should be prepared and the court should be informed that it could be made available at the hearing should the court request it or, if need be, even after the hearing. If it is provided after the hearing the court may if it wishes allow parties to submit further written argument.

[19] It has been held that only the portions of the record that have been extracted by the applicant and attached to its supplementary affidavit constitute evidence.[4] This, in my view, is too restrictive an approach to the law. It has to be remembered that the respondent too can place

[4] *Venmop 275 (Pty) v Cleveland Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at [17]

whatever portions from the record it seeks to rely upon before court by annexing it to its answering affidavit. Should this occur, that too, would be evidence before court. Furthermore, there is nothing in law preventing the court from wanting to draw on any portion of the full record that is not extracted by the parties and annexed to their papers if it is of the view that to do justice such an exercise would be a necessary endeavour. In a word, sub-rule 53(3) which allows for the applicant to extract "*portions of the record as may be necessary for the review*" and the common law which extends this right to the respondent, do not inhibit the court from itself seeking recourse to the non-extracted portions of the record. This approach in my view is consistent with two principled objectives: (a) it accords both parties the right to draw a benefit from portions of the record to advance their respective cases; and, (b) it allows the court to perform its "*function to scrutinise the exercise of public power for compliance with the constitutional prescripts.*"[5]

[20] In our case, the respondent in its answering papers placed before court those portions of the full record which were left out by the applicant but which it believed were relevant and important for the advancement of its case. Its heads of argument made no reference to any portion of the record that was not included as part of the parties' papers. During oral submission the respondent's counsel was given an opportunity to identify any portions of the record not annexed to the parties' papers which could

[5] *Helen Suzman Foundation v Judicial Services Commission* 2017 (1) SA 367 (SCA) at [13]. For a more detailed account of why rule 53(1) is important to allow courts to perform this constitutionally prescribed function see *Democratic Alliance v President of the Republic of South Africa* 2017 (4) SA 253 (GP)

advance the respondent's case, but counsel did not take advantage of this opportunity. In these circumstances, the ire of the applicant's senior counsel at the attitude of the respondent was understandable. The respondent should not have taken this point at the hearing of 14 May 2018. The postponement would not have been necessary. The fault for all of this lies with the respondent. Its conduct is completely unacceptable. Moreover, having regard to the issues on the merits, I saw no need to have regard to any portion of the full record not annexed to the parties' papers in order to resolve the said issues. Accordingly, I have come to the conclusion that the applicant is entitled to the costs occasioned by the postponement and given the way this issue arose. I see no reason why the costs should not be on a punitive scale, nor do I see any reason to deprive the applicant of the costs of two counsel.

The merits of the applicant's case

[21] The claim of procedural unfairness is drawn from the allegation that the respondent's finding "*on the quality of BBBEE in your application*" is a *ex-post facto* justification and that it was not allowed an adequate opportunity to respond to any concerns the respondent had in this regard before it took the impugned decision. There is in my view no substance to this claim: the respondent clearly alerted the applicant on 24 March 2016 by way of a letter from the chartered accountants of its concerns in this regard; the applicant responded to the concerns on 29 March 2016 in writing; the issue was again focussed upon at the hearings where the respondent was given every opportunity to allay its concerns. Accordingly, on these facts, it cannot be

found that the respondent acted procedurally unfairly towards the applicant. It is also clear from the facts that in the very first letter the applicant received informing it that it had failed in its application, i.e. on 24 June 2016, the impugned decision was, *inter alia*, based on the finding that "(t)*he Board raised possible fronting concerns that were not adequately mitigated by the applicant during the evaluation process and subsequent hearing*". This statement is consistent with the latter statement of 16 November 2016 where it said that the impugned decision was based on the finding about "*the quality of the applicant's BBBEE*" status. To submit that the decision was "*belatedly taken*" is plainly wrong. There is simply no factual support for such a submission nor for the further submission that it was capricious or arbitrary, unconstitutional or unlawful for the same reason. Put simply, if it was not belatedly taken it cannot be said to be legally incompetent (i.e. capricious, arbitrary, unconstitutional or unlawful) for being belatedly taken. To hold otherwise would be absurd. All the grounds, (relayed in [11.2] above) for which the applicant relies upon for this one alleged fact, which has now been found to be incorrect, are therefore inapplicable or, to put it differently, not established.

[22] Another complaint of the applicant was that the respondent was not empowered by s 30 of the GGA to take the decision it did. Section 30 of the GGA provides a list of applicants for whom applications for licences should be refused. The list disqualifies applicants whose majority shareholder or whose key employee is, amongst others, an un-rehabilitated insolvent, a person who has been convicted of the crime of theft or corruption, or who is a member of

parliament, or who is related to a member of the Board, etc. The list does not say that if any applicant is not BBBEE compliant its application should be refused. According to the applicant, the respondent acted outside the powers conferred upon it by s 30 of the GGA by refusing to grant the applicant the four licences. The short, and in my view adequate, answer to this complaint is that s 30 of the GGA does not provide an exhaustive list of applicants who can be refused licences. It does not mean that if an application does not suffer from any of the defects referred to in s 30 it should be granted a licence. The misconception in this contention is patent when regard is had to the obvious fact that there may be more than one application for a single licence where none of them suffer from the defects referred to in s 30 of the GGA. If the applicant's contention is to be accepted, they must all receive a licence. This cannot hold. The contention is rejected.

[23] We are now left with the contention that the reliance on the "*quality of the applicant's BBBEE*" is irrational as well as unreasonable. The rationality and reasonableness test has been dealt with in a recent judgment.[6]

[24] While the respondent had concerns about the economic and financial viability and the financial plans and the funding models of the applicant, its main reason for refusing the licences was the BBBEE compliance of the applicant. This concern covered the issue of directorships and shareholding structure. As noted above this was raised in the letter of the chartered accountants dated 24 March 2016. At the hearings the validity of the facts

[6] *Black Eagle Project Roodekrans v MEC: Department of Agriculture, Conservation and Environment, Gauteng Provincial Department and others* [2019] ZAGPJHC 23 (23 February 2019)

giving rise to the concern was established. The applicant admitted that the power to appoint directors was skewed against the majority black shareholders. Once those facts were established, the applicant's case for being substantively compliant with the BBBEE requirement was legitimately an issue before the respondent. The respondent had every right to scrutinise it further. Once it did, the applicant conceded that it failed in this regard and decided to amend its MOI to overcome this problem. But that was after the application was already submitted. Further, the scrutiny involved the asking of not very difficult questions to the black shareholders, especially Mr Rakgabeletsi, and they (but he in particular) failed to allay any of the respondent's concerns. In fact, Mr Rakgabeletsi's and Mr Gründlingh's (who at times answered to questions posed to Mr Rakgabeletsi) responses only reinforced the respondent's concern, to the point where it was entitled to draw the conclusion that the BBBEE compliance was, in essence, formal and not substantive. Hence, its finding that "*the quality of the BBBEE*" in the application was inadequate to meet the requirement set out in the RFP.

[25] Based on the evidence before it, the conclusion reached by the respondent is perfectly rational. At the same time, it is not one that "*no reasonable person, acting reasonably*", could take. It is consistent with the objectives and provisions of the Broad Based Black Economic Empowerment Act, 53 of 2003 (BBBEE Act) which requires effective and meaningful participation of previously disadvantaged members in the governance structures of enterprise such as that of the applicant.

[26] I, therefore, cannot find anything irrational or unreasonable with the decision of the respondent.

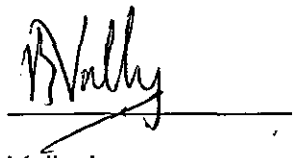
Order

[27] The following order is made:

(i) The application is dismissed.

(ii) The respondent is to pay the cost of postponement of the matter on 14 May 2018 as well as the costs of preparing the additional record on an attorney and client scale, which costs are to include those occasioned by the employment of two counsel.

(iii) Save for the costs referred to in paragraph (ii) above, the applicant is pay the costs of the application which costs are to include those occasioned by the employment of two counsel.



Vally J

Dates of hearing:	28 January 2019
Date of judgment:	6 March 2019
For the Applicant:	M M Oosthuizen SC with N Fourie
Instructed by:	Luneberg & Janse van Vuuren Inc
For the Respondent:	J G Rautenbach with T Moretlwe
Instructed by:	Motlatsi Seleke Attorneys