IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO.~~

(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO.~~

(3) REVISED.

DATE 18/3/2019 SIGNATURE

CASE NO: 70868/2012

DATE: 20/3/14

IN THE MATTER BETWEEN:

MAXIME HOTEL (PTY) LTD — FIRST APPLICANT

EGOLI GAMING (PTY) LTD
(TRADING AS GOLDRUSH
GAMING) — SECOND APPLICANT

AND

THE CHAIRPERSON: NATIONAL
GAMBLING BOARD N.O. — FIRST RESPONDENT

THE ADMINISTRATOR: GAUTENG
GAMBLING BOARD N.O. — SECOND RESPONDENT

THE MINISTER OF TRADE
AND INDUSTRY — THIRD RESPONDENT

JUDGMENT

KOLLAPEN J:

1. The applicants have brought proceedings in this Court in which they seek the following relief:

   An order 'declaring regulation 3(2) of the Regulations on Limited Payout Machines published under GN R 1425 in GG 6977 of 21 December 2000 as amended by the National Gambling Act 7 of 2004:

   a) *ultra vires* the powers, functions and duties of the National Board as outlined by the National Gambling Act 2004; and
   b) as infringing upon the exclusive licensing authority of the Gauteng Gambling Board as contemplated by the National Gambling Act, 2004 and the Gauteng Gambling Act.'

2. The first and the third respondents oppose the relief sought on the merits but have in addition also raised various points *in limine* in opposition.

   In addition the respondents have instituted a counter-application in which they seek an order declaring regulation 3(2) to be valid and of full force and effect. Alternatively, in the event that the Court makes a finding that regulation 3(2) is invalid, they seek an order in terms of Section 172 (1)(b)(ii) of the Constitution suspending the declaration of invalidity for a period of two years in order for Parliament or the first or third respondent to remedy the defect.

THE FACTUAL BACKGROUND

3. The first applicant is the holder of a license issued by the second respondent to operate 5 (five) limited pay-out machines (LPMs) at its premises at corner Bok and Banket Streets, Joubert Park, Johannesburg.
   The second applicant is the holder of a route operator license.

4. On the 8th of June 2011, the first applicant applied to the second respondent for the grant of additional gaming licenses in order to operate 40 (forty) LPMs at its aforementioned premises.

5. On the 16th of April 2012 the second respondent advised the second applicant (in its capacity as operations manager of the first applicant) that the second respondent had approved its application to operate 40 LPMs, subject to concurrence by the National Gambling Board (the 'NGB').

6. On the 8th of October 2012, the first respondent stated in a letter to the applicants' then-attorneys that:

> *'The NGB retains and has the ultimate authority to approve or disprove* (sic) *any application for any license to operate machines in excess of five. The NGB's role should not be viewed as a 'concurrence' or ratification of the PLA's decision as stipulated in your letter, but has to satisfy itself that the national guidelines or criteria for the evaluation of such applications has been met to its satisfaction.'*

In the same letter the first respondent advised that the application received from the Gauteng Gambling Board (the 'GGB') was yet to be considered and that they had raised certain issues of concern with regard to the application and had sought clarity from the GGB in this regard. Further they stated that they had since received a response from the GGB and that the application would be considered by the Board's structures.

7. In response thereto, the applicants' attorneys on the 19th of October 2012 raised concern about the delay in the processing and finalising of the application. They requested that the first respondent inform them of the date on which the NGB would take a decision on the application.

The first respondent replied on the 8th of November 2012 and it rejected any notion that it was unnecessarily delaying processing the application. On the contrary, it stated that it needed to apply its mind in determining the application and that the applicants would be advised once a determination had been made.

8. On the 6th of December 2012, the applicants launched the current proceedings. It is common cause that at the time that they did so, the first respondent had not taken a decision relative to the application of the first applicant for a license to operate 40 LPMs. The applicants submit that they are prejudiced financially by the failure to have a license to operate 40 LPMs issued.

AN OVERVIEW OF THE LEGAL FRAMEWORK

9. Schedule 4 of the Constitution stipulates that gambling is one of the functional areas of concurrent national and legislative competence, while Section 1 of the National Gambling Act 7 of 2004 (the 'NGA') provides that the limited pay-out machine industry is part of gambling and therefore is a part of the concurrent provincial and national legislative competence.

10. Section 18 of the NGA provides that a provincial licensing authority may license a person as a site operator to operate limited pay-out machines.
Section 26 of the NGA recognizes the potentially detrimental socio-economic impact of a proliferation of limited pay-out machines and it obliges the Minister (the third respondent) to regulate the limited pay-out industry in accordance with section 26. In this regard Section 26 (2)(d) obliges the third respondent to prescribe a limit on the maximum number of licensed limited pay-out machines within the Republic, within any particular province and at any one site.

Finally. Section 30 of the NGA provides that each licensing authority has exclusive jurisdiction within its province to the extent provided in provincial law to investigate and consider applications for, and issue provincial licenses in respect of, casinos. racing. gambling or wagering.

11. The Regulations on Limited Payout Machines, published under GN R 1425 in Government Gazette No. 6977 of 21 December 2000 ('the LPM Regulations') provide *inter alia* as follows:

> Regulation 3(1): *'Subject to the provisions of sub-regulation (2), the maximum number of limited pay-out machines which may be allowed by a provincial licensing authority to be operated on a single site must be five.'*;
>
> Regulation 3(2): *'The Board may, on good cause shown and upon application by a provincial licensing authority approve the operation of limited pay-out machines in excess of five machines and not more than forty: Provided that such application must be made in respect of every site for which limited pay-out machines in excess of five is sought.'*

The reference to 'Board' in regulation 3(2) is a reference to the National Gambling Board.

THE APPLICANTS' SUBMISSIONS

12. The stance of the applicants is that regulation 3(2), which grants to the first respondent the power to issue LPMs in excess of 5 per site, infringes upon the exclusive licensing authority of the second respondent and is, on account of that, invalid and liable to be set aside.

13. In this regard they contend that neither the National Gambling Act No 33 of 1996 nor its successor the National Gambling Act No 7 of 2004, provide for the approval and issue of a provincial gambling license by the National Gambling Board. They argue that this function is located exclusively within the powers of the Provincial Licensing Authority, in this instance the Gauteng Gambling Board.

14. On this basis they contend that regulation 3(2) of the Regulations on Limited Payout Machines of the 21st of December 2000 which provides that the National Gambling Board may on application by the provincial licensing authority approve an application for the licensing of a site with more than 5 but less than 40 limited pay-out machines, falls outside of the subject matter that the third respondent can make regulations about.

15. In the alternative they contend that if it is found that the third respondent can make regulations about the subject matter of regulation 3(2), then the third respondent cannot empower the National Gambling Board to trump the decisions on the licensing of LPMs by the Gauteng Gambling Board.

16. Beyond opposing the application on the merits the respondents have raised the following points *in limine*:

    a) The proceedings are irregular in that the applicants, to the extent that they contend that the first respondent has not taken a decision on their application for 40 LPMs, were obliged to seek relief in terms of the Promotion of Just Administrative Act 3 of 2000 ('PAJA');

    b) That the relief sought is academic and moot to the extent that an order of invalidity in relation to regulation 3(2) would leave intact regulation 3(1) which in any event provides that a provincial licensing authority may not license more than 5 LMPS per site;

c) That the approval of the applicants' license application by the GGB was *prima facie* invalid as the GGB was dissolved at the time of the decision and accordingly there could be no valid application submitted for approval by the NGB;

d) That the requirements for the exercise of the Court's discretion in terms of Section 19(1)(a)(iii) of the Supreme Court Act, have not been met on account of the non-joinder of other interested parties as well as the failure by the applicants to seek relief in terms of PAJA;

e) The failure by the applicants, to the extent that the issue in dispute and in respect of which relief is sought is a constitutional issue, to file a notice in terms of Rule 16A of the Rules of this Court.
In this regard such a notice was filed on the 19th of June 2013, which may render this point *in limine* moot.

DISCUSSION AND ANALYSIS OF THE POINTS *IN LIMINE*

- **The application before the Gauteng Gambling Board is *prima facie* invalid**

17. The third respondent in argument contended that the application of the applicants that served before the GGB and was approved by way of the letter of the 16th of April 2012, could never have constituted a lawful approval as the GGB was dissolved during that period and the appointed administrator had no power to approve licenses.

18. The factual basis of this argument was derived in part from the facts on the papers as well as what I term additional facts not on the papers, particularly as

they relate to the dissolution of the GGB. In fairness this was never the case for the third respondent, it being raised for the first time in argument and its validity in part being dependent on facts not canvassed on the papers.

19. Whatever the merits of the argument may be, I do not believe that the dictates of fairness which must characterize civil proceedings justify its introduction. It amounts to taking the other party by surprise and relies on facts not canvassed on the papers and is in my view not worthy of further consideration.

- **Irregular proceedings**

20. It is common cause that the first respondent has not taken a decision in respect of the applicants' application for the issue of an operating license in excess of 5 machines. In addition whatever the stance of the second respondent may have been, it did not have the power to give final approval of the application, such power being vested exclusively in the second respondent in accordance with the provisions of regulation 3(2).

21. When the applicants submitted their application for an operating license for 40 LPMS, they must have done so mindful of the architecture of the Act and the regulations and in particular that the power to grant such an operating license vested in the second respondent.
In this regard however it must be noted that the first respondent by way of the letter of the 8th of November 2012 referred to above, advised that the application was under consideration and the applicant, without further recourse to the first respondent, launched these proceedings on the 6th of December 2012.

22. That application is for all intents and purposes still pending and the applicants in such a situation may well insist on a decision being taken by placing the decision-maker on terms, alternatively it may consider the failure to take a

decision as a refusal of the application in which event it may avail itself of the remedies provided for in PAJA.

In ***INTERTRADE TWO (PTY) LTD v MEC FOR ROADS AND PUBLIC WORKS, EASTERN CAPE AND ANOTHER*** **2007 (6) SA 442 (CkHC).** PLASKETT J remarked as follows:

> *'It is common cause that no final decision has been taken in respect of the tenders despite the effluxion of a more than reasonable time for a decision to be taken. This means that there can be no dispute that Intertrade is entitled to relief: s 6(2)(g) together with s 6(3)(a) of PAJA, provide that the failure to take a decision within a reasonable time is a ground of review and hence an infringement of the fundamental right to just administrative action.'* (at 453F)

23. The applicants have done neither but have instead elected to launch a constitutional challenge against the validity of regulation 3(2).

One can hardly speculate what the decision of the second respondent will be (if it makes a decision, which it is under a duty to do) and in the event of it approving the application there would be no need to deal with the challenge brought in these proceedings in relation to the validity of regulation 3(2). On the other hand if it refuses the application or fails to take a decision then the applicant will have recourse to the provisions of PAJA and in that challenge, the question of the constitutional validity of regulation 3(2) may be raised.

24. What the applicants have done is to seek declaratory relief on the basis of what they contend is a collateral challenge. The application for the license which is at the heart of the litigation and the cause of the applicants' concerns is not

before the Court but the applicants seek declaratory relief which if granted, may well enable the applicant to insist on the issuing of the license.

25. Our Courts have unequivocally cautioned that where it is possible to decide any case without reaching a constitutional issue that is the course to be followed.

(See for example the remarks of KENTRIDGE AJ in ***S v MHLUNGU AND OTHERS*** **1995 (3) SA 867 (CC)** at page 894, paragraph 59 which were quoted with approval by CHASKALSON P in ***ZANTSI v COUNCIL OF STATE CISKEI AND OTHERS*** **1995 (4) SA 615** at page 618, paragraph 3.)

In *Zantsi* (supra) CHASKALSON P affirmed this approach in quoting Matthews J in ***Liverpool, New York and Philadelphia Steamship Co v Commissioners of Emigration*** **113 US 33 (1885)** at 39 as follows:

> *'Never. . .anticipate a question of constitutional law in advance of the necessity of deciding it;. . . never. . .formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'*

26. The applicants argued that they were entitled to proceed in the manner in which they did for the relief they seek, arguing that it constituted a collateral challenge and relying on the *dicta* in ***KOUGA MUNICIPALITY v BELLINGAN AND OTHERS*** **2012 (2) SA 95 (SCA)**, where the Court endorsed the view that where the State charges a person with contravening legislation, that person may collaterally challenge the validity of the legislation in civil proceedings for a declaratory order. The Court however specifically left open the question whether a collateral challenge by way of declaratory order may be brought by a person who is merely liable to prosecution and who has not been charged.

27. I have serious doubts as to whether the principles in *Kouga* are applicable *in casu* and whether the applicants have a right to launch a collateral challenge.
A collateral challenge is by its nature defensive and is ordinarily raised in proceedings that are not designed directly to impeach the validity of the administrative act. (See ***OUDEKRAAL ESTATES (PTY) LTD v CITY OF CAPE TOWN AND OTHERS*** **2004 (6) SA 222 (SCA)**, where the Court took the view that the right to challenge the validity of an administrative act collaterally arises because the validity of the administrative act constitutes the essential prerequisite for the legal force of the action that follows).

28. In ***CITY OF TSHWANE METROPOLITAN MUNICIPALITY v CABLE CITY (PTY) LTD*** **2010 (3) SA 589 (SCA)**, the Court, referring to the *dicta* in *Oudekraal,* affirmed that the right to raise a collateral challenge to the validity of an administrative act arises and is justified because the party bringing the challenge faces the threat of a public authority with coercive action, where the legal force of such action depends upon the validity of the administrative act in question.
In *Oudekraal* (*supra*) the Court remarked as follows:

> *'It will generally avail a person to mount a collateral challenge to the validity of an administrative act where he is threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question. A collateral challenge to the validity of the administrative act will be available, in other words, only 'if the right remedy is sought by the right person in the right proceedings''.* (at 245H-246A)

29. From this it is reasonable to conclude that the right to raise a collateral challenge is proscribed and in part depends on the proximity of the risk faced.

My view is that the applicant in these proceedings has not established such a right. It could hardly be said that these applicants face the threat of a public body with coercive action - what they have done is to make an application for a license which is in the process of being determined. An applicant for a license is hardly in the same position as someone facing criminal prosecution or indeed someone against whom coercive state action is directed.

30. On their version they contend that there has been an unreasonable delay on the part of the first respondent in finalising the application. Clearly in the context of the factual matrix underpinning these proceedings, they would have recourse to PAJA. For the reasons given, they have not established the right to bring a collateral challenge to the validity of regulation 3(2). Of course it is not as if they are left without a remedy; it is simply a matter of concluding that the remedy lies elsewhere.

31. To broaden the circumstances under which a collateral challenge to the validity of an administrative act may be brought carries the real risk of speculative and unnecessary challenges that may have little or no practical effect.
The proximity of the risk of facing coercive action by a public authority in my view provides a useful moderating tool. On the one hand it ensures that those who face the real risk of coercive state action have recourse to collaterally challenge the legal basis of such action, while on the other hand it guards against the proliferation of challenges where the factual situation does not demonstrate the existence of such a risk. It may be a delicate exercise but it is certainly a necessary one. As I understand it, our courts while recognising the right to bring a collateral challenge, have been careful in providing the broad parameters within which the right may be said to exist.

(See ***NATIONAL INDUSTRIAL COUNCIL FOR THE IRON, STEEL, ENGINEERING AND METALLURGICAL INDUSTRY v PHOTOCIRCUIT SA (PTY) LTD AND OTHERS*** **1993 (2) SA 245 (CPD)** and ***METAL AND***

ELECTRICAL WORKERS UNION OF SOUTH AFRICA v NATIONAL PANASONIC CO (PAROW FACTORY) **1991 (2) SA 527 (CPD)** where the Court cautioned that a collateral challenge would only be allowed if the right remedy was brought by the right person in the right proceedings and at the right time).

32. The applicants have misconceived their remedy and should have proceeded in terms of the provisions of PAJA which make express provision for the setting aside of an administrative act where the administrator was not empowered to act.

The point *in limine* in my view was well taken and the application falls to be dismissed on this ground alone.

- **<u>The relief sought is moot and / or academic</u>**

33. The challenge of the applicants is confined to regulation 3(2). The respondents contend that even if successful, the outcome of this litigation would leave regulation 3(1) firmly in place and undisturbed which would have the effect that the power of a provincial licensing authority would be restricted to the issue of an operating license for a maximum of 5 limited pay-out machines. It is argued that such relief would have no consequence or benefit for the applicant in that it already is the holder of the maximum operating license that the second respondent is empowered to issue, and the retention of regulation 3(1) effectively precludes the issue of any further operating license by the second respondent in respect of the same site.

34. The applicants' stance is that they do not seek the striking down of regulation 3(2) in its entirety but rather that the power regulation 3(2) vests in the first respondent, be declared *ultra vires* and that under such circumstances the power of the Court to read the regulation down in order to still achieve the

intention of the regulation is likely to result in a re-formulated regulation that would allow provincial licensing authorities the power to issue operating licenses in excess of 5 LPMs.

35. The nature of the relief the applicants seek must be established from the papers. The thread that consistently runs through the papers is the stance of the applicants that regulation 3(2) is *ultra vires* and they seek an order declaring it to be invalid. The notice of motion issued at the behest of the applicants is clear and unambiguous in seeking an order 'declaring regulation 3(2) ultra vires the powers, functions, and duties of the National Board.'
This is the case the applicants make out in their founding affidavit and it accordingly is not open to the applicants, having taken such a stance, to now contend that they do not seek the striking down of regulation 3(2).

36. However even if the applicants are correct in their assertions regarding the nature of the relief they seek, and the option of reading down which they contend for results in saving regulation 3(2) in some re-shaped form, what remains behind is regulation 3(1) which has not been the subject of this application. In this regard there may be two possible scenarios.
If regulation 3(2) is struck down in its entirety, what remains is regulation 3(1) which limits the power of a provincial licensing authority to issue a license for up to 5 LPMs.

37. If regulation 3(2) can be saved to the extent that it empowers the provincial licensing authority to issue a license for more than 5 but less than 40 LPMs, then a conflict would exist between regulation 3(2) and regulation 3(1).
In both scenarios the applicants would not be entitled to the issue of the license they seek, rendering the relief they seek moot and / or academic.
On this score the point *in limine* is sustainable and the application falls to be dismissed on this ground as well.

- **The merits**

38. For the reasons above there is no need to canvass the merits of the matter. However in passing it may warrant mention that when one has regard to the policy choice of the law-maker to designate gambling a concurrent national and provincial competence, what follows in the division of labour and powers with regard to the issue of operating licenses in respect of LPMs appears to fit into this architecture. The vesting of the power to issue licenses for more than 5 LPMs with the National Board is in keeping with the powers Section 26 grants to the third respondent to regulate the limited pay-out machine industry and to prescribe the maximum number of machines nationally, provincially and per site.

39. On the contrary it may well be consistent with ensuring the desired unity in economic activity alluded to in ***EX PARTE PRESIDENT REPUBLIC OF SOUTH AFRICA: IN RE CONSTITUTIONALITY OF THE LIQUOR BILL*** **2000 (1) SA 732 (CC).**

In dealing with the question whether the Liquor Bill infringed upon the provinces' exclusive legislative mandate, CAMERON AJ (as he then was) said the following:

> *'But it is unnecessary to conclude that the competence in regard to 'liquor licences' does not extend to intra-provincial production and distribution activities since the national government has, in my view, in any event shown that, if the exclusive provincial legislative competence in respect of 'liquor licences' extends to licencing production and distribution, its interest in maintaining economic unity authorises it to intervene in these areas under s 44(2). 'Economic unity' as envisaged in s 44(2) must be understood in the context of our Constitution, which calls for a system of co-operative government, in which*

provinces are involved largely in the delivery of services and have concurrent legislative authority in everyday matters such as health, housing and primary and secondary education. They are entitled to an equitable share of the national revenue, but may not levy any of the primary taxes and may not any tax which may 'materially and unreasonably' prejudice national economic policies, economic activities across provincial boundaries or the national mobility of goods, services, capital or labour. Our constitutional structure does not contemplate that provinces will compete with each other. It is one in which there is to be a single economy and in which all levels of government are to co-operate with one another. In the context of trade, economic unity must, in my view, therefore mean the oneness, as opposed to the fragmentation, of the national economy with regard to the regulation of inter-provincial, as opposed to intra-provincial, trade. In that context it seems to follow that economic unity must contemplate at least the power to require a single regulatory system for the conduct of trades which are conducted at national (as opposed to an intra-provincial) level.' (At 768B-F)

40. In addition it could hardly be said that regulation 3(2) constitutes an unconstitutional infringement of the powers of provincial licensing authorities. Provincial authorities only have exclusive jurisdiction to the extent provided for. The clear architecture of the National Gambling Act and its regulation create, in the constitutionally permissible, and necessary and justifiable manner, the necessary balance between the national and provincial spheres of government in properly regulating the gambling industry in general and the limited pay-out industry in particular.

I would have been inclined under such circumstances to have also dismissed the application on its merits.

For the reasons already given there is no need to make any order in respect of the counter-application.

ORDER

41. In the circumstances I make the following order:

i. The application is dismissed.

ii. The applicants jointly and severally the one paying, the other to be absolved, are ordered to pay the costs of the first and the third respondents, which in relation to the third respondent, shall include the costs of two counsel.

N KOLLAPEN
JUDGE OF THE NORTH GAUTENG HIGH COURT

70868/2012

HEARD ON: 17 FEBRUARY 2014

FOR THE APPLICANTS: ADV P F LOUW SC & ADV N JAGGA

INSTRUCTED BY: SHEPSTONE & WYLIE (ref: Tayob/SABI 25064.1)

FOR THE FIRST RESPONDENT: ADV A J DICKSON SC

INSTRUCTED BY: RAMUSHU MASHILE TWALA INC (ref: G Twala/RA/MAT7946)

FOR THE THIRD RESPONDENT: ADV I ELLIS & ADV M MAJOZI

INSTRUCTED BY: THE STATE ATTORNEY (PRETORIA) (ref: 1692/2013/Z49)