



IN THE REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG DIVISION, PRETORIA

CASE NO: 73875/14

26/8/16

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED.

26.8.16 *Hen Louw*

DATE

SIGNATURE

In the matter between

SOFILINE (PTY) LTD

Applicant

and

**THE CHAIRPERSON OF THE
MPUMALANGA GAMBLING BOARD**

First Respondent

THE MPUMALANGA GAMBLING BOARD

Second Respondent

**MEMBER OF THE EXECUTIVE COUNCIL FOR
ECONOMIC DEVELOPMENT, ENVIRONMENT
& TOURISM, MPUMALANGA**

Third Respondent

**LISTENSURE (PTY) LTD T/A DELMAS STAR
CITY HOTEL AND CASINO ENTERTAINMENT
RESORT**

Fourth Respondent

JUDGMENT

Fourie AJ

INTRODUCTION:

1. This is a review application arising out of a request for proposals ("*RFP*") for applications for a casino licence in Mpumalanga Province, published on 6 September 2013 by the Mpumalanga Gambling Board, cited herein as the second respondent.
2. The Mpumalanga Gambling Board ("*the Board*") was established in terms of the Mpumalanga Gambling Act, No. 5 of 1995 ("*the Act*"). In terms of the National Gambling Act, No. 7 of 2004, four casino licences were allocated to Mpumalanga. In 1996, the Board adopted a policy that the licences would be allocated to each of four demarcated zones. Three of the four licences were subsequently issued.
3. The Board issued RFP's in relation to the fourth licence in 2008, 2012 and in 2013. The applicant applied for the fourth licence pursuant to the 2012 and 2013 RFP's. Both RFP's were cancelled by the Board.
4. In this application, the applicant seeks an order reviewing and setting aside the cancellation of the 2013 RFP.

BACKGROUND:

5. In August 2006 and subsequent to a re-demarcation of districts between Limpopo, Mpumalanga and Gauteng Provinces, the second respondent commissioned a study from the University of South Africa to determine the viability of a fourth casino in Mpumalanga. Pursuant thereto, in September 2008, the Board issued the first or 2008 RFP. No licence was issued pursuant to this invitation.
6. In September 2012, having engaged in a process of public participation, the Board amended its policy to allow for applications for the fourth licence to be made in respect of any location in the province and gave notice accordingly. This was followed by an invitation for proposals. The 2012 RFP was, however, cancelled by the Board on 17 July 2013 as the Board had formed the view that the 2012 RFP did not adequately reflect its intention to have BEE equity as a condition of the licence.
7. On 3 September 2013, the Board consulted the Member of the Executive Council for Economic Development, Environment and Tourism, Mpumalanga (*"the MEC"*), herein cited as the third respondent, in terms of section 29(1) of the Act, regarding the third or 2013 RFP. The MEC approved the 2013 RFP.
8. On 6 September 2013, the Board again published an RFP inviting proposals for the fourth casino licence in the province.

9. Pursuant thereto and on 20 January 2014, the applicant submitted its proposal together with proof of payment of the non-refundable fee of R 250 000.00.
10. The fourth respondent, Listensure (Pty) Ltd t/a Delmas Star City Hotel and Casino Entertainment Resort, also submitted a proposal for the fourth licence pursuant to the 2013 RFP. No relief is sought against the fourth respondent, which has not opposed the application or filed any affidavit. References made in this judgment to *"the respondents"* are in respect of the first, second and third respondents only. There were no other applications.
11. An exposition of the subsequent events as recorded in contemporaneous documents is required, as an analysis thereof is essential to the determination of this application. The emphasis in the quotes is mine.

- 11.1. On 2 February 2014, the Premier of the Mpumalanga Provincial Government wrote to the MEC. The letter reads as follows:

"It was recently brought to my attention that the Mpumalanga Gambling Board published, during September 2013, a Request for Proposals in respect of a Casino Licence with the closing date of 20 January 2014.

As neither myself nor the Executive Council was consulted in this regard, it will be appreciated it you would, as the Member of

the Executive Council responsible for gambling matters in the Province, provide me, as a matter of priority, with a written exposition of the processes and procedures followed by both yourself as well as the Mpumalanga Gambling Board, which lead to the publication of the above-mentioned Request for Proposals, with specific reference to the complete lack of consultation with either myself or the Executive Council.

In this regard, your attention is drawn to section 133(2) of the Constitution, 1996, which states that Members of the Executive Council of a Province are accountable collectively and individually to the Provincial Legislature for the exercise of their powers and the performance of their functions.

Furthermore, the process already embarked upon in respect of the said Request for Proposals, must be suspended forthwith until the Executive Council has been afforded the opportunity to duly consider and express itself on this matter."

- 11.2. On 12 February 2014 the MEC and the Chairperson of the second respondent (who has been cited as the first respondent), had a telephone conversation, confirmed in a letter from the MEC on the same date, which recorded the following:

"The Honourable Premier has expressed dissatisfaction in

the manner in which this process has been managed, with specific reference to the complete lack of consultation with him and/or the Executive Council.

To this end he has directed that the process already embarked upon in respect of the RFP for the 4th Casino Licence be suspended forthwith until the Executive Council has been afforded the opportunity to duly consider and express itself on the matter.

It is hoped this directive will secure your urgent attention."

- 11.3. On the same date, the Board met, ostensibly - according to the timeline provided in the RFP - to select a finalist amongst the proposals received. It appears from the minutes that a challenge that the applicant had lodged with the Victor Khanye Local Municipality to the acquisition by the fourth respondent of a site for the proposed establishment of a casino in Delmas, was brought to the attention of the Board members. The Board resolved to defer the selection of finalists pending receipt of a legal opinion in respect of this issue. Notably, the first respondent was not present and no mention was made of the MEC' aforesaid request.

- 11.4. On or about 10 March 2014, the Board addressed a progress report to the Mpumalanga Provincial Executive Council (*"The Executive*

Council”), which report was approved by the former MEC. This appears to have been in response to the directive of the Premier contained in his letter of 2 February 2014, relayed to the first respondent by the former MEC on 12 February 2014, for the Executive Council to be afforded the opportunity to duly consider and express itself on the matter of the fourth licence. On 12 March 2014, the Board also made a presentation to the Executive Council in respect of the process, at the end of which it *“recommended that Exco takes note of the sequence of events and progress to date, and provides guidance going forward”* regarding the licensing process.

- 11.5. The minutes of the meeting of the Executive Council on the same date record the following:

“Executive Council remarked that:

- 1) There is a concern that the matter is close to finality without EXCO having made inputs.*
- 2) An ideal site for the casino should be identified where Mpumalanga people will benefit maximally. There is a concern that proposed Delmas site is too close to Gauteng.*
- 3) On why the matter was not presented to EXCO, it was*

indicated that there was an oversight.

- 4) *The process should be halted for the Board and the Department to interact fully with EXCO regarding the matter.*
- 5) *A study, to justify the need and site of the fourth casino, should be conducted and presented to EXCO."*

"The Executive Council resolved that:

- *The process of appointing the fourth casino operator should be started afresh taking into account the issues raised above."*

11.6. On 17 March 2014, the former MEC wrote to the first respondent with reference to the meeting of the Executive Council on 12 March 2014, stating that:

"The process of appointing the Fourth Casino Licence operator should be started afresh taking into account that a study to justify the need and site of the fourth casino should be conducted and presented to the Executive Council.

As the Member of the Executive Council responsible for MGB, I hereby direct that this resolution be processed accordingly."

11.7. On 28 March 2014 the Board held a special meeting, the minutes of which record, *inter alia*, that:

11.7.1. *"The CEO informed the Board that a letter has been received from the MEC giving a directive that the process of appointing the Fourth Casino Licence Operator should be started afresh taking into account that a study to justify the need and site of the Fourth Casino should be conducted and presented to the Executive Council."*; and

11.7.2. *"The Board deliberated upon this matter at length and was of the view to consider the following:*

- *As much as the directive from the MEC is being considered, the proposers/bidders need to be engaged in respect of a PAJA process in order to foster the principles of fairness and transparency*
- *In this regard letters are to be forwarded to the proposers/bidders, as well as to the MEC to inform her that the matter is being considered."*

11.7.3. In addition, it was resolved that *"(i)n terms of PAJA, letters regarding the contents of the letter from the MEC be drafted and sent to the proposers/bidders to invite written*

representations from them as to why the Board should not withdraw or cancel the Casino RFP in terms of section 4.2 of the RFP."

- 11.8. The letter written to the former MEC by the Board and foreshadowed in the aforesaid minutes is in my view important, particularly the following paragraphs:

"Subsequent to receipt of the letter from the Honourable MEC, the Board sought a legal opinion from Senior Counsel on the process to be followed in processing the Executive Council Resolution ("the resolution"), referred to in the aforementioned letter."

"On 28 March 2014, the Board convened a Special Board Meeting where it resolved to accept the recommendation of Senior Counsel's legal opinion to invite the bidders ... to make written representations on or before 7 April 2014 why the Board, should not cancel the Request for Proposals in order to give effect to the aforesaid resolution."

- 11.9. The applicant responded on 2 April 2014, setting out its objections. The fourth respondent noted that it was unable to comment on the limited information provided.

11.10. On 8 April 2014, the Board held a special meeting during which it resolved that:

"1. There is merit in the directive to conduct a study in view of the changes in the demography and the economy of the Province and the new National Development Plan.

2. The original representations of the bidders did not take the matter further or in a different direction.

3. Therefore The Fourth Casino Licence RFP be cancelled in terms of section 4.2 of the RFP and letters informing the bidders and the MEC of the Board's decision be forwarded to them".

11.11. On 18 April 2014, the Board informed the MEC that it had resolved to cancel the RFP and had informed applicants of the decision.

11.12. On 1 April 2014, the UNISA Bureau of Market Research submitted a proposal for the second feasibility study to the second respondent. It appears from the proposal that the final report could be completed within one month after commencement of the study. The study was in fact completed in June 2014 and provided to the MEC, who in turn, provided it to the Executive Council for its consideration. The Executive Council eventually considered the second UNISA report on 12 August 2015 and issued a resolution to the effect that a fourth

licence is feasible, identifying eight issues that it deemed significant.

The Delmas site is not supported.

12. The reasons furnished by the Board in response to the applicant's request for reasons for the cancellation of the 2013 RFP, may be summarised as follows:

12.1. An objective feasibility study had value in the compilation of the RFP and could enable the Board to have an informed position arising from the outcomes of the feasibility study on the impact the issuing of the fourth Casino Licence will have on the diverse population of the Mpumalanga Province.

12.2. Awarding a Casino Licence without a detailed feasibility study may constitute a dereliction of its duty.

12.3. Approximately 8 years had elapsed since the UNISA report was undertaken and during this period there had been changes in population numbers, disposable income levels and gambling behaviours, as well as the economic impact caused by the 2008/2009 recession.

12.4. The Board could not ignore the adoption of the National Development Plan 2030 by Parliament which contains objectives that may inform the feasibility study and the formation of the evaluating criteria in considering the proposals of the bidders.

12.5. It is imperative before embarking on the process to award a fourth Casino Licence to commission a feasibility study to consider all the matters raised above.

12.6. Consequently, the Board, having considered the above, resolved to withdraw the revised RFP pending the commissioning of the feasibility study for a fourth casino.

THE CASE FOR THE APPLICANT:

13. The applicant contends that the decision by the Board to cancel the 2013 RFP was unlawful and falls to be reviewed and set aside because:

13.1. It was taken subject to the unlawful dictation of the Executive Council and the MEC;

13.2. It was irrational and unreasonable;

13.3. It was procedurally unfair, because the Board did not inform the applicant of the true reasons for the intended cancellation and as a result the applicant was not afforded a fair hearing before the decision was taken.

14. The applicant relies in this regard on the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA"), and on the principle of legality that applies to the exercise of all public power.

THE CASE FOR THE RESPONDENTS:

15. On behalf of the respondents, it was contended that:
- 15.1. The decision to cancel the RFP was made after considering the effect of adhering to the peremptory directive of the MEC, which resulted in the Board requesting a feasibility study.
 - 15.2. The decision was made by the Board itself.
 - 15.3. The decision was rational and reasonable under the circumstances.
 - 15.4. The Board adhered to fair administrative process.
 - 15.5. The relief sought by the applicant is non-suited as the applicant has not indicated any rights that were adversely affected, and because the procurement process has already expired and cannot be revived.
 - 15.6. In supplementary heads of argument filed pursuant to the recent judgment delivered by the Supreme Court of Appeal in **SAAB Grintek Defence (Pty) Ltd v South African Police Service & Others**, (316/2015) [2016] ZASCA 104 (5 July 2016), the respondents contended that the cancellation of the RFP did not constitute administrative action and was accordingly not reviewable under PAJA.

FIRST GROUND OF REVIEW : UNLAWFUL DICTATION

16. The applicant argues that in terms of the Mpumalanga Gambling Act, power is conferred on the Board and only the Board, to issue requests for applications for casino licences and to determine the fate of such applications. Neither the Act nor the 2013 RFP confer any power on the MEC or the Executive Council to issue or cancel a request for applications or proposals or to give to the Board any instruction to issue or cancel such request. This contention was not disputed by counsel for the respondents. Both parties agreed that if the Board decided to cancel the 2013 RFP because it was instructed to do so by the Executive Council or the MEC, such decision was unlawful and fall so be set aside.
17. Furthermore, there are no material differences between the parties regarding the law pertaining to unlawful dictation.
18. The issue to be decided is accordingly a factual one. Does the evidence before Court demonstrate that the Board took the decision to cancel the 2013 RFP because it was instructed to do so, whether by the Executive Council or by the MEC or both, or does the evidence support the contention that it took the relevant decision independently?
19. I have already set out the contemporaneous documents and correspondence relating to the decision. Counsel for the applicant, Mr Budlender, who appeared together with Mr Ferreira, contends that these documents make it

clear that the Board cancelled the 2013 RFP because it was instructed to do so by the Executive Council and the MEC.

20. Not so, says Mr Mphaga SC, who appeared for the respondents with Ms Ellis. His argument appears to rest on the following:

20.1. There is no indication in either the minutes of the Board meeting on 12 February 2014, or the letters forwarded to the bidders pursuant thereto, that the Board suspended the process as directed by the Premier.

20.2. On receipt of the letter from the MEC dated 12 February 2014, recording the directive of the Premier, the first respondent did not call a meeting of the Board as the Executive Council only required a progress report, and neither did the Board suspend the process.

20.3. The resolution taken by the Executive Council on 12 March 2014 to the effect that the process should be started afresh taking into account the issues raised (in respect of the study), constituted an executive decision, which the former MEC was constitutionally obliged to convey to the Board. She was also obliged to ensure that the required study be conducted, and the means to achieve this was by utilising the provisions of section 3(c) of the Act. Section 3(c) provides that the Board shall advise the MEC or furnish a report or recommendation to the MC on any matter referred to the Board by

the MEC for consideration and arising from the application of the Act or relating to the control over gambling in the province. The provisions are peremptory and not subject to any time constraints. The Board is obliged to adhere to a request in terms of section 3(c), unless the request does not relate to any matter arising from the application of the Act or the control of gambling in the Province. The Board was accordingly compelled to adhere to the request by the former MEC to be provided with the feasibility study, and this, he argued, was the only directive contained in the former MEC's letter of 17 March 2014.

- 20.4. I must confess that I find it difficult to read the directive in such a restricted manner. The last paragraph of her letter reads that "*I hereby direct that this resolution be processed accordingly*". Mr Mphaga conceded that a directive in this context is akin to an instruction. The reference to "*this resolution*" is to the resolution of the Executive Council dated 12 March 2014. The operative part of the resolution is "*that the process of appointing the fourth casino operator should be started afresh*". The balance of the sentence constituting the resolution, namely "*taking into account the issues raised above*", prescribes the manner in which the process is then to be conducted. The phrase "*be processed accordingly*" can only mean that effect be given to the resolution of the Executive Council. The submission by the respondents that it is possible to read the

directive of the Executive Council while ignoring the instruction that the process of appointing the casino operator be started afresh, is at best, artificial and forced. It cannot be upheld.

20.5. I find support for this view in the following:

20.5.1. In the letter directed by the Board to the bidders on 28 March 2014, the bidders were invited *"to make representations in writing on or before 7 April 2014, why the Board should not withdraw or cancel the RFP as provided for in clause 4.2 of the RFP, to give effect to the request of the MEC as set out in the aforesaid letter."* The bidders were clearly invited to comment on the Board's intention to withdraw or cancel the process. They were not requested to comment on the amendment of the RFP or the restructuring of the process, nor does it appear, on the necessity of a feasibility report.

20.5.2. The applicant, in paragraph 2 of its letter in response to this invitation, pertinently drew the attention of the Board to the issue of unlawful dictation, where it stated that *"if the Board were to withdraw the RFP to give effect to the request of the Executive Council, the Board would be acting ... pursuant to the unauthorised or unwarranted dictates of a person or body"*.

20.5.3. One would have expected the Board to have made a concerted attempt to refute this allegation in making its decision on 8 April 2014, yet no mention is made of any grounds upon which the Board based its decision to withdraw the RFP, rather than to suspend or amend it. In its response to the applicant's request for reasons, when the Board had ample opportunity to formulate its reasons, it still failed to provide a single reason for having cancelled the process.

20.6. Mr Mphaga further contended that the mere fact that the resolution of the Executive Council contained the phrase "*the process of appointing the fourth casino operator should be started afresh*", does not mean that the Board acted thereon. This is because, he submitted:

20.6.1. The process was already in jeopardy in light of the applicant's submissions in respect of the property purchased by the fourth respondent, yet the Board still intended proceeding with the process which it had shown no intention of abandoning or suspending.

20.6.2. If the Board had been acting on instructions, it would already have suspended the process.

20.6.3. The Board did not cancel the RFP when its chairperson

was informed that the MEC had failed to consult on the matter with either the Executive Council or the Premier.

- 20.6.4. The phrase was not a directive. There was in fact only one directive in the MEC's letter of 17 March 2014, namely the request for a study, and it is upon this directive, and this directive only, that the Board acted.
- 20.6.5. The MEC was entitled to request a report, and it this request to which the Board responded. This request was legal and valid and the Board had no lawful reason to refuse such a request.
- 20.6.6. The minutes also make no reference to the process having to start afresh.
- 20.6.7. In acceding to the request for a study, the Board was prompted to consider the effect thereof, in other words, the feasibility of proceeding with the procurement process and timelines provided for in the RFP, whilst the study was obtained and considered by the Executive Council. (This is the closest that the Board comes in addressing the actual cancellation).
- 20.6.8. The minutes of the meeting of the Board on 8 April 2014

reflect that the Board deliberated on the matter (of the representations received from the bidders) at length, which infers that the issue of cancellation was debated. The same may be said of the minutes of the meeting on 28 March 2014.

21. I find the respondents' arguments in this regard also to be unconvincing. I agree with Mr Budlender's submission that the contemporaneous documents call for an answer, and a comprehensive answer at that.

21.1. The events prior to 17 March 2014 serve primarily to place the issue in context. It was on 17 March 2014 that the Board was formally directed to implement the resolution taken by the Executive Council, and this was, in the submission of the respondents, the genesis of this application.

21.2. Mr Mphaga emphasised the importance of the feasibility study several times. The merits of obtaining a feasibility study are not in dispute. The need for such a study also does not support the respondents' submissions.

21.3. As I have already noted, there is no room for the argument that the MEC's letter contained only a directive to obtain a report.

21.4. There is no indication of what facts or factors the Board took into

account in the minutes of the meetings of 28 March 2014 and 8 April 2014, or the respondents' reasons. No reasons appear in the affidavits deposed to by the first respondent, Mr Vilakazi. The high water mark of his affidavit is the statement in paragraph 15 that *"(a)ccordingly and after having considered all the factors, including the implications thereof on the Third RFP processes and timeframes, the MGB decided in its sole discretion to cancel the Third RFP."* This is simply not enough.

- 21.5. The contemporaneous documents do not reflect an acknowledgment on the part of the Board that an instruction to cancel the process may be ignored as falling outside the authority of the Executive Council. The affidavit deposed to by the first respondent does not state that the Board acknowledged that this portion of the instruction could be regarded as *pro non scripto* and could be ignored. In fact, nothing is said about it.
- 21.6. These documents are only capable of being read to mean that the Executive Council issued an instruction or directive to cancel the RFP, the MEC conveyed the directive to the Board, the Board understood it to be a directive to cancel the RFP and gave effect to that directive.
- 21.7. Paragraph 4.2 of the RFP affords the Board the right to cancel or suspend the RFP, or to restructure or cancel the process. Nowhere

is any explanation offered why the Board considered the cancellation of the RFP to be the preferable option. Considerations of prejudice to bidders, delays occasioned by the report, references to lengthy debates, are all speculative and were not addressed in the affidavits.

22. There is simply nothing on the papers upon which I am able to find that the Board acted independently and I do not accept the respondents' contention that the Board took the decision to cancel the procurement process of its own volition.

LEGAL PRINCIPLES:

23. The legal principles pertaining to the matter of unlawful dictation, were common cause in argument. In common law, a discretionary power vested in a particular administrator may not be exercised by another, whether he or she is in a superior or subordinate position. Stated differently, the exercise of powers must accord with the principle of legality, the holder of a public power may exercise no power and perform no function beyond that conferred upon him or her by law. See **Baxter, Administrative Law**, 442; also **Fedsure Life Assurance Limited & Others v Greater Johannesburg Transitional Metropolitan Council and Others**, 1999 (1) SA 374 (CC) at paras. 57 – 59. *"Where power is conferred upon an office or statutory body it is intended that the power should be exercised by that office or body and no one else. The recipient of the power has presumably been chosen for a purpose – for his accountability, expertise, seniority or advantaged position in exercising the*

power. Should he allow the power to be exercised by someone who was not chosen he will effectively have abdicated his own power and will not have complied with the legislation. The Courts will recognise neither his chosen substitute nor any person who has usurped his powers." Where a functionary abdicates the power confirmed upon him or her to another person, such abdication is invalid. See **President of the Republic of South Africa & Others v South African Rugby Football Union & Others** ("SARFU"), 2000 (1) SA 1 (CC) at par. 38. Unlawful dictation is a form of abdication where a functionary vested with a power, does not of his own accord decide to exercise the power, but does so on the instructions of another. See **SARFU** at par. 40. The functionary vested with a power is permitted only to consult with and to consider the views of others but not "*to adopt the role of rubber stamp*". Whether there has been an abdication must be decided on the facts of each case. See **Minister of Environment Affairs and Tourism & Another v Scenematic Fourteen (Pty) Ltd**, 2005 (6) SA 182 (SCA) at par. 20, **Walele v City of Cape Town & Others**, 2008 (6) SA 129 (CC) at par.144.

24. It is common cause that only the Board is entitled to make the decision to cancel the process in question. The Board, however, exercised this power on instruction of the Executive Council. In this sense, the Board abdicated its powers in terms of the Mpumalanga Gambling Act to the Executive Council. As such the resolution to cancel the Request for Proposals for the fourth casino licence was unlawful and must be set aside.

25. It is accordingly not necessary to consider the further grounds upon which this review rests. It was also common cause that the **SAAB** judgment did not affect the first ground of review insofar as it is based on the principle of legality. It is also therefore not necessary to consider whether the Board's decision to cancel the RFP, adversely affected the applicant's rights.
26. A further aspect must however be addressed. It was argued on behalf of the respondents that the relief sought by the applicant is non-suited because the procurement process has already expired and cannot be revived. The RFP published on 6 September 2013, contained clear defined timelines for the entire procurement process. The process in terms thereof came to an end in September 2014, and could only have been extended prior to the expiration thereof. This application was issued during the following month. For their contention that it is not possible for the decision-maker to revive the tender process, the respondents relied on **Telkom SA Ltd v Merid Trading (Pty) Ltd & Others**, [2011] JOL 26617 (GNP), **Joubert Galpin Searle & Others v Road Accident Fund & Others**, [2014] 2 All SA 604 (ECP) and **SAAB**.
27. Mr Budlender, on the other hand, submitted that this case is completely different, the reason being that the decision to cancel was made in April 2014, at which stage the tender was still valid and the process had not yet expired.
28. I agree that this case may be distinguished from the authorities upon which the respondents rely. In this instance, the conduct that rendered the process

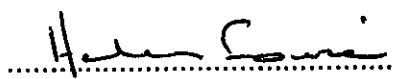
subject to review, occurred prior to the expiry of the validity period of the proposals. In the matters referred to in the preceding paragraph, the tender period expired prior to any decision having been made by the relevant decision-maker.

29. The further relief sought by the applicant also requires reflection. Mr Budlender submitted that the only effective remedy was the relief claimed in prayer 2. Should the matter be referred back to the Board to take a new decision whether to withdraw or cancel the RFP, it will simply do so in the shadow of the dictation to which it previously succumbed. It was argued on behalf of the respondents on the other hand, that the events subsequent to the invitation to submit proposals, being the resolution taken by the Executive Council and the feasibility report that has now been prepared by UNISA, cannot be ignored, but also, cannot be implemented unless they form part of the RFP. This, it was submitted, renders the relief sought academic.
30. This issue can easily be resolved. Clause 4.2 of the RFP records that the Board reserves the right to cancel or amend the RFP, or to restructure or cancel the process. The Board can in terms of this clause incorporate the resolution and the recommendations of the feasibility report.
31. Costs were only sought as against the third respondent in the event of opposition. The third respondent filed an affidavit in terms of Rule 6(5)(d)(iii) wherein he raised legal arguments in support of the first and second respondents. The applicant is entitled to an order of costs as against the

third respondent.

32. The following order is made:

- 32.1. The decision of the second respondent taken on 8 April 2014, to withdraw the Request for Proposals for a fourth casino licence, published on 6 September 2013 (*the RFP*), is reviewed and set aside.
- 32.2. The second respondent is directed to continue to evaluate the preliminary proposals received by it in response to the RFP, within one month from the date of this order, for the purpose of inviting detailed proposals as contemplated in Regulation 4(6) to the Mpumalanga Gambling Act, No. 5 of 1995.
- 32.3. The first, second and third respondents are ordered to pay the costs of the application, jointly and severally, such cost to include the costs of two counsel.


.....
H R FOURIE

ACTING JUDGE OF THE HIGH COURT

FOR THE APPLICANT

ADVOCATE: S. BUDLENDER AND N. FERREIRA

ATTORNEYS: EDWARD NATHAN SONNENBERGS, CAPE TOWN %
FRIEDLAND HART SOLOMON & NICOLSON, PRETORIA

FOR THE FIRST, SECOND AND THIRD RESPONDENTS

ADVOCATE: M. MPHAGA (SC) AND I. ELLIS

ATTORNEYS: STATE ATTORNEY, PRETORIA