IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE
APPEAL NO: 1277/13
CASE NO: 11360/11

In the matter between:

THUO GAMING WESTERN CAPE (PTY) LTD Appellant

and

THE CHAIRPERSON OF THE WESTERN CAPE GAMBLING AND RACING BOARD Respondent

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FINAL DRAFT JUDGMENT : 21 MAY 2014

GAMBLE, J:

INTRODUCTION

[1] In this appeal Thuo Gaming Western Cape (Pty) Ltd ("Thuo") seeks to overturn an order made by Van Staden AJ on 20 December 2012 (in respect whereof reasons were furnished on 26 February 2013) dismissing an application by Thuo for the review of certain conditions imposed by the Western Cape Gambling and Racing Board ("the Board') when it granted a licence to Thuo in May 2010 to operate certain gambling machines during the period 1 June 2010 to 31 May 2011.

[2] Thuo is a wholly owned subsidiary of Grand Parade Investments Limited ("GPI"), a listed company, which has extensive interests in gambling and horse racing activities in the Western Cape. Those activities fall within the purview of the Board which is a juristic person established in terms of sec 2 of the Western Cape Gambling and Racing Act 4 of 1996 ("the Provincial Act"), and which is charged with a variety of functions in relation to the gambling and racing industries in this province.

[3] Before us (as in the Court *a quo*) Thuo was represented by Advs S.P. Rosenberg SC and A.D. Brown while the Board was represented by Advs I. Jamie SC and H.J. De Waal. We are indebted to counsel for their assistance in this matter.

[4] There are a number of statutory and regulatory instruments at play in this matter which have to be understood and interpreted contextually. As Wallis JA put it in the Natal Pension Fund case [1]:

> *"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the*

[1] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at 603F-604A

provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all of these factors…The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation;…The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document"

[5] For purposes of this matter, it is therefore necessary to have regard to the emergence of the legalized gambling industry, both before and after the commencement of the constitutional era, and the response of the authorities thereto. Its historical setting is, to my mind, important in understanding the industry's place and the control thereof in our society.

BACKGROUND

[6] Gambling has been defined as:

> *"The wagering of money or something of material value (referred to as 'the stakes') on an event with an uncertain outcome with the primary intent of winning additional money and/or material goods. Gambling thus requires three elements to be present: consideration, chance and prize…The term* ***gaming*** *in this context typically refers to instances in which the activity has been specifically permitted by law."*[2]

[7] At common law, gambling debts were not enforceable in our Courts on the basis that the underlying contract was *contra bonos mores* having been tainted by *turpitudo*.[3] As the judgment of Fagan JA in Gibson's case makes it clear, "*immorality*" lay at the core of the reluctance to enforce such debts.

[8] Prof. N. Carnelley pointed out in LAWSA [4] that prior to 1965 each province in the Republic had its own gambling legislation. With the introduction of the Gambling Act, 51 of 1965, there was a consolidation of existing provincial legislation and most gambling activities, save horseracing, were prohibited.

[9] But informal gambling activities were nevertheless rife as they no doubt had been elsewhere in the world for centuries. In the townships and backyards of the

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[2] Wikipaedia Online Encyclopaedia *s.v* "Gambling".
[3] Gibson v Van der Walt 1952 (1) SA 262 (A)
Turpitudo is defined in Cassell's New Latin Dictionary as "*moral baseness*".
[4] Law of South Africa (2nd Ed) Vol 10 Part 2 p164 *et seq.*

Witwatersrand, "*FAFI*" games were very popular [5]. And on street corners and pavements all over the country, young men could be seen playing a game in which the wager was to guess under which of several bottle tops a piece of crumpled tin foil had been hidden. [6] Gambling also found its way into mainstream sporting activities such as cricket, as the evidence before the King Commission of Enquiry into Cricket Match Fixing held in Cape Town in June 2000 suggested [7].

[10] As Prof. Carnelley also observes, horseracing has always been treated differently to other forms of wagering and has been regulated through various provincial ordinances and, *inter alia*, rules of the Jockey Clubs over the decades. For purposes of this case it is not necessary to consider horseracing.

[11] Prof. Sampie Terblanche [8] reminds us that the apartheid government was a deeply Calvanistic regimé with strong ties to the Dutch Reformed Church. There can be little doubt, therefore, that all forms of gambling other than horse racing were anaethema to the Nationalist government. However, with the establishment of the Bantustans a somewhat unusual phenomenon arose. The so-called TBVC states [9] were regarded by the apartheid government as "*independent*" countries and, accordingly, the adherence to the demands of the church in regard to immoral gambling activities was

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[5] Wikipaedia, Online Encyclopaedia describes the activity as follows: "**FAFI** or **FA-FI** (pronounced *FAH-FEE*), also known as mo-china, is a form of betting played mainly by black South African women, particularly those living in South African townships, and is believed to have originated with South Africa's Chinese community. This game can also be linked to the Italian lottery which is also called the numbers racket.

[6] Informal enquiry has it that this game was commonly referred to as "FINDA-FINDA".

[7] http://static.espncricinfo.com/db/NATIONAL/RSA/KING_COM/KING_COMMISSION_GIBBS-TRANS_O8JUN2000.HTML

[8] A History of Inequality in South Africa 1652-2002 Part 3: Chapter 9 The Systemic Period of the Political Hegemony of the Afrikaner Establishment (1948-1994)

[9] An acronym for Transkei, Bophuthatswana, Venda and Ciskei

not seen to be applicable in these areas. Brand [10] records that during the period 1977 to 1994 a total of 17 casino licences were issued in the Bantustans, many of them to a company known as Sun International Limited. The conduct of gambling in these casinos was controlled by the so-called "*governments*" in the Bantustans who obviously did not regard gambling as immoral.

[12] The Bantustans were, generally, located in rural areas and as Prof. Terblance[11] points out were occupied in the main by a poor agrarian proletariate. Certainly these were not the sort of people who could afford to spend significant sums of money at casinos. The supreme irony that then arose was that residents of South Africa travelled across the Bantustan "*borders*" to be freed of the yoke of turpitude which precluded them from gambling at home, yet it was they who contributed handsomely to the welfare of these casinos and ultimately of the Bantustans. Residents of the Western Cape had to travel relatively far to cross these "*borders*" and many, in search of the ultimate jackpot, took weekend cruises on ocean- liners which operated floating casinos outside of the Republic's territorial waters.

[13] While legitimate gambling activities then took place outside of the "*borders*" of the Republic (and in many cases not that far from home), some entrepreneurs were more creative and began to operate "*gaming clubs*" at which card games and gambling machines were available to patrons in the cities. As the judgment of King J in Highstead Entertainment [12] demonstrates, one such operation owned

[10] Gambling Laws of South Africa, Vol 1, General Introduction pvii
[11] Op.cit
[12] Highstead Entertainment (Pty) Ltd t/a "*The Club*" v Minister of Law and Order and Others 1994 (1) SA

companies in Cape Town, Sandton and Durban at which hundreds of people were employed.

[14] It would be fair to say then that by the early 1990's various forms of gambling activities were taking place within the borders of the Republic of South Africa. Those that were geographically located in the Bantustans were regarded as lawful while many activities (such as the "*gaming clubs*") were said to be illegal. The emergence of a unitary state was imminent as the multi-party negotiations which preceded the adoption of the Interim Constitution in 1993 proposed, and this no doubt presented concerns as far as the Bantustan casino's were concerned. Once adopted the Interim Constitution, 200 of 1993, made provision in Schedule 6 thereto for provincial competence in respect of "*casino's, racing, gambling and wagering*". Against this constitutional imperative statutory control was necessary. To this end the government appointed a Commission of Enquiry under the chairmanship of Mr. Justice Howard in 1993 to investigate the potential legalization of gambling in South Africa.

LEGISLATIVE FRAMEWORK

[15] Flowing from the Howard Commission's report, the Lotteries and Gambling Board Act 210 of 1993 was passed with a view to establishing a statutory board to control gambling, lotteries and fund-raising activities. In 1995 the Lotteries and Gambling Board under the stewardship of Prof. Nic Wiehahn, produced a report which formed the basis of the National Gambling Act, 33 of 1996 ("the 1996 Act'). In its main

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387 (C) at 390G

report of March 1995, that board recommended that a maximum of 40 casino licences be awarded countrywide.[13]

[16] The Constitution of the Republic of South Africa, 1996 [14] grants concurrent national and provincial legislative competence in respect of "*casinos, racing, gambling and wagering, excluding lotteries and sports pools*", while the latter two activities are the subject of national legislation in the form of the Lotteries Act 57 of 1997. Consequently, gambling and racing in the Western Cape are regulated by both the Provincial Act and the National Act referred to hereunder.

[17] The chronology of the legislation relevant to this case is the following. In May 1996 the Provincial Act was passed and brought into operation in August 1997. That Act (as subsequently amended) defines, *inter alia*, -

21.1 A "*gambling machine*" which is –

> *"any mechanical, electrical, video, electronic, electro-mechanical or other device, contrivance, machine or software, other than an amusement machine, that –*
>
> *(a) is available to be played or operated upon payment of a consideration; and*

[13] Brand, Loc.cit
[14] Sec 104 (1)(b)(i) read with Schedule 4 Part A

(b) may, as a result of playing or operating it, entitle the player or operator to a pay-out, or deliver a pay-out to the player or operator" and,

21.2 A "*limited pay-out machine*", which is a "*gambling machine outside of a casino in respect of the playing of which the stakes and prizes are limited as prescribed by regulations made in terms of the National Act.*"

[18] In December 2000 the relevant Minister in the National Cabinet issued the "*Regulations on Limited Pay-Out Machines"* ("the LPM Regs"), in terms of the powers conferred upon him under the 1996 Act.

[19] In 2004 Parliament passed the National Gambling Act, 7 of 2000 ("the National Act") which repealed the 1996 Act in its entirety. This Act came into operation on 1 November 2004.

[20] In 2007 the LPM Regs were amended pursuant to the provisions of sec 88 of the National Act.

THE PROVINCIAL ACT

[21] In this matter, the Board (as established in terms of sec 2 of the Provincial Act) is responsible for the licensing and control of LPM's in the Province. To this end sec 2(2) provides that:

> *"S2(2) The right to carry on any gambling or racing or activities incidental thereto in any manner, whether directly or indirectly, within the Province shall, subject to sub-section (4), vest exclusively in the Board."*

Sec 2(4) is to the following effect:

> *"S2(4) The main object of the Board shall be to control all gambling, racing and activities incidental thereto in the province subject to this Act and any policy determinations of the Executive Council relating to the size, nature and implementation of the industry."*

The reference to "*Executive Council*" is to "*the Executive Council of the Province*" as contemplated in sec 132 of the Constitution.

[22] In 2011 Thuo made application under sec 46 of the Provincial Act to the Board for a "*route operator licence*". Such a category of licence (which can only be issued to a company) is required under sec 46(2):

> *"S46(2) A route operator licence is required by every company which permits or engages in the business of operating limited pay-out machines in or on one or more premises licensed in terms of sec 47"*

In terms of sec 46(2)(A) such a licence is granted exclusively to the operator:

> *"S46(2)(A) A route operator licence shall attach to the operator specified in the licence."*

And under sec 46(3), the Board is entitled to impose conditions in respect of any route operator licence it may issue:

> *"S46(3) A route operator licence shall authorise, subject to any conditions which the Board may impose, the operation of approved limited pay-out machines in or on premises or such part of such premises as are licensed in terms of sec 47."*

[23] Closely linked to the route operator licence is a "*site licence*" which must be issued under sec 47 of the Provincial Act. As the phrase suggests, this licence is required by the entity (not necessarily the owner) which is responsible for operating the site on which an LPM is to be located. In common parlance this entity is referred to as the "*site operator*" and the licence is also called a "*site operator licence*". For convenience, I shall set out the section in full:

*"**47 Site Licence***

(1) A site licence is required for any premises in the Province in or on which limited pay-out machines are placed by the holder of a route operator licence.

(2) A site licence shall authorise, subject to any conditions which the Board may impose, the keeping and exposing for play in or on the licensed premises or such part of such premises as is specified in the licence of any limited pay-out machines operated in terms of sec 46.

(3) A site licence shall attach to the premises specified in the licence.

(4) The Board shall not grant an application for a site licence unless it is satisfied that -

(a) the person who or which will be responsible for the operation of the gambling business on the site; and

(b) subject to the proviso to sec 30(2), all persons holding a financial interest of five percent or more in the person contemplated in para (a),

comply with the provisions of sec 28 or 29, as the case may be, and 30."

[24] The reference in sec 47 to secs 28, 29 and 30 relates to the various criteria enumerated for qualification and/or disqualification for licences such as age (over 18), legal disability (e.g. insolvency), political office, (membership proscribed) criminal convictions and the like.

[25] Under the National Act, an LPM is defined as:

"a gambling machine with a restricted prize, described in sec 26."

[26] Sec 26(1) sets the basis for the relevant National Minister's regulation of LPM's:

"26(1) Cognisant of the potentially detrimental socio-economic impact of a proliferation of limited pay-out machines, the Minister must regulate the limited pay-out machine industry in accordance with this section.

[27] Sec 26(2) in turn prescribes certain issues that must be covered by such regulations:

"S26(2) The Minister, by regulation made in accordance with sec 87, must –

(a) establish a program for the gradual introduction of limited pay-out machines in the Republic, in clearly defined and delineated phases;

(b) establish a mechanism for ongoing socio-economic impact assessment of the use of limited pay-out machines in the Republic;

(c) establish criteria which, on the basis of the assessments contemplated in para (b), must be satisfied before the commencement of each successive phase of the program to introduce limited pay-out machines in the Republic;

(d) prescribe a limit on the maximum number of licensed limited pay-out machines that may be introduced in each phase –

(i) within the Republic;

(ii) within any particular province; and

(iii) at any one site, and may prescribe different site maximums applicable in different circumstances;

(e) after consulting the Board, determine the circumstances in which a site may be licensed, and for that purpose, may establish different categories of sites, and different requirements with respect to each such category; and

(f) prescribe a limit on the maximum –

(i) aggregate stake permitted to commence and complete a limited pay-out gambling game;

(ii) single pay-outs allowed from a limited pay-out machine; and

(iii) aggregate pay-out in respect of each game played."

[28] Sec 26(3) of the National Act lists some ten minimum standards which the Minister may prescribe in relation to applications for licences regarding LPM's. These are:

“(a) Standard information to be required from applicants;

(b) Minimum evaluation criteria to be applied by licensing authorities;

(c) Evaluation procedures to be followed by licensing authorities;

(d) Compliance standards for limited pay-out machines, including the maximum number of single game cycles over a particular period of time;

(e) The methods by which a prize won on a limited pay-out machine may be paid;

(f) Any essential or defining elements of a limited pay-out gambling game;

(g) The procedures that constitute the start and end of a single game on a limited pay-out machine;

(h) The accounting standards that must be met, and accounting records that must be kept, by route operators, site operators and independent site operators;

(i) Minimum information to be provided by licensees concerning the sourcing, distribution, movements, conversions and disposal of limited pay-out machines; or

(j) Measures to limit the potentially negative socio-economic consequences of access to gambling opportunities, including public notices at licensed premises."

[29] Then sec 26 goes on to deal with the registration and control of such machines:

"(4) A person must not –

(a) distribute a limited pay-out machine to a site operator or independent site operator, or allow such a machine to be made available for play unless that machine has been registered in accordance with this Part; or

(b) move a limited pay-out machine from one site to another without the prior approval of, and subject to

monitoring and control by, the provincial licensing authority that registered that machine."

[30] The section proceeds to impose the following obligations on a route operator:

> *"(5) A route operator –*
>
> *(a) must not make available for play –*
>
> *(i) more limited pay-out machines than the maximum number for which the operator is licensed; or*
>
> *(ii) on any particular site, more limited pay-out machines than the site is licensed to accommodate;*
>
> *(b) must maintain the limited pay-out machines owned and operated by that route operator; and*
>
> *(c) must collect money from those machines and pay any applicable provincial taxes or levies in respect of those machines."*

[31] In terms of the definitions contained in the National Act, route and site operators are defined with reference to sec 18 which concerns sites. A "*site*" is defined as the "*premises licensed in terms of the applicable provincial law for the placement of one or more limited pay-out gambling machines contemplated in sec 18."*

[32] I shall repeat sec 18 in its entirety because of the central role that that section plays in this case:

> *"**18 Sites***
>
> *(1) A provincial licensing authority may –*
>
> *(a) license a person as a site operator to operate limited pay-out machines in or on specific named premises; and*
>
> *(b) determine the hours of operation for that site which may be the same as, different from or outside the normal hours of operation of the primary business conducted at that site.*
>
> *(2) The operation of limited pay-out machines must be incidental to and not be the primary business conducted in any premises licensed as a site, if that site falls within an*

incidental use category determined by the Minister in terms of sec 26(1)(b).

(3) A site operator may be linked to a particular route operator or may be independent, if provided for in terms of applicable provincial laws.

(4) A site operator who is linked to a route operator may –

(a) keep limited pay-out machines owned by the route operator on the site; and

(b) make those machines available to be played by members of the public.

(5) An independent site operator has the same rights, powers and duties as –

(a) a route operator in terms of sec 26; and

(b) a site operator in terms of subsection (4)(b).

(6) Only a juristic person may be licensed to own or operate more than five limited pay-out machines as an independent site operator.

(7) A licensed site operator or independent site operator must –

(a) prominently display at the entrance to the designated area –

(i) the licence issued to that operator;

(ii) a copy of the licence issued to the relevant route operator, if applicable; and

(b) maintain adequate control and supervision of all limited pay-out machines at the site during the licensed hours of operation"

[33] Sec 53 of the National Act plays a significant roll in highlighting socio-economic considerations relevant to gambling. It reads as follows:

"53 Economic and social development issues to be considered

(1) When considering an application for a licence, other than an employment licence, or when considering an application for the transfer of a licence, a provincial licensing authority –

(a) must consider the commitments, if any, made by the applicant or proposed transferee in relation to –

(i) black economic empowerment; or

(ii) combating the incidence of addictive and compulsive gambling;

(b) must consider the potential socio-economic impact on the community of the proposed licence; and

(c) may impose reasonable and justifiable conditions on the licence to the extent necessary to address the matters referred to in paras (a) and (b).

(2) At least once every year after the issuance of a licence other than an employment licence, the provincial licensing authority that issued that licence –

(a) must review the commitments considered in terms of subsection (1)(a) and the achievements of the licensee in relation to those commitments; and

(b) may impose further or different reasonable and justifiable conditions on the licence to the extent necessary to address the matters referred to in subsection (1)(a) and (b).”

[34] The National Act also has detailed provisions relating to competition issues:

“54 Competition issues to be considered

(1) When considering an application for a licence, other than an employment licence, or when considering an application for the transfer of a licence, a provincial licensing authority must consider whether approving the application is likely to substantially affect competition in the gambling industry generally, or in respect of the proposed activity –

(a) within that province, in the case of a provincial licence; or

(b) within the Republic, in the case of a national licence.

(2) After considering the matters contemplated in subsection (1), the provincial licensing authority must refuse the application unless there are overriding public interest reasons for approving it, if it appears that approving the application would result in the applicant, alone or in conjunction with a related person, achieving market power.

(3) For the purposes of subsection (2) –

***"market power"** has the meaning set out in sec (1) of the Competition Act, 1998 (Act 89 of 1998);*

***"public interest reasons"** include the reasons set out in sec 12(A)(3) of the Competition Act, 1998; and*

*"**a related person**" means a person –*

(i) who has direct or indirect control over the applicant;

(ii) over whom the applicant has direct or indirect control; or

(iii) who is directly or indirectly controlled by a person referred to in subparagraph (i) or (ii).”

[35] Lastly, there is sec 87 of the National Act which deals with regulations. For present purposes it is necessary to deal only with sec 87(2)(e)(iii):

“(2) After consulting the Council the Minister may make regulations concerning –

(a) ..

(b) ..

(c) ..

(d) ..

(e) minimum standards in respect of licensing procedures by provincial licensing authorities including –

(i) ..

(ii) ..

(iii) the criteria to be complied with before any licence is granted in terms of this Act or applicable provincial law."

The council referred to in this section is defined in sec 1 as "*The National Gambling Policy Council established by section 61*".

[36] Lastly, I refer to the LPM Regs issued by the National Minister under the 1996 Act. Firstly, there are the following relevant definitions:

*"**independent site operator**" means a site operator, who is not linked to a route operator and is licensed to own and operate limited pay-out machines on a single site and is responsible for maintaining the machines, effecting the collection of money and paying the provincial taxes and levies due to the provincial licensing authorities;*

***"limited pay-out machine**" means a gambling machine outside of a casino in respect of the playing of which the stakes and prizes are limited as prescribed by these Regulations"*

"***route operator***" *means a company registered in terms of the Companies Act, 1973 (Act 61 of 1973), which is –*

(a) licensed to own and operate limited pay-out machines;

(b) responsible for maintaining limited pay-out machines; and

(c) responsible for effecting the collection of money and paying the provincial taxes and levies in respect of any limited pay-out machine under its licence;

*"**site operator"** means –*

(a) the licensee who is entitled to keep limited pay-out machines owned by a route operator on his premises and to make them available to be played by members of the public; or

(b) where a provincial licensing authority licenses the premises on which the activities contemplated in para (a) are conducted, that licensed premises."

It bears mention that the definition of "*site*" in the LPM Regs was repealed with the passing of the National Act in 2004.

[37] Reg 2(2) deals with the maximum number of limited pay-out machines which may be licensed in any particular province. In the case of the Western Cape this has been set at nine thousand machines. In Reg 3 one finds a limitation on the number of LPM's at any particular site:

> *"(1) Subject to the provisions of subregulation (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.*
>
> *(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."*

[38] Under Reg 5 the maximum stake with which a LPM game may be commenced and played to its conclusion is Five Rand and, in terms of Reg 6(1) the maximum prize payable by any one LPM machine is Five Hundred Rand. Persuant to Reg 7 progressive jackpots are not permitted on LPM's, nor may the licensee of any LPM offer any prize in excess of the sum of five hundred Rand.

[39] In terms of Reg 9 there are only three categories of operator licences which may be issued in regard to LPM's, namely, a route operator's licence, a site operator's licence and an independent site operator's licence. Evidently the Board has decided that independent site operators will not be permitted to operate in the Western Cape and accordingly no more need be said in relation to this category of operator.

[40] Reg 13 provides for the standardisation of LPM's in accordance with certain standards of the SABS. Reg 14 has strict provisions relating to the movement of LPM's from one site to another. Such movement must receive the prior approval of the Board which must monitor, document and strictly control such movement.

[41] When a provincial licensing authority intends to invite applications for new licences it must do so through statutory notices in the relevant Provincial Gazette and to newspapers circulating in the Province (Reg 17). There then follows a transparent process which includes the advertisement of any applications received, the inspection thereof, the investigation and evaluation thereof, and the conducting of public hearings in relation thereto. It is not necessary to go into any detail in this regard save to say that there is a high degree of transparency built into the whole process of licensing of LPM's.

[42] Reg 31 places a limit on the number of LPM's at any particular site. It reads as follows:

"A route operator may not make available for play –

(a) more limited pay-out machines than the maximum number of machines for which that route operator is licensed; and

(b) more limited pay-out machines on a site than the relevant site is licensed for."

[43] Reg 37 contains a host of criteria which must be considered by the Board when it considers any licence application. These include the route operator's qualifications to hold a licence, its suitability, its business plan, the economic empowerment and community benefits which any particular application may bring, the geographical spread of LPM sites and the extent to which an applicant for a licence is able to demonstrate the achievement of Black economic empowerment with the operation and selection of the relevant LPM sites.

[44] Finally, Reg 41 resonates with the provisions of sec 18 of the National Act and sets formulae according to which it may be determined whether the proposed operation of LPM's at a site is "*incidental to the primary business at [any] particular premises" or not.*

THE SOCIAL IMPACT OF LEGAL GAMBLING

[45] From the aforegoing it is clear that the gambling industry in general and the LPM form of gaming, in particular, is heavily regulated: and for good reason. Having been constitutionally sanctioned, organized gambling has shrugged off the mantle of

moral opprobrium which it once bore in South Africa and the somewhat schizophrenic state of the "*casino republics*" has been addressed. But this legitimation of the once illegitimate comes with in-built safeguards to protect the vulnerable users of a past time that can quickly turn the wealthy to paupers and reduce the poor to penury.

[46] And so we see that the Preamble to the National Act includes the following important statements of intent:

> *"It is desirable to establish certain uniform norms and standards, which will safeguard people participating in gambling and their communities against the adverse effect of gambling, applying generally throughout the Republic with regard to casinos, racing, gambling and wagering, so that –*
>
> - *gambling activities are effectively regulated, licensed, controlled and policed;*
>
> - *members of the public who participate in any licensed gambling activity are protected;*
>
> - *society and the economy are protected against over-stimulation of the latent demand for gambling; and*
>
> - *the licensing of gambling activities is transparent, fair and equitable;*

It is expedient to establish certain national institutions, and to recognize the establishment of provincial institutions, which together will determine and administer national gambling policy in a co-operative, coherent and efficient manner."

[47] The Preamble to the Provincial Act is in similar vein, but contains a little more detail to tailor it to local needs:

"WHEREAS gambling and racing can contribute to the economy of the province of Western Cape; and

WHEREAS the growth and success of gambling and racing are dependent on public confidence and trust that gambling and racing are conducted honestly and competitively and free from criminal or corruptive elements; and

WHEREAS it is necessary to ensure the health, safety, general welfare and good order of the inhabitants of the Province; and

WHEREAS it is recognized that public confidence and trust and the health, safety, general welfare and good order of the inhabitants of the Province are dependent upon the strict regulation of all persons, premises, practices, associations and activities relating to gambling and racing; and

WHEREAS it is recognized that opportunities for gambling and racing entail particular risks and dangers to the inhabitants of the Province, which justify the imposition of appropriate restrictions, regulations and controls; and

WHEREAS no applicant for a licence or for an approval in respect of gambling or racing has any right to a licence or approval".

THE MAIN PLAYERS

[48] Against that detailed backdrop I turn to the application for a route operator's licence which was the focus of the review before the Court *a quo.* Before doing so, I propose to give brief details of the relevant principal players in the local gambling industry.

[49] We are told in the papers that there are currently only two route operators in the Western Cape – Thuo and Vukani Gaming Western Cape (Pty) Ltd ("Vukani"). While the LPM Regs permit a maximum of nine thousand machines in the Western Cape, only two thousand machines have been licensed and they have been evenly split between Thuo and Vukani.

[50] Of Vukani's related corporate entities we know nothing, but we are told by the deponent to the founding affidavit, Ms. Lazelle Parton, that she is the Group Corporate Affairs Manager of GPI Management Services (Pty) Ltd ("GPIMS") which is a wholly owned subsidiary of the GPI Group, and which provides a variety of support

services to the subsidiaries in that group, including Thuo. Judging from certain of the annexures in the application, there is a commonality of directors – e.g. Messrs Hassen Adams and Alexander Abercrombie sit on the boards of both GPI and Thuo.

[51] One of the entities with which Thuo does business is Gold Circle (Pty) Ltd. Little detail is furnished about Gold Circle's ownership or directors, but in the answering affidavit deposed to by the chairperson of the Board, Mr. Takalani Madima, we are referred to barely legible extracts from Gold Circle's website. Consideration of that website shows that Gold Circle is a company which operates in the horseracing and betting industries in KwaZulu-Natal: nothing is said about the Western Cape. From the website it does not appear that there is any commonality of directorships between Gold Circle GPI or Thuo.

[52] However, in para 50 of the answering affidavit (to which I shall revert in more detail later), Madima alleges that Gold Circle holds the "*Totalisator Licence*" in the Western Cape and KZN, and operates from 57 totalisator premises in the Province. He also asserts that it owns 41% of the shareholding of Betting World (Pty) Ltd, a large national bookmaker which evidently operates from 26 premises in the Western Cape [15].

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[15] In sec 1 of the National Act a *"bookmaker"* is defined as *"a person who directly or indirectly lays fixed-odds bets or open bets with members of the public or other bookmakers, or takes such bets with other bookmakers".*

The definition of a *"totalisator bet"* is to be found in sec 4(2) of the National Act.

> *"4(2) A person places or accepts a totalisator bet when that person stakes money or anything of value on the outcome of an event or combination of events by means of –*
>
> *(a) a system in which the total amount staked, after deductions provided for by law or by agreement, is divided among the persons who make winning bets in proportion to the amount staked by each of them in respect of a winning bet or*

In the circumstances the Board claims that Gold Circle, both on its own and through its association with Betting World is actively involved in horseracing and sports, online and telephone betting in the Western Cape.

[53] There seems to be little doubt that Gold Circle is involved in both the traditional form of betting (where a bookmaker offers a punter a fixed set of odds on a specified result [16]) as well as the tote [17]. Gold Circle was not a party to these proceedings nor was it given any notice of the litigation.

THUO'S ROUTE OPERATOR LICENCE FOR 2010/11

[54] The papers show that Thuo was granted its first route operator's licence in about 2004, and that there was thereafter an annual renewal which was effected. Prior to the issue of Thuo's first route operator's licence the Board issued a document styled "*Request for Proposal*" ("RFP"). This was a detailed exposition of the relative statutory requirements, as well as an intimation to potential applicants of the Board's stance on certain issues of policy.

[55] So, for example, the Board told prospective licensees that it did not intend licensing "*Independent Site Operators*" (as referred to above) at that stage and it also told applicants how it saw the functioning of LPM operations in the Province.

(b) a scheme, form or system of betting, whether mechanically operated or not, that is operated on similar principles."

[16] Say, a two-one chance of horse A winning the Metropolitan Handicap at Kenilworth on date Z.

[17] The colloquial abbreviation for the totalisator in which all bets are pooled and the proceeds divided up in accordance with the proportion of stake v success.

*"**Limited Gambling Machine Operator**"*

The concept of an Operator originates from the view that it is generally more cost effective for owners of premises on which a relatively small number of limited gambling machines is exposed for play, not to own those machines, given the technical requirements, but rather to enter into an agreement with a licensed Operator, who owns and maintains such gambling machines. The Premises Manager shall be responsible for the proper maintenance of the Premises to ensure neatness and hygiene. The extent of the initial investment in Premises by Applicants by way of the replacement or upgrading of features or infrastructure, such as painting or the refurbishment of décor shall be entirely at the discretion of Applicants but will be taken into account in the evaluation of the bids received. Ongoing maintenance of this nature subsequent to initial licensing will be the subject of a standard agreement, in terms of which responsibility for maintenance of the various areas of responsibility will be appropriately apportioned between the Operator on the one hand and the Premises Manager on the other.

In addition, the Operator shall be responsible for the maintenance of the limited gambling machines located on the Premises, shall give effect to the collection of taxes and other monies, and shall pay the fees and taxes due to the Board and the Province."

[56] In regard to the number of LPM's it was prepared to license, the Board said that it envisaged one thousand LPM's for a maximum of three operators:

> *"If fewer than three Applicants are found suitable for licensing, the Board reserves the right to increase the number of machines allocated per Applicant proportionally, subject to national norms, or to re-advertise and invite other Applications."*

[57] The Board spelled out fully in the RFP how it envisaged the relationship between the holder of a route operator's licence and a site operator's licence:

> *"**Relationship between the Operator and the Premises Manager"***
>
> *In terms of section 47(1) of the Law a Premises Licence is required for any Premises in the Province in or on which limited gambling machines are placed by an Operator. Section 47(2) further stipulates that a Premises Licence shall authorize, subject to any conditions which the Board may impose, the keeping and exposing for play in or on the licensed Premises or such part of the Premises as is specified in the licence, of any limited gambling machines operated in terms of section 46.*
>
> *The holder of an Operator Licence will enter into an agreement with the Premises Manager in respect of the Premises in or on which*

limited gambling machine operations are envisaged to occur. The Board must be informed of the nature of such agreements, as it has a responsibility to monitor agreements, to ensure that monopolistic practices do not arise, and that such agreements are fair both to the Operator and to the Premises Manager. The Board must further establish that the terms of such agreement will not have a negative impact on the immediate surroundings of the Premises. This aspect will be further dealt with in phase 2 of the Process. …

When issued, a Premises Licence will attach to the Premises in respect of which it has been granted and will not be transferrable. The Premises Licence shall make reference to the identity of the Operator authorized to expose limited gambling machines for play on such Premises, and it shall be the responsibility of the Operator, which shall be placed in physical possession of the Premises Licence, to ensure that such Premises Licence is prominently displayed on the licensed Premises and that a certified copy of such Premises Licence, endorsed to such effect by the Chairperson and the Chief Executive Officer of the Board, or their authorized delegates, are retained and readily accessible at the Operator's offices."

[58] The Board also stipulated a formula in the RFP for the distribution of profits on the basis that 60% went to the route operator and 40% to the "*Premises Manager*"

(presumably intended to be a synonym for a "*site operator*"). It also warned that it would keep a close eye on monopolistic practices, particularly in regard to a casino operator acquiring a financial interest in a route operator. It is clear from the RFP that the Board wanted to clearly distinguish the relationship between a route operator and a site operator.[18]

[59] The introduction of LPM's in the Western Cape was to occur incrementally. Firstly, the route operators were to be identified and licensed. Then, suitable premises were to be identified by the route operator and once the premises had been vetted by the Board it would issue a "*Premises Licence*" under sec 27(c) of the Provincial Act. [19] The route operator was to conclude a provisional agreement with the holder of such "*Premises Licence*" which was to be approved by the Board:

> *"Successful Applicants for Operator Licences shall enter into draft agreements with the persons or entities exercising control over the premises in respect of which limited gambling machine premises licences are envisaged to be applied for. Each such draft agreement shall be concluded for a minimum term of two years, contingent on compliance by the parties with the Law, Regulations and Rules. Any other agreements entered into by Operators which purport to be unconditional or do not contain the express terms stipulated above will not be acknowledged by the Board.*

[18] In argument Mr. Rosenberg SC used the phrase "*put up a firewall*" to illustrate the importance of the distinction.

[19] With the promulgation of the National Act in 2004 the term changed from "*premises licence*" to "*site operator's licence*".

> *The Board may at any time review an agreement approved by it. The indicated period of two years will be to the benefit of both parties as it will give both the opportunity of consolidating their relationship. It will furthermore provide the Board with a reasonable period in which to monitor the progress of such relationship and assess the economic practices of the parties."*

[60] The RFP is undated but it clearly preceded the promulgation of the National Act since it contains references to the 1996 Act and the Provincial Act. Looking at the proposal or "*bid document*" (as the parties termed it) submitted by Thuo, one can see that the company eagerly awaited the introduction of LPM's in the Province:

> *"In 2004, the Western Cape will become the first major province to allow a legal Limited Gambling Machine ("LGM") business to be established. In taking this lead, the government has recognized that well regulated limited pay-out gaming can be a stimulant for economic activity and empowerment, a provider of entertainment, and a source of additional revenue for the benefit of the whole community."*

[61] What the RFP and the bid document submitted in response thereto show is that both parties understood the fundamentals of the LPM industry in the Western Cape, but, realizing that it was still nascent, accepted that adjustments and changes would be inevitable as the industry found its feet.

[62] On 2 June 2008 the Board issued a route operator licence to Thuo (then trading as "*Grandslots*") for the period 1 June 2008 – 31 May 2009. A month before the expiry of that licence, the Board's Mr. C. September wrote to Thuo informing it that the Board had reviewed the licence conditions of all (in reality, both), route operators and proposed imposing additional conditions. It highlighted the intended changes to Thuo's licence conditions and invited its comments a month hence.

[63] The Board initially proposed changes to conditions 26 and 30 of the licence conditions (I shall call this "*Version 1"*) which were to read as follows:

> *"26*
>
> *No single business entity or natural person shall own more than 5% of the two thousand allocated limited pay-out machines (LPM's) approved by the Board….*
>
> *30*
>
> *No Route Operator, its Group/Parent Company, director or employee of a Route Operator shall have a direct or indirect interest in any of the licensed sites."*

[64] Thuo's Mr. Giovanni Rizzo (its General Manager and an Executive Director) responded to the Board's proposals on 29 May 2009. He did so cautiously, pointing out that the Board had not furnished reasons for the proposed changes (many

of which were new) and reserved Thuo's rights to amplify its comments once the Board's reasons were known.

[65] In regard to proposed condition 26 Mr. Rizzo said the following:

> *"The proposed condition is a new one and should be deleted. It seeks to impose an arbitrary limitation on site operators which serves only to stifle competition and commercial enterprise and ultimately BEE. The Board already regulates the number of site licences in the various areas in the Province and places demographic quotas in respect of site owners and the competition laws regulate anti-competitive practices. There is therefore no justification for further imposing quotas on an industry that is already significantly regulated."*

And, in regard to proposed condition 30 he said this:

> *"The proposed condition is a new one and, in our view, is unacceptable and should be deleted. It will only serve to inhibit commercial enterprise which is not the function of the Board or the purpose of the Act."*

[66] On 3 June 2009 the Board issued a new route operator licence to Thuo to cover the period 1 June 2009 to 31 May 2010. It attached to the licence its list of conditions in which conditions 26 and 30 were in the same form as Version 1.

[67] On 15 September 2009 the Board sent Thuo a revised set of conditions (I shall call this "*Version 2*") in which the disputed clauses remained the same. Version 2 did, however, contain other changes to Version 1 which are not material to this case.

[68] The parties met the following day to discuss the proposed changes generally, and following thereupon, Parton wrote to the Board expressing Thuo's objections to, *inter alia*, conditions 26 and 30 as follows:

> *"**Ad condition 26***
>
> *Once again, the Act does not contain any provision to support the imposition of this condition and it is submitted that the imposition of the condition would be beyond the powers of the Board and would be ultra vires the powers of the Board."*
>
> ***Ad condition 30***
>
> *The Act, the Rules and the Regulations do not prohibit the conduct that the Board would seek to prohibit by imposing this condition. As such, it is submitted that any attempted imposition of this condition by the Board would be beyond the powers of the Board."*

[69] It seems as if the Board applied its mind (at least in part) to these objections for, on 11 January 2010, it wrote to Thuo with further proposed changes to the conditions, which I shall term "*Version 3*". In this version, condition 30 had been renumbered as "*13*" but its contents remained unchanged. Condition 26 had been renumbered as "*11*" and read as follows:

> *"11*
>
> *No single business entity or natural person shall own sites which, in total, operate more than 5% of the 2000 allocated limited pay-out machines ("LPM's") approved by the Board."*

[70] On 26 January 2010 Thuo's attorneys wrote to the Board dealing with the proposed conditions *seriatim.* In respect of the clauses under discussion the following was said in respect of Version 3:

> *"**Ad condition 11***
>
> *..We are not aware of any provision in the Act that supports the imposition of this condition and we submit that the imposition of the condition would be beyond the powers of the Board as the condition is neither necessary nor expedient for the purposes of the Act."*
>
> ***Ad condition 13***
>
> *..The Act, the Rules and the Regulations do not prohibit the conduct that the Board seeks to prohibit in imposing this condition. As such,*

we submit that any attempted imposition of this condition by the Board would be beyond the powers of the Board."

[71] To this the Board replied on 11 March 2010. It first roundly commended itself for adopting what it called "*a more inclusive and transparent process*" in relation to seeking to reach agreement with Thuo on the licence conditions. It then went on to say that, despite various requests by Thuo to see the conditions imposed on Vukani's licence, it was not prepared to disclose these, relying on various confidentiality provisions.

[72] The Board then proceeded, for the first time in almost a year, to share its thinking behind the proposed changes with Thuo. September offered the following explanations:

"Condition 11:

This condition was enacted pursuant to sec 35 of the Western Cape Gambling and Racing Act, 1996 and sec 54 of the National Gambling Act, 2004. With the roll-out of the limited pay-out machine industry, the Board always insisted broad based ownership, to ensure that as many businesses (sic) benefit from this industry.

The restriction of one single owner to have no more than one hundred LPM's is reasonable. In the RFP, it was stated that the

Board must ensure the (sic) monopolistic practices do not arise and by not restricting the site owners in terms of the number of LPM's, it could be viewed as if the Board is in fact encouraging it.

We refer to the aforegoing, without detracting from the fact that specific National legislation, being the Competition Act, also applies to licence holders….

"Condition 13:

The intent with (sic) introduction of the LPM industry, and the role of the two Route Operators, as set out in the RFP, was that Route Operators develop small businesses which have existing primary businesses. The Board intended for the site owners to operate independently of the Route Operators (sic) was not considered during the roll-out. The rules as well as the ICS are set out in such a manner that it (sic) creates segregation of duties and activities between the two."

[73] On 26 May 2010 the Board issued a new route operator licence for the period 1 June 2010 to 31 May 2011 to Thuo. Attached to that licence were the conditions as contained in Version 3.

SUBSEQUENT DEVELOPMENTS

[74] Subsequent thereto and in the period July to September 2010 there were on-going discussions between the parties in the form of meetings and correspondence in which Thuo attempted to persuade the Board to reconsider conditions 11 and 13. The latter dug in its heals in what ultimately became a sterile debate.

[75] But during the course of these discussions, the real motivation for the Board's position emerged. In September 2010 Mr. Adrian Funkey, GPI's Chief Executive Officer and a director of Thuo, pointed out to the Board that with the imposition of condition 11 Thuo's site operator, Gold Circle, was automatically in breach of the condition in that it owned 26 sites on which about 130 of Thuo's LPM's were exposed for play.

[76] In reply, on 16 September 2010 the Board confirmed that it was aware of the fact:

> *"that Gold Circle currently exceeds its LPM quota in terms of condition 11 of the Route Operator Licence Conditions of Thuo Gaming Western Cape (Pty) Ltd, effective 1 June 2010…*
>
> *Five per cent of two thousand LPM's equates to one hundred LPM's. Our records reflect that Gold Circle currently operates one hundred and thirty five LPM's.*

Please be informed accordingly, that all Gold Circle applications approved by the Board after 1 June 2010 will be placed in a "POOL". These licences will only be released upon closures (sic) of existing Gold Circle sites."

The Board went on to invite Thuo to make written representations to its CEO "*regarding this control imposed to ensure your compliance with aforementioned licence condition."*

[77] The "*POOL*" arrangement was considered problematic and so on 29 September 2010 Thuo wrote to the Board seeking clarity on, *inter alia*, the following issues:

"(1) In the event that Thuo chooses not to license any more Gold Circle sites, will the Board allow the existing and operational Gold Circle sites (29 sites/135 LPM's) to continue operating, based on the fact that they were licensed prior to 1 June 2010 when condition 11 was imposed?

1.1 If the assumption in point (1) above is correct, will Thuo be allowed to re-allocate LPM's between the existing operational Gold Circle venues? i.e. reducing the number of LPM's at poor performing Gold Circle sites and relocating them to better performing Gold Circle operational sites, whilst still maintaining one

hundred and thirty five LPM's operational amongst the twenty nine licensed sites.

1.2 For sites to be released from the "POOL", would we have to close an existing Gold Circle venue to replace it with the new one, or would we have to close several venues until we are within the limitations of condition 11 before the Board will release any sites from the "POOL"?

[78] To this enquiry the Board responded as follows on 18 October 2010:

"(1) Yes, currently the 29 sites/135 machines can continue to operate; however, the objective is to ensure that the LPM's allocated to Gold Circle would eventually be no more than one hundred LPM's:

1.1 No, no allowances will be made for the re-allocation of machines. Prior to the movement of LPM's, approval is requested by the Route Operator and granted by the Board. Once the LPM's are removed, then the total number of LPM's allocated to Gold Circle has officially been reduced. The Route Operator would thus not be permitted to allocate any more

LPM's to Gold Circle should such allocation result in Gold Circle operating more than one hundred LPM's.

1.2 In this regard the Board has resolved that the machine count would have to dip below the one hundred machine/five per cent of two thousand machines mark before any new sites can be released from the Pool."

[79] Thuo was then given an opportunity to make submissions at the meeting of the Board on 26 October 2010. But its pleas were in vain and on 10 November 2010 the Board informed Thuo in writing that its request for the proposed deletion of license conditions 11 and 13 had been denied. Thuo was informed by the Board of its right to request reasons in accordance with the provisions of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").

[80] Thuo took up the offer to request and on 6 December 2010 the Board offered the following formal reasons for its decision under the relevant provisions of PAJA:

- The parties *in casu* already had a stake in various gambling operations in the Province.

- The two conditions (11 and 13) were included in the amended licence conditions in order to guard against the formation of monopolies and/or oligopolies.

- The primary aim of the LPM industry was never, expressly or impliedly, intended to be that route operators should acquire LPM sites, as the RFP granted only two route operators licences with each route operator already having 50% of the market.

- Per the RFP, the LPM industry was "*rolled out*" on the premise of developing small and medium businesses, for site owners to provide a secondary form of entertainment on the one hand and route operators to invest by assisting those owners interested in installing LPM's on their sites. It was thus never intended for big/larger entities such as the route operators.

- The concerns raised by Thuo regarding potential prejudice to Gold Circle had already been addressed.

- The Board further considered the requirement for route operators to monitor compliance at LPM sites. This aspect could potentially be compromised in the event of a route operator also owning sites.

- The Board was obliged to consider relevant factors and information inhibiting Thuo from achieving the threshold stipulated in Condition 11 should it be approached by the licence holder in this regard.

[81] Against that procedural background, then, the scene was set for the review application before the Court *a quo*. It merits mention that at no stage did Thuo allege

any procedural irregularity on the part of the Board. On the contrary, I am impressed by the way in which the Board conducted itself herein in its attempts to ensure procedural fairness and, in particular, application of the *audi alteram* principle.

[82] In his reasons furnished in February 2013 Van Staden AJ cautioned himself against being unduly interventionist and showed due deference to the decisions of the Board, particularly, having regard to the fact that this was a matter involving a discretion in relation to the issuing of a licence.

[83] I shall deal more fully hereunder with certain of the points taken in the papers before the Court *a quo*. Suffice it to say at this stage that the papers followed, in the main, the allegations set out above. On the eve of the hearing before Van Staden AJ the Board sought leave to file a late affidavit by its erstwhile CEO, Mr. Maroba Matsapola. The affidavit was allowed in without reply thereto from Thuo.

[84] The purpose of the late affidavit was effectively to remove the embarrassment occasioned to the Board by the argument put up by Thuo in its heads of argument filed with the Court *a quo*. While we did not have insight into those heads it appears as if the complete illogicality of Condition 11 in its final form had ultimately dawned upon the Board. Accordingly, the Board decided to revise Condition 11 completely (what I shall term "*Version 4*") as appears from the following extract from Matsapola's affidavit:

"3. I confirm that the intention of the respondent, with the imposition of Condition 11, was to prohibit a single entity or natural person from operating more than 5% of the total of 2000 limited pay-out machines ("LPM's"), available for allocation. The intention was not to restrict the rights of owners of the properties on which LPM's are found.

4. However, in order to avoid any uncertainty, I will recommend to the Board that Condition 11 be immediately amended to read as follows:

> *'A licence holder shall not expose for play limited pay-out machines (LPM's) at any site if the effect thereof would be that the operator of such site, whether an artificial or natural person, is permitted to operate more than 5% of the 2000 allocated LPM's."*

[85] Matsapola went on to say that he was confident that the Board would adopt the recommended amendment to Condition 11 and went on to explain why the amendment was being brought so late:

"8. The reason why the condition has not been amended earlier, and the reason why the respondent seeks to have this affidavit introduced at this late stage, is because the applicant has properly raised its interpretation of Condition

> *11 for the first time when its heads of argument were filed. If that interpretation had been raised during the consultation process regarding Condition 11, it would have been amended before it was adopted."*

[86] I should point out that the illogicality in the earlier versions of Condition 11 is obvious on a plain reading thereof. The objection to the condition was in relation to the ownership of sites by the site operator in circumstances where ownership *per se* was irrelevant to the operation of such a site.

[87] In any event, the matter proceeded before the Court *a quo* with Condition 11 as per Version 4 and Condition 13 as it had been throughout in Versions 1, 2 and 3.

MOOTNESS

[88] Before this Court counsel were asked whether the issue between the parties was not moot given that the relief originally sought in the notice of motion related to a licence which had expired on 31 May 2011, or at latest 31 May 2012. Counsel assured the Court that Conditions 11 and 13 were standard form conditions which the Board intended applying henceforth in respect of all route operator licences and Mr. Jamie SC produced the conditions attached to the latest such licence which confirmed this. Mr. Rosenberg SC supported that the view of the Appellant that the matter was not moot and informed the Court that the parties both wished a final pronouncement on the point to avoid further litigation going forward.

[89] The parties were *ad idem* that the proper way to approach the matter then was for the Court to exercise its powers under sec 8(1)(d) of PAJA and to issue a declaratory order. To this end Mr. Rosenberg SC prepared a draft order, the substance whereof met with the approval of Mr. Jamie SC.

[90] In the result, Thuo asked this Court to grant the following relief in the event that the appeal was successful:

> *"a A declaratory order is issued to the effect that the Respondent's imposition, in the Applicant's route operator license from time to time, of:*
>
> *(i) The condition reading: "A licence holder shall not expose for play limited pay-out machines (LPM's) at any site if the effect thereof would be that the operator of such site, whether an artificial or natural person, is permitted to operate more than 5% of the 2000 allocated LMP's"; and*
>
> *(ii) The condition reading: "No Route Operator, its Group/Parent Company, director or employee of a Route Operator shall have a direct or indirect interest in any of the licensed sites."*

is unlawful and of no force and effect."

THE ARGUMENTS ON APPEAL

[91] Against the background of the amended relief sought, Mr. Rosenberg SC focussed the argument for Thuo fairly sharply. In the first instance, he contended that the imposition of Conditions 11 and 13, as standard-form conditions henceforth, was impermissible in that it unnecessarily trammelled the discretion of the decision-maker in the evaluation of licence applications. It was argued that the proper place for the imposition or enforcement of the Board's policy considerations was through the promulgation of regulations. The failure to properly accommodate the Board's policy considerations and designs had the effect that the conditions in question did not pass the rationality test on review [20].

[92] In addition to that line of argument, Mr. Rosenberg SC attacked the imposition of a limitation of 5% of the allocated LPM's in Condition 11 (Version 4) as lacking rationality. He complained that the Board had provided no basis whatsoever for its choice of the level of percentage: why was it not 1%, or 10%, or even 25%?

[93] Mr. Jamie SC's riposte was to the following effect. Firstly, he said, there was nothing untoward in the way the Board had gone about attaching Conditions 11 and 13. He maintained that the conditions followed the Board's statutory obligations under

[20] Counsel relied on the following cases in support of this argument: Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa 2004 (3) SA 346 (SCA) at 354 para 20; Head, Western Cape Education Department and Others v Governing Body, Point High School and Others 2008 (3) SA 18 (SCA) at 29 para 16

both the National and Provincial Acts to curb monopolistic practices, to promote Black economic advancement in the industry and to promote smaller businesses (so-called SMME's – "*small, micro and medium enterprises*"). In addition, he reminded the Court of the fact that it was not entitled to second-guess policy choices made by the Board and that a measure of judicial deference was called for [21].

[94] The thrust of Mr. Rosenberg SC's argument centered on the following passage from the judgment of Nugent JA in Kemp N.O. v Van Wyk [22]:

> *"[1] A public official who is vested with a discretion must exercise it with an open mind but not necessarily a mind that is untrammelled by existing principles or policy. In some cases, the enabling statute may require that to be done, either expressly or by implication from the nature of the particular discretion, but, generally, there can be no objection to an official exercising a discretion in accordance with an existing policy if he or she is independently satisfied that the policy is appropriate to the circumstances of the particular case. What is required is only that he or she does not elevate principles or policies into rules that are considered to be binding with the result that no discretion is exercised at all. Those principles emerge from the decision*

[21] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) at 513-5

[22] 2005 (6) SA 519 (SCA) at 522 para 1

of this Court in Britten and Others v Pope 1916 AD 150 and remain applicable today."

THE CASE PUT UP BY THE BOARD

[95] When Thuo formally asked the Board in November 2010 for its reasons under PAJA for imposing Conditions 11 and 13 the explanation was the following. Firstly, it claimed that it was empowered under secs 12(4) of the Provincial and 48(5) of the National Acts to impose conditions at its discretion, a discretion which it claimed was a wide one. It went on to explain its reasoning as follows:

" • *The 2 conditions (11 and 13) were included in the amended licence conditions in order to guard against the formation of monopolies and/or oligopolies.*

- *The primary aim of the LPM industry was never, expressly or impliedly, intended to be that Route Operators should acquire LPM sites, as the RFP granted only two Route Operators licences with each Route Operator already having 50% of the market.*

- *Per the RFP, the LPM industry was rolled out on the premise of developing small and medium businesses, for site owners to provide a secondary form of entertainment on the one hand and Route Operators to invest by assisting those*

owners interested in installing LPM's on their sites. It was thus never intended for big/larger entities such as the Route Operators.

- *The concerns raised by Thuo regarding potential prejudice to Gold Circle had already been addressed.*

- *The Board further considered the requirement for Route Operators to monitor compliance at LPM sites. This aspect could potentially be compromised in the event of a Route Operator also owning sites…"*

[96] The position may be illustrated with reference to an example put up by Mr. Jamie SC in argument. A popular hamburger restaurant in Sea Point (for the sake of convenience I shall call it "*Paul's")* has as its primary business the selling of fast-food. Located in its large reception area is a collection of slot machines owned by Thuo for use by patrons who want an additional thrill to the consumption of one of the hamburgers for which "*Paul's*" has become famous. Thuo supplies the machines to "*Paul's*" and attends to the maintenance thereof as well as the collection of revenue. For those purposes "*Paul's"* is a site operator and Thuo is a route operator. In terms of their site management agreement, Thuo takes 60% of the profit on the machines and "*Paul's"* 40%". However, "*Paul's*" is not the owner of the restaurant premises – These are rented from "*Mutual Co*" through "*ZX Properties Services*."

[97] In terms of Condition 13 (as formulated in all Versions) Thuo may have no interest in "*Paul's*", "*Mutual*" or "*ZX*". And, since "*Mutual*" is a company listed on the Johannesburg Stock Exchange, Thuo may not hold shares in that company either, whether directly or through its property portfolio on the Johannesburg Stock Exchange. These limitations apply not only to Thuo, but also to, *inter alia*, Adams, Abercrombie and Pattton in their personal capacities.

[98] In terms of Condition 11, as originally drafted, "*Paul's*" may not own its premises if the total number of LPM's it operates, exceeds one hundred. And, if "*Paul's*" opens branches in table View, Mitchell's Plain and Gugulethu, the total number of LPM's at the four premises may not exceed one hundred. The restrictions imposed in terms of this condition apply to both natural persons and corporate entities.

[99] Thuo's complaint in the founding affidavit in relation to Condition 11 is that:

(1) *"It abitrarily limits the scope of the business that…[Thuo]…is able to conduct through its key accounts such as Gold Circle";*

(2) The effect thereof is *"to force site operators such as Gold Circle to downscale the size of their operations to the arbitrary extent imposed by the Board in Licence Condition 11 even if the operator in question does not control a dominant*

share of the LPM market and is not in contravention of the competition laws";

(3) The number of sites available for licensing and LPM operation are limited and so the enforcement of Condition 11 *"may well mean that both …[Thuo].. and Vukani may not be able to expose all of the 1000 LPM's allocated to each of them for play";*

(4) In any event the Board has control over the site licence application process and has thereby exercised control over any unnecessary proliferation of LPM's;

(5) In reality the Board seeks to use Condition 11 to limit the number of sites at which Thuo may place machines and, in particular, the Board intends to restrict the number of LPM sites operated by Gold Circle.

[100] In regard to Condition 13, Thuo complains that it seeks to limit "*the freedom of enterprise"* [23] of Thuo, its shareholders, directors and employees who have black economic empowerment entities through which they wish to grow their personal wealth.

[23] There is no direct reference to sec 22 of the Constitution in the founding affidavit, and the import of the phrase is therefore not clear.

[101] In the answering affidavit Madima, in dealing with Condition 11, says that when the Board first called for applications for route operator licences the intention was "*to create opportunities for the direct involvement of small and medium sized enterprises and to provide impetus for individual entrepreneurs. In order to achieve this objective, the number of licences held by a single operator must be limited*."

[102] In regard to Condition 13, Madima says again that the LPM industry was started with a view to developing small and medium businesses and that it was not intended that larger entities such as route operators should be able to acquire site licences. The route operators were required to fulfill a developmental role for example, by investing in LPM's and helping site operators apply for licences. In such circumstances, says Madima, route operators will become conflicted and will not be able to serve their primary functions in an unbiased manner.

[103] From the aforegoing it can be seen that the imposition of the conditions in question is steeped in issues of policy and they are routinely imposed by the Board with the express intention of giving effect to those policy considerations. I have no quibble with the Board seeking to advance policy considerations spelled out in both the National and Provincial Acts. Indeed that is exactly what it should strive to achieve. But when it does so by way of licensing conditions it must ensure that it does so fairly and rationally. Fairness requires it to ensure that all applicants for licensing are made aware of the intention to impose conditions of that type. It is axiomatic that to do so enables an applicant to know what limitations may be imposed on the proposed authority to operate LPM's, for it to prepare its application in the light thereof, and, importantly, for it to

decide not to submit an application in the event that the proposed conditions are not to its liking, are considered unduly onerous, or will be detrimental to its business enterprise [24].

[104] I have set out above in some detail the relevant information conveyed to Thuo by the Board in the RFP. The limitations imposed through Conditions 11 and 13 do not appear therefrom and so no reasonable LPM operator would have been alerted thereto [25]. And, that is precisely what Thuo complains of in the replying affidavit.

[105] As Nugent JA observed in Kemp N.O., *supra*, the decision-maker exercising a discretion in relation to the grant of a licence must do so without the process being restricted by considerations of policy. Otherwise the discretion is not properly exercised.

[106] I agree with Mr. Rosenberg SC that the only way to ensure the proper implementation of policy guidelines or decisions in matters such as this is to incorporate them in regulations. Such a regulatory process will ordinarily include advertising for public comment, a public airing of views and ultimately the publication of the regulations in a public document. These may be harsh and they may make inroads into a party's right, for example, under sec 22 of the Constitution. But, at the end of the day, they provide clearly delineated perameters against which all applications for the type of

[24] Tseleng v Chairman, Unemployment Insurance Board and Another 1995 (3) SA 162 (T) at 177-8
[25] Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd 2005 (6) SA 182 (SCA) at 198 para 18.

licence in question can be evaluated. That really is the essence of a transparent process in the field of administrative law in a constitutional democracy.

THE LATE AMENDMENT TO CONDITION 11

[107] The late amendment to Condition 11 on the eve of the hearing before Van Staden AJ highlights the manifest confusion and hence irrationality which had plagued the first three versions thereof. Whereas the earlier versions focussed on ownership of the LPM's themselves which were to be operated, Version 4 dealt with the ownership of the site at which the LPM's were to be operated. The change in focus is material and tends to show just how the earlier Versions were lacking in rationality. Certainly, Thuo was entitled to challenge the absence of rationality in the manner in which it did.

[108] But to my mind, even when the changes were made to Condition 11 by the introduction of Version 4, the fundamental problem persisted: both Conditions 11 and 13 were not rationally connected to any empowering provisions under either the National Act, the Provincial Act, or any of the relevant regulations. There is nothing in either statute which empowers or obliges the Board to fix the impugned conditions. The closest one finds is sec 26(2)(d)(iii) of the National Act which obliges the Minister to regulate by subordinate legislation the maximum number of LPM's that may be placed at any one site. *Non constat* that the Board is empowered to incorporate such a limit as a condition of issue of the licence in question.

[109] As far as Condition 13 is concerned, it seeks to impose limits on ownership of the site at which machines are to be placed, in contradistinction with the restriction of

ownership of LMP's by the route operator. Once again, this condition lacks rationality, firstly, because there is nothing in either the National or Provincial Acts which empowers the Board to place this sort of restriction on an entity such as Thuo. Further, it seems to me to be an unwarranted restriction on Thuo's right to trade freely.

[110] There can be little doubt that having regard to the historical background to the development of the gambling industry sketched above, and in particular in the Bantustan era, the authorities would want to ensure that the LPM industry was not concentrated in the hands of a few influential players, but that there should be access thereto across the broader spectrum of commercial activities, both large and small. To that end a fair spread of LPM's at a variety of sites across the Province would no doubt be desirable.

[111] At the same time, the gambling authorities would want to be assured that the potential of poor people wanting to get rich quickly is balanced against responsible use of LPM's in circumstances where disposable income might be limited. For that reason, the careful and prudent placement of LPM's at the correct localities is critical.

[112] But these over-arching objectives are not achieved by limiting the extent of a party's interest in the premises at which an LPM is located. Those objectives are only attainable once a proper consideration and assessment of all relevant circumstances has taken place. That exercise is the responsibility of the relevant Minister, who would be the appropriate functionary to legislate accordingly through the promulgation of regulations. Once again, it is not the function of the Board to fix a policy.

[113] But somewhat paradoxically the Board does not seek to rely on socio-economic factors to justify its conditions. Rather, it expresses concern about conflicts of interest that might arise between the defined role of route and site operators. In doing so it misses the point, since it effectively precludes a party like Thuo from playing any part whatsoever in the growth of site operators and, most importantly, operates harshly against persons in the position of directors or employees of companies which own LPM's from having any interest in an entity owning the site rather than operating from such site.

[114] The absence of any material in the Rule 53 record which demonstrates what the possible basis for such a condition would be only serves to confirm the view that the condition is irrational.

CONCLUSION

[115] I am accordingly of the view that the Court *a quo* erred in refusing to review the imposition of Conditions 11 and 13 in the licences of the Applicant. It is common cause that in the event of the appeal being upheld the *declarator* referred to earlier, should be issued.

[116] In the circumstances I would make the following order:

1. The appeal is upheld and the order of the Court *a quo* is replaced with the following order:

(a) A declaratory order is issued to the effect that the Respondent's imposition, in the Applicant's route operator license from time to time, of:

(i) The condition reading:

"A license holder shall not expose for play limited pay-out machines (LPM's) at any site if the effect thereof would be that the operator of such site, whether an artificial or natural person, is permitted to operate more than 5% of the 2000 allocated LPM's"; and

(ii) The condition reading:

"No Route Operator, its Group/Parent Company, Director or Employee of a Route Operator shall have a direct or indirect interest in any of the licensed sites"

is unlawful and of no force and effect.

(b) The Respondent shall be liable for the costs of the application, including the costs of two counsel.

2. The Respondent is ordered to pay the costs of the appeal, including the costs of two counsel.

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GAMBLE, J

I agree: It is so ordered

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ALLIE, J

I agree.

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DOLAMO, J