THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 24453/18

In the matter between:

GARDEN ROUTE CASINO (PTY) Ltd	First Applicant
TSOGO SUN CALEDON (PTY) Ltd	Second Applicant
WEST COAST LEISURE (PTY) Ltd	Third Applicant

and

PREMIER OF THE WESTERN CAPE	First Respondent
PROVINCIAL MINISTER OF FINANCE	Second Respondent
WESTERN CAPE GAMBLING AND RACING BOARD	Third Respondent
CHAIRPERSON OF THE WESTERN CAPE GAMBLING AND RACING BOARD	Fourth Respondent
SUNWEST INTERNATIONAL PTY) LTD	Fifth Respondent
WORCESTER CASINO (PTY) LIMITED	Sixth Respondent

Delivered electronically this 2nd day of July 2021 by email to the parties.

JUDGMENT

NDITA; J

Introduction

[1] This application concerns casino and gambling operator licenses. The relief sought is best understood against the backdrop of the legislation governing the issuing of the aforesaid licences. Casinos and gambling in the Western Cape are regulated by both national and provincial legislation, namely, the National Gambling Act 7 of 2004 ("the National Act") and the Western Cape Gambling and Racing Act 4 of 1966 ("the WC Act"). In terms of section 45 of the National Act, the National Minister of Trade and Industry ("the National Minister") may, by regulation made in accordance with section 87 of the National Act, prescribe the number of casino operator licences that may be granted in the Republic and in each province. In terms of section 30 of the National Act, each provincial licensing has exclusive jurisdiction within its province, to the extent provided in the Provincial Legislation, to:

(a) investigate and consider applications for, and issue provincial licences in respect casinos, racing, gambling, wagering, other than for an activity or purpose for which a national licence is required in terms of the National Act;

(b) conduct inspections to ensure compliance with the regulatory framework.

[2] Section 2 of the WC Act establishes a Board, whose main object is to control all gambling, racing and activities incidental thereto in the Province and any policy determinations of the Executive Council relating to the size, nature and implementation of the industry. Its powers include:

2.1 inviting application for licences in terms of the WC Act (subject to certain exceptions) and accepting such applications without such invitations;

2.2 Considering and disposing of applications for licences in such manner and such time and place as it may from time to time determine.

2.3 Granting renewing, amending, suspending or revoking licences under the WC Act.

2.4 Imposing, amending, suspending or revoking conditions in respect of any time.

[3] In terms of the WC Act, the Executive Council makes policy determinations which guide the exercise of the powers by the Board and the Provincial Minister makes regulations about how the Board shall exercise its powers. The Provincial Minister has the power to make regulations in respect of:

(a) the maximum permissible number of licences of any particular kind that may from time to time be granted in a particular area; and

(b) the granting of exclusive rights to the holder of a casino operator's licence for any period and in respect of any area. The Board on the other hand exercises its powers in the light of the Act, the policy determinations made by the Executive Council, and the Minister' regulations.

[4] On 29 August 1997 the Executive Council of the Western Cape issued *"Western Cape Gambling and Racing Policy Determinations (*the Policy*)"* which provide as follows:

"With the introduction of the of the gambling industry to the Province, the Board shall take cognisance of the objectives contained in the National Gambling Act, 1996 (Act 33 of 1996), and preamble to the [Act], i.e. to minimise the possible negative impact of gambling, to prevent overstimulation of the latent demand for gambling and to optimise the objectives of economic development, job creation and revenue regeneration. To this end –

(a) Applications for casino operator licences, and where practicable, all other operator licences, shall be dealt with on a competitive proposal/call basis. (Casino operator licences shall be considered first, after which applications for limited gambling machine (LGM) operator shall be called for);

(b) the five casino operator licences allocated to Western Cape shall be distributed, one each to five regions, in order to stimulate and encourage development throughout the Province, inter alia, by the empowerment of local disadvantaged groups through both employment and equity ownership;

(c) a casino operator licence allocated to each of the regions shall be exclusive for a period of ten years, based on the required exclusivity fees determined by the Law:

(d) notwithstanding the provisions of paragraph (b), the exclusivity zone for the Cape Metropolitan casino, in relation to the other casinos, shall have a 75-kilometre radius, calculated from the City Hall of Cape Town."

[5] As can be discerned from the aforegoing, the policy which was promulgated by the Executive Council:

5.1 prescribes one casino operator licence for each of the five regions of the Western Cape;

5.2 prescribes an exclusivity period of ten years in respect thereof.

[6] Section 81 of the WC Act empowers the Minister to make regulations regarding various matters, including (a) the maximum number of licences of any particular kind that may from time to time be granted in a particular area; and (b) the granting of exclusive rights to the holder of a casino operator licence for any period and in respect of any area. Section 41(2) read with section 12(3) of the WC Act authorises the Board, on application to amend a casino operator's licence if there is a change in the place at which the holder wishes to perform activities authorised by the licence.

[7] The issues in this matter arose because the Applicants' holding company, Tsogo Holdings wished, as a result of changed circumstances, to submit an application of its subsidiaries to the Board for the amendment of its casino licence licences so as to permit the performance of the licensed activities from premises in the Cape Metropole. They state that because of the significant expense of involved in the preparation of such an application, Tsogo Holdings first enquired from the Board whether the policy determination of 29 August 1997 is not a constraint to the Board's granting such an application. The Board in response to the enquiry explained that it was not competent to consider an application for the relocation of a casino operator licences in the Western Cape. Furthermore, according to the Board's explanation, it is impermissible to apply for an amendment of a licence where the intention is to substitute one premises for another.

[8] Against the Board's refusal to consider and determining Tsogo Holding's application to relocate a casino to the Cape Metropole, the relief sought by the applicants in this application is premised on the fact that the aforegoing Policy directives impermissibly, *inter alia*, usurp powers that are vested in the Minister in terms of section 81 of the WC Act. It is couched in the following terms:

"[1] To the extent necessary, granting the Applicants condonation for having failed to institute an application for the relief sought in paragraph 2 hereunder in accordance with the timeframes stipulated in section 7 of the Promotion of Administrative Justice Act No.3 of 2000, alternatively, within a reasonable time period of time, and granting the Applicants leave to institute the present proceedings.

[2] Ordering paragraphs 1.1 (b) to (d) of the Western Cape Gambling and Racing Policy Determinations issued by the Executive Council of the Western Cape on 29 August 1997 (as amended) ["the Policy"] to be ultra vires and to be of no force and effect.

[3] Declaring that the Third Respondent is competent to consider and determine an application under section 41 (2) of the Western Cape Gambling and Racing Act 4 of 1966 ("the Western Cape Act") for a casino operator licence to be amended so as to permit the holder to perform its licensed activities from the Cape Metropolis.

[4] Directing the Third Respondent to consider and decide any application by the First, Second or Third Applicant under section 41 (2) of the WC Act.

[5] Declaring that a casino operator licence is not a premises licence as envisaged in terms of section 41 of the WC Act.

[6] Directing that the costs of this application be paid by those Respondents which oppose the relief sought herein, and in the event that there is opposition by more than one Respondents, such Respondents shall be liable for costs on a joint and several basis."

The parties

[9] The First Applicant, Garden Route Casino Pty) Ltd, is a limited liability private company with registration number 1998/000391/707 duly incorporated in the Republic of South Africa and with its registered business address at Palazzo Towers East, Montecassino Boulevard, Fourways, Gauteng. The First Applicant is the holder of a casino operator licence known as "Garden Route Casino" at Pinnacle Point Road, Mossel Bay. The Second Applicant is Tsogo Sun Caledon (Pty) Ltd also with registration 1996/010/ 0708/07, duly incorporated in the Republic of South Africa with its registered business address at Palazzo Towers Montecassino Boulevard, Fourways, Gauteng. The Second Applicant is the holder of a casino operating licence issued by the Board, in terms of which it operates the casino known as "Caledon Casino, Hotel and Spa". Likewise, the Third Applicant, West Coast Leisure (Pty) Ltd, is a private company with limited liability with registration number 1994/005194/07 duly incorporated in the Republic of South Africa with its registered business address at Pallazzo, Montecassino Boulevard, Fourways, Gauteng. The Third Applicant is the holder of a casino operator licence issued by the Board, in terms of terms of which it operates the casino known as "Mykonos Casino" in Langebaan.

[10] The First Respondent is the Premier of the Western Cape ("the Premier") in whom the authority in the executive authority in the Western Cape vests, His physical address being at No.7 Wale Street, Cape Town. The Premier also exercises the executive authority together with provincial Ministers by, inter alia, developing and implementing provincial policy. The Second Respondent is the Provincial Western Cape Minister of Finance ("the Provincial Minister") is cited in his official capacity as the Executive Member of the Provincial government of the Western Cape responsible for casino, racing, gambling, and wagering (excluding lotteries and sports pools). The Western Cape Gambling and Racing Board is the Third Respondent and is a juristic body established in terms of section 2 of the WC Act which provides that the right to carry on any gambling or racing activities incidental thereto in any manner, whether directly or indirectly, within the Province vests exclusively with the Board. The Board's main object is to control all gambling or racing or activities incidental thereto in the Province subject to the WC Act and any policy determinations of the Executive Council relating to the size, nature, and implementation of the industry. The Board' principal place of business is at Seafare House, 68 Orange Street, Cape Town. The Chairperson of the Western Cape Gambling and Racing Board is the Fourth Respondent and is cited in her official capacity. The Fourth Respondent's principal place of business is similar to that of the Third Respondent.

[11] The Fifth Respondent is SunWest International (Pty) Ltd, a company duly incorporated in terms of the company laws of South Africa, with registration number 19914/003869/07 and with its registered address at 6 Sandown Valley Crescent, Sandown, Sandton, Gauteng, 2146. The Fifth Respondent is the holder of a casino operator licence issued by the Board in terms of which it operates the casino known as "The GrandWest Casino". The Fifth Respondent is the sole casino operator licence holder for the Cape Metropole. No relief is sought against the Fifth Respondent and is cited in these proceedings on the basis that some of the relief sought may have a bearing on it. The Worcester Casino (Pty) Ltd is the Sixth Respondent and is a company duly incorporated in terms of the laws of the company laws of South Africa with registration number 1998/01622/07 and with its registered address similar to that of the Fifth Respondent. The Sixth Respondent is the holder of a casino licence operator licence issued by the Board in terms of which it operates the casino known as "Golden Valley Casino". Likewise, no relief is sought against

the Sixth Respondent and it is cited on the basis that certain aspects of the relief sought may impact on it.

[12] For ease of reference the applicants are referred to as Tsogo Sun, the first and second respondents as the Provincial Government and the third to fifth applicants as Sun International.

Factual Background

[13] The factual background underpinning this application is outlined in the founding affidavit deposed to Mr Hendrik De Lange, Tsogo Sun Group's National Gaming Compliance Manager. Mr De Lange gives the following factual background: The Western Cape is divided into five regions for the purposes of casino licence operators. These are (a) the Cape Metropole; (b) Southern Cape, Klein and Central Karoo district ("Southern Cape"); Breede River District; (d) Overberg District and (e) West Coast District. One licence has been awarded in respect of each region. As earlier alluded to, the First, Second and Third Applicants operate three of the five casinos in the Western Cape. The Fifth Respondent operates the Grandwest Casino in the Cape Town area, whereas the Sixth Respondent operate a casino in Worcester. I refer to the affidavit deposed to by Mr De Lange on behalf of Tsogo Sun simply as Tsogo Sun's affidavit.

[14] According to Tsogo Sun, the initial exclusivity periods imposed by the Board have expired and the casino operator licence holders have continued to operate an exclusive basis, to the exclusion of any other casino operating within the five regions. The table appearing hereunder depicts information relevant to each of the casino operator licence holders:

Casino Operator	Licence Holder	Date of award of Casino Operator Licence	Commencement Date	Exclusivity Expiry Date
GrandWest	SunWest International (Pty) Ltd [Fifth Res ondent	6 December 1999	15 December 2000	5 December 2010

Caledon	Tsogo Sun Caledon (Pty) Ltd [Second A licant	14 April 2000	11 October 2000	10 October 2010
Mykonos	West Coast Leisure (Pty) Ltd [Third A licant	4 September 2000	1 4 November 2000	13 November 2010
Garden Route	Garden Route Casino (Pty) Ltd [First A licant	11 July 2002	1 2 December 2002	11 December 2012
Worcester	Worcester Casino (Pty) Ltd [Sixth Res ondent	10 May 2005	22 November 2006	9 May 2014

[15] The Applicants allege that since about 2009, the Executive Council and the Minister have been considering changing the policy of exclusivity, so as to permit a second casino in the Cape Metropole. The Applicants attached to the founding affidavit copies of newspaper articles which refer to the Provincial Government 's intended changes. More specifically, it was, according to the Applicants reported that the Provincial Government intended to announce a change of policy which will permit an existing Western Cape casino operator licence to relocate to an area in the Cape Metropole, which the Provincial Government believes is untapped by GrandWest and would not significantly affect GrandWest's revenue. The Applicants state that in order to reflect the intended policy changes, there were various proposals by the Provincial Government for amendment of the legislative framework during 2012 and 2013. Draft Bills were published, but were ultimately not enacted.

[16] The Applicants state that they made submissions to the Provincial Government in response to the publications of the draft legislation wherein they supported the proposal that the law be amended to make it possible for two casinos

to operate in the Cape Metropole. Tsogo Sun further states that they held back from exercising their rights to apply to the Board for the relocation of one of its outlying casino section 41 (2) WC Act in favour of yielding to what appeared then to be imminent legislative changes which would facilitate the awarding of two casino operator licences without the need for litigation. In addition, after taking advice, they decided to await the enactment of the anticipated legislation. However, so avers Tsogo Sun, significant time has passed without the intended legislation coming to fruition, and there being no indication that such legislation will be promulgated in the near future, the indications are that it may well be further delayed because of impending litigation instituted by the Fifth and Sixth Respondents as well as their holding company, Sun International. According to the Applicants the primary relief sought by Sun International in that application is the reviewing and setting aside the decision supposedly taken by the Provincial Government of the Western Cape on 9 June 2010 (on the recommendation of the Board) to abolish future casino exclusivity in the Cape Metropole, and to allow one of the outlying casinos to relocate to the Cape Metropole. In short, Sun International sought that the existing Policy should remain in force. Tsogo Sun states that the Executive Council has however, not published a new policy determination in terms of sections 2 (4) and 2 (6) of the WC Act. According to the Applicants, it appears that no final decision has been taken in this regard.

[17] In the present application, Tsogo Sun seeks a declaration of invalidity of the impugned provisions of the Policy. This is premised on the fact that section 41(2) of the Western Cape Act provides that if there is a change in the place at which the holder of a licence wishes to perform the activities authorised by the casino operator's licence which would require the amendment of the licence, the holder may apply to the Chief Executive Officer of the Board for the amendment of the licence.

[18] On 11 November 2015, Tsogo Holdings wrote to the CEO of the Board advising it that one of its subsidiaries, wished to submit an application for the amendment of its casino operator's licence so as to permit the performance of the licenced activities from the premises in the Cape Metropole. Tsogo Sun avers that the purpose of the letter was to enquire whether the Board's view was that the Policy is a constraint to granting such an application before incurring significant expenses in the preparing and submission of such an explanation. Because Tsogo Sun's case is founded mainly on the views of the Board as expressed in response in its letter

dated 30 November 2015, I find it necessary to refer substantially to its contents. It reads thus:

"3. It is trite that an administrative functionary has no inherent powers and can only do what the legislation expressly or impliedly authorise them to do. Where an administrative functionary seeks to do that which is not authorised by law, its conduct is ultra vires and reviewable I a court of law.

4. The Draft Seventeenth and Eighteenth Amendment Bills, and Draft Amendments to the Regulations published in Provincial Gazette of 16 March 2012 evidences:

4.1 The legislature's intent to provide for the relocation of one of te outer-lying casinos to the Metropole;

4.2 That such casino will pay a premium exclusitivity fee for relocation within 75km of the Cape Town City Hall; and

4.3 That exclusivity fees are paid annually.

5. Having studied all legal prescripts conferring powers on the Board to consider and issue casino operator licences, including the casino premises/complex, I opine that the Board is not competent o consider an application for the relocation of a casino operator licence in the Western Cape.

6. . . .

7. It is pertinently clear from the Executive Council Policy Determinations, published on 29 March 1999, that the Board was enjoined inter alia to give effect to:

7.1 That the Board shall issue five casino operator licences, one in each of the five regions. These regions were clearly marked on a map annexed to te Policy Determinations/and or the respective Request for Proposals issued when applications for casino operator licences were called for in the Western Cape; and

7.2 The financial commitments, exclusivity perid as well as the ambit of the exclusivity zones of both the Metropole casino and the four outer-lying casinos were clearly circumscribed in the said Policy Determinations.

8. Considering an application for relocation of one your casinos to the Metropole, would in my view, go against the expressed intention of the Provincial legislature as evidenced in the Draft legislative amendments referred ti in paragraph seven supra.

9. It would also breach the policy determinations, (that one casino licence be issued in each of the five regions dermacated fr the Western Cape) and would be ultra vires the powers of the Board for the reasons stated above.

10. I note that your letter under reply specifically enquires whether the writer may consider an application for relocation of one your casino operator licences to the metropole in accordance with the powers conferred by Section 41(3) of the Western Cape Gambling and Racing Act. The provision provides for the Chief Executive Officer to amend a licence in specified circumstances. The immediate subsection 3 of the said provision however expressly provides that where a licence holder wishes to perform gambling activities at premises other than that specified in its licence such licence holder shall apply to the Board for the relevant premises licence.

11. It is therefore clear that one may not apply for the amendment of a licence where the intention is to substitute one premises for another. In this instance, you would be required to apply for the relevant premises licence, which application must be considered by the Board.

12. . . .

13. In the premises, I advise that neither the Board, nor its Chief Executive Officer is competent to consider the relocation of a casino to another region, and/or the metropole."

[19] According to Tsogo Sun, it is clear from the Board's reply that it considers itself bound by the Policy, and that irrespective of the merits of the application submitted to it in terms of section 41(2) of the WC Act, it will refuse such application if the effect thereof will be in breach of the exclusivity requirement in the Policy. Tsogo Sun avers that this application has become necessary because of the Board's view to the effect that the impugned provisions of the Policy circumscribe and fetter the discretion that section 41 (2) confers on it. It also disputes the Board' stance in paragraph 10 of its letter, to the effect that the applicants are the holders of "a premises licence" in terms of the Act. Thus, it, to this end seeks a declaratory order that the applicants are holders of a casino operator's licence.

[20] I now turn to outline the various ground upon which the applicants assail the provisions of the Policy.

[21] Tsogo Sun contends that the impugned provisions of the Policy are ultra vires and invalid for the following reasons:

21.1 First, the Policy as adopted pursuant to section 2(4) and 2 (6) of the WC Act. In terms of section 2(6), the Executive Council is empowered to make policy determinations relating to the "size, nature, and implementation" of the industry. According to Tsogo Sun, the Executive Council is however, not authorised to

prescribe a requirement for exclusivity in each of the regions of the Western Cape, the effect of which is that no more than one operator licence may be held for each region.

21.2 Second, a policy determination made by the Executive Council cannot override, amend or be in conflict with the WC Act. The WC Act confers on the Board the power and discretion to grant applications, and determine conditions of licences in section 37 and 41(2). The applicants state that such power and discretion cannot be removed by a policy determination such as that which has been made.

21.3 Third, section 81 of the WC Act empowers the Provincial Minister to make Regulations in respect of, inter alia:

(a) the maximum permissible number of licence of any particular kind that may from time to time be granted in a particular area;

(b) the granting of exclusive rights to a holder of a casino licence operator for any period and in respect of any area.

Tsogo Sun further avers that the Executive Council has purported, by making a policy determination under section 2(4), to exercise the Provincial Minister's power under section 81. Furthermore, although the Provincial Minister is part of the Executive Council, there is a marked difference between a policy and subordinate legislation such as a Regulation. Moreover, there is a difference between a power which is to be exercised by Cabinet as a whole, and a power which is to be exercised by a member of the Cabinet. According to this contention, if legislation empowers the Minister to make a decision by regulation, the power may only be exercised by the Minister through a regulation. The applicants further aver that this issue has been addressed by the Supreme Court of Appeal in its judgment in *Akani Garden Route (PTY) LTD v Pinnacle Point Casino (PTY) LTD* 2001 (4) SA 501 SCA as follows:

"Where for instance, the provincial Act entrusts the Minister with the responsibility of determining the maximum permissible number of licences of any particular kind that may be granted in a particular area (s 81 (1) (d)), the Cabinet cannot regulate the matter by means of a policy determination, something it did. Likewise, where 37 (1) (l) empowers the Board to impose conditions relating to the duration of the licence, the Cabinet cannot prescribe to the Board by way of a policy determination that, for instance, casino licence holders shall be for a period of ten years, something else it

did. In other words, the cabinet cannot take away with one hand that which the lawgiver has given with another."[1]

21.4 Fourth, Tsogo Suns contends that Policy draws an irrational distinction in respect of the exclusivity zone for the Cape Metropole casino [in paragraph 1.1(d) ad "other casinos" in paragraph 1.1 (e) which provides that "exclusivity zone for the other casinos should be determined by the Board".

[22] For all the aforegoing reasons, the applicants seek the relief outlined in the notice of motion.

[23] Tsogo Sun avers that it is entitled to the declaratory relief sought in the notice of motion as the Board has unequivocally stated that it is precluded from considering the application one of the applicants intended to submit, despite the judgment of the Supreme Court of Appeal *in Akani*. In summary the primary relief the applicants seek is a declaratory order that paragraphs 1,1 (b) to (d) of the Policy are ultra vires, invalid and of no force and effect in the following manner:

23.1 Paragraph 1,1(b) of the Policy stipulating that there shall only be one casino in each region is ultra vires and invalid as this the beyond the powers of the Executive Council;

23.2 Paragraph 1.1 (c) stating that a casino operator's licence shall be exclusive for a period of ten years is similarly invalid and of no force and effect because the declaration is beyond the powers of the Executive Council;

23.3 Paragraph 1.1 (c) stating that a casino licence shall be exclusive for a period of ten years is likewise, ultra vires as the declaration goes beyond the powers of the Executive Council.

23.4 Paragraph 1.1 (d) of the Policy prescribing the exclusivity zone for the Cape Metropole is unlawful to the extent that it is inconsistent with section 44A of the WC Act.

[24] As earlier pointed out, Tsogo Sun also seeks a declaratory order to the effect that the applicants are holders of a casino operator's licence and not the holders of a "premises licence" in terms of the Act. According to this contention, the Board's refusal to consider a section 41(2) is wrongly premised on the fact that the applicants are the holders of a "premises licence".

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[1] *Akani Garden Route (PTY) LTD v Pinnacle Point Casino (PTY) LTD* 2001 (4) SA 501 SCA at 509 G-I.

[25] The applicants emphasise that the impugned provisions violate the fundamental constitutional principle of legality in that they are both ultra vires and irrational. They further contend that the Promotion of Justice Act 3 of 2000 ("PAJA") is not applicable to this matter, and even if it did, that does not affect the Applicant's challenge to the validity of the impugned provisions, as those provisions are inconsistent with both the principle of legality and the requirements of PAJA in that:

25.1 They were not authorised by the empowering provision of the WC Act;

25.2 They were made as a result of misapprehension by the decision-maker of its powers under the WC Act;

25.3 They are not rationally connected to: (a) the purpose for which they were made; and (b) the purpose of the empowering provision; and

25.4 They are otherwise unconstitutional or unlawful, in that the Executive Council usurped the functions which the legislature has conferred on the Provincial Minister and the Board.

[26] Tsogo Sun further states that the making of the Policy was not an administrative act, under either the common law or PAJA for the following reasons:

26.1 It was a decision of a legislative nature: the Policy Determination is a form of legislation, similar to a regulation; or alternatively,

26.2 It was the exercise of the executive powers and functions of the Provincial Executive.

[27] Accordingly, so surmise Tsogo Sun, neither PAJA nor the common law of administrative law finds application. It further evers that the application was brought within a reasonable time as there is no time limit within which an affected party may challenge the lawfulness of a Policy Determination purportedly made in terms of section 2(4) of the WC Act. In any event, so contends Tsogo Sun, the circumstances in this matter and the interests of justice require that the application not be time barred and that the merits of the application be determined for the following reasons:

27.1 The relief sought in this application is forward-looking as the applicants do not seek to reverse anything which has been done under the Policy Determination. They seek only relief which will prevent future breaches of the law, and which will enable them to exercise their statutory rights. Besides, so goes the contention, the licence holders have had the benefit of the ten years and more of the exclusivity which was provided by the Policy when they applied for casino operator licences and cannot

validly cannot contend that they made their investment in their casinos on the assumption that exclusivity would continue in perpetuity.

27.2 Second, the applicants had no interest in challenging the Policy until they sought to exercise their rights under section 41(2) of the WC Act, and the Board raised the existence of the Policy as an insurmountable barrier to the exercise of its powers under section 41(2);

27.3 Third, unless the relief sought in this application is granted, the applicants' intended application in terms of section 41 (2) will determined on a basis which is inconsistent with the Act;

27.4 Fourth, according to the applicant, there have been a number of indications by the provincial government that the legislation would be amended in a manner which would make this application unnecessary.

27.5 Fifth, it cannot be in the interests of justice that a casino operator can have exclusivity for its operations indefinitely, and potentially into perpetuity, when that exclusivity is conferred by a decision which is in breach of the governing statute.

27.6 Sixth, it is unconsciable and intolerable for a public authority simply to ignore a judgment of the Supreme Court of Appeal, and then assert that t does not have to comply with the law. Courts will not countenance that attitude.

27.7 Seventh, according to the applicants, the Board is estopped from denying that the impugned provisions are invalid. This, according to the contention is so because where the actor in question is an organ of state which exercises regulatory functions, it will not be permitted to enforce a provision in the regulatory regime, which, in litigation brought by another party which is subject to that regime, has been found to be invalid. To this end, common law should be developed to address this situation.

27.8 Eighth, Tsogo Sun contends that if the Board had attempted to enforce the impugned provisions on Akani, Akani would succeed in an argument that this was impermissible, on the grounds that the provisions are invalid, and this issue was already determined in earlier litigation. It therefore was not in the interests of justice for some of these provisions to be enforced against another party, and for that party to be prevented from challenging them. Put differently, the regulatory regime cannot differ, depending on who is being regulated.

27.9 Ninth, the provisions are legislative and quasi-legislative. They cannot be valid for some persons, and invalid for others.

[28] The upshot of all the aforegoing contentions is that Tsogo Sun asks for an order extending the period provided in section 7(1) of PAJA to the date when this application was launched, should tis court find that PAJA is applicable. More specifically, Tsogo Sun seeks condonation for the late filing of this application.

The First and Second Respondent's answering affidavit

[29] As earlier alluded to, the First and Second Respondents oppose this application. In an affidavit deposed to by Mr Harry Clifton Malila, a Deputy Director-General in the Western Cape Provincial Government, and the Branch Head: Fiscal & Economic Services in the Western Cape Provincial Treasury ('the Provincial Treasury'), the main basis for opposition is that this application prejudges several issues under consideration in the process of drafting new legislation dealing with the regulation of gambling in general and the licensing of casinos in the Western Cape.

[30] The defences raised by the Provincial Government are best understood in the context of their factual and legal background as set out in its answering affidavit. The Provincial Government states that prior to 1994, gambling within the borders of the Republic of South Africa was largely prohibited by the Gambling Act 51 of 1965, while casinos were permitted – and highly regulated – in the former 'independent homelands' of Transkei, Bophuthatswana, Venda and Ciskei. After 1994, both the Interim Constitution and the Final Constitution specified gambling as a concurrent national and provincial competency, which in turn led to a new approach to gambling in the new dispensation, namely its being permitted throughout the Republic subject to strict regulation. This required putting in place both a national and provincial policy and regulatory frameworks. The Provincial Government explains that the Western Cape Provincial government commissioned wide-ranging research to assist with the drafting of its gambling policy and regulatory framework. On 13 September 1995, the Provincial Cabinet (then called the Executive Council) approved a gambling policy framework which, among other things, provided for the incremental development of the industry's market potential in order to minimize possible negative effects. Furthermore, the Provincial Cabinet approved an approach to developing the gambling industry that would aim to realize the following benefits:

30.1 promoting economic development with concomitant employment and training opportunities;

30.2 facilitating the development of secondary industries in close association with gambling ventures;

30.3 ensuring greater participation of the disadvantaged in the economy;

30.4 promoting and supporting tourism;

30.5 promoting the provision of community facilities; and

30.6 generating tax for the Province so as to improve its revenue position.

[31] The Provincial Cabinet's approach included introducing appropriate legislation in the provincial legislature, and to this end, enacted on 22 May 1996 the provincial the WC Act. Section 2 of the WC is entitled *'Establishment of Western Cape Gambling and Racing Board'* and does the following:

31.1 section 2(1) establishes the Western Cape Gambling and Racing Board;

31.2 section 2(2) vests in the Board the exclusive right to '*carry on any gambling or racing or activities incidental thereto'* subject to sub-section (4); and

31.3 section 2(4) determines the main object of the Board to 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.

[32] Section 45 of the WC Act deals with casino operator licenses generally. It includes the following:

32.1 section 45(2) provides a casino operator license is required by every company which permits or conducts gambling in or on any premises in the Province which are not limited gambling machine premises or premises operated under a bingo license; and

32.2 section 45(4) provides that a casino license shall attach to the premises specified in the license, and which shall be developed in accordance with the approved development application.

[33] The Provincial Government explains that the adoption of the Policy on 30 July 1997 obliged the Board to take cognizance of the objectives contained in the 1996 national Act and the WC Act, more specifically *'to minimize the possible negative impact of gambling, to prevent overstimulation of the latent demand for gambling and to optimize the objectives of economic development, job creation and revenue*

generation.' To this end, clause 1.1 sets out specific determinations which bind the Board, and they are the following:

(a) the five casino operator licenses allocated to Western Cape shall be distributed, one each to give regions, in order to stimulate and encourage development throughout the Province, inter alia by the empowerment of local disadvantaged groups through both employment and equity ownership;
(b) a casino operator license allocated to each of the five regions shall be exclusive for a period 10 years, based on the required exclusivity fees determined by the Law;
(c) notwithstanding the provisions of paragraph (b), the exclusivity zone for the Cape Metropolitan Casino, in relation to the other casinos, shall have a 75-kilometre radius, calculated from the City Hall of Cape town;'

The Provincial Government reiterates that the WC Act does not make provision for the extension or renewal of the exclusivity determination. That said, all the casino operator's licences, have expired as depicted in the applicant's table.

[34] According to the First and Second Respondents, the lapsing of the exclusivity regime, required the Provincial Treasury to devise a new fee dispensation to take its place. In addition, freed of the casino license holders' rights to exclusivity, the Provincial Treasury had to consider whether the regulatory framework as a whole should be revised in order to permit more than one casino to be located in the well-resourced Cape Metropole. If that were permitted, one or more of the outlying casinos would have to cease operations, given that the number of licenses allocated by the national government to the Province is fixed at five. This, according to the Provincial Government, is so because for every additional casino that is permitted in the Cape Metropole, one of the outlying casinos must close. Furthermore, this has given rise to a complex matrix of impacts, amongst other things because casino operations generate significant formal employment and potential for economic opportunity along the supply chain in the areas where they operate, the overall aim of regulating gambling being to leverage the industry's potential financial and economic benefits to society while ensuring that demand is not over-stimulated in any particular area, and that negative impacts of gambling are effectively mitigated. They also generate substantial revenue, in the form of taxation and license fees, for the Province. Gambling tax is currently one of the significant provincial taxes – the

remainder of the Province's own revenue derives primarily from motor vehicle license fees, health patient fees and interest on investments. *Moreover,* Casino taxes contribute by far the greatest share of the Western Cape gambling industry's more than half a billion Rand annual contribution to the provincial fiscus (in the 2017/18 financial year, casino taxes contributed R 433 117 795 to the provincial coffers). Casinos are, however, sensitive to overall economic conditions, and face increasing competition from limited pay-out machines, sports betting and online gambling. In addition, the turnover of the five licensed casinos in the Province differ significantly. The GrandWest casino in Cape Metropole remains, by some margin, the largest casino operation in the Western Cape, consistently contributing more than 80 per cent of the Western Cape's casino tax revenue

[35] The Provincial Government avers that in August 2009, with a view to the advent of the post-exclusivity era, the Provincial Treasury commissioned the Bureau for Economic Research ('BER') in the Faculty of Economics and Management Sciences at Stellenbosch University to put together a team of economists, legal practitioners from the private sector and financial specialists to advise the Provincial Treasury on the complex socio-economic issues concerning gambling in the Western Cape, as well as in respect of data analysis and fiscal modelling. This was to allow the Provincial Treasury to properly investigate and, if necessary, to formulate a new regulatory framework. The BER's research had to deal with at least the following:

35.1 the then current and projected micro-and macroeconomic changes in the provincial economy, as well as in each of the areas where the then current casino operations were located, and how these would be affected if there were a relocation of one or more of the outlying casinos to the Cape Metropole;

35.2 the then current and projected direct and indirect economic impacts on the local economics in the areas where the current casinos operated, any areas to which re-location was proposed, and potential alterative areas for re-location;

35.3 the need to ensure that gambling in the Province is not over-stimulated in any one area, including a consideration of the potential for increased access of financially vulnerable households to gambling opportunities which might lead to an increase in problem gambling – in other words, the social impact of any proposed relocation(s);

35.4 independent verification of the data provided by the casino operators;

35.5 the need to devise a new fee regime in the aftermath of the exclusivity fee regime, in line with the principle that the industry should pay for its regulation and ensure the Board's financial self-sufficiency;

35.6 the need to ensure that any relocation process is undertaken in a constitutionally compliant manner, i.e. based on a transparent, competitive and transformative process; and

35.7 the need to devise a suitable taxation structure in order to be responsive to any redistribution of gross gambling revenue across the Province that the possible relocation of one or more of the outlying casinos into the Cape Metropole any trigger.

[36] According to the Provincial Government the relocation of an outlying casino has a huge impact on the taxation. The licensed casinos in the Province have been taxed using a progressive tax scale, based on Gross Gambling Revenue ('GGR'). This approach caters for the one large casino in the well-resourced Cape Metropole. Given the much higher taxable GGR generate by GrandWest relative to the other four licensed casinos in the Province, it is taxed at a progressively higher rate than the others (whose revenues do not reach the higher tax brackets). The effect of that is If the relocation of one or more of the outlying casinos to the Cape Metropole has the effect of reducing GrandWest's GGR, without a concomitant increase in the GGR to other operators, it will flatten the gambling tax base and decrease the Province's own revenue unless the tax brackets are adjusted. For that reason, the current basis on which gambling taxes are formulated may have to be overhauled if competition for GrandWest in the Cape Metropole is permitted. Any investigation of a new tax structure must accordingly not only take account of the projected GGR loss at GrandWest due to increased competition, as well as the financial impacts on the remaining outlying casinos.

[37] The Provincial Government states that any revision of the tax structure would have to simultaneously achieve the following:

37.1 the proposed relocation(s) must not result in a net loss of tax revenue to the Province;

37.2 the revised tax structure must be devised so as to be neutral as regards the location of the casino operations in the Cape Metropole, i.e. the casinos in the Cape Metropole should base business decisions purely on commercial considerations and free from any considerations of differing tax consequences based on their location; and

37.3 although it is unavoidable that the move towards a less progressive tax structure will have some impact on the tax burden on the remaining outlying casinos, it must be ensured that this is not significantly averse to them.

[38] The Provincial Government further states that another complex issue relating to the relocation of an outlying casino relates to whether to replace the previous exclusivity fee with a new economic opportunity fee based on the value of the access granted to the casino(s) permitted to relocate to the Cape Metropole. This is particularly so because devising a formula for a possible economic opportunity fee requires a reliable projection of the anticipated additional GGR for the relocating casino(s) in a variety of circumstances.

Events leading up to the litigation by the parties in this application

[39] The aforegoing factual background is, according to the Provincial Government relevant to understanding the impugned current litigation. It says that in June 2010, following a confidential information gathering exercise with each of the five casino operators in the Province, the BER provided the Provincial report'), which concluded with six recommendations:

39.1 there was insufficient justification Treasury with its report ('the 2010 BER in terms of economic efficiency, social welfare considerations, or optimization of revenue, to maintain the anti-competitive status quo of one casino operating in the Cape Metropole;

39.2 the BER recommended that one additional casino be permitted to operate in the Cape Metropole;

39.3. it recommended comprehensive amendments to legal; framework.

39.4 it recommended an across-the-board increase in the gambling tax by two percentage points to optimize revenue potential, as an interim measure;

39.5 it recommended that the exclusivity regime (including the payment of exclusivity fees) be abolished and replaced by an increase in the tax rate;

39.6. it recommended that a fraction of the additional tax revenue be earmarked for direct funding of the Board; and

39.7. it recommended a transparent, competitive bidding process for the new casino in the Cape Metropole.

[40] It is undisputed that on 9 June 2010 the Provincial Cabinet approved these recommendations, but determined that the *status quo* would continue pending the introduction of the comprehensive amended regulatory framework to give effect to

the selection options and other proposals. This led to the publication for comment of Draft Seventeen and Eighteenth Amendment Bills and draft Regulations on the WC Act on 16 March 2012 as a consequence of which the Western Cape Seventeenth Gambling and Racing Amendment Act, 2013 and the Western Cape Eighteenth Gambling and Racing Amendment Act, 2013 came into effect on 1 September 2013**.** (‘the Seventeenth and Eighteenth Amendment Acts’). The Provincial Government avers that the approval of the recommendations by the Provincial Cabinet on 9 June 2010, more particularly that one additional casino be permitted to operate in the Cape Metropole led to the institution of proceedings in this Court under case number 18791/2015 by Sun International on 30 September 2015 challenging the Provincial Cabinet’s decision to approve the recommendations by the Provincial Treasury to permit a second casino to be located in the Cape Metropole. On 17 December 2015 Tsogo Sun instituted the current proceedings, where in effect it seeks orders directing the Board to consider and determine an application by one of the outlying casino operators to relocate to the Cape Metropole.

Events since the litigation commenced

[41] According to the Provincial Government, after the commencement of the litigation by Sun International / Tsogo Sun, the Provincial Treasury revived its request to the BER to provide an update on its 2010 report. The main focus was whether there was any reason why its recommendations made in 2010 should be withdrawn, amended or, if necessary, be revised on the basis of updated data and the submissions made in the legislative process leading to the Seventeenth and Eighteenth Amendment Acts. Before Terms of Reference could be finalised, however, early in 2016 Sun International and Tsogo Sun approached the Provincial Treasury with a joint proposal to consider the addition of not one but two casinos to the Cape Metropole, i.e. the relocation of the Golden Valley casino in Worcester (owned by Sun International) to a site in or near the Waterfront in Cape Town, and the relocation of the Caledon casino (owned by Tsogo Sun) to a site in the Strand / Helderberg Area. Consequently, during March 2016 the Provincial Treasury requested the BER to undertake not only an update of certain aspects of the 2010 BER report, but also research to enable the Provincial Government to assess the impact of the joint proposal received from Sun International and Tsogo Sun. Tsogo Sun and Sun International agreed to suspend their respective litigation (i.e. the present matter and the one instituted by Sun International on 30 September 2015, as

earlier alluded to) whilst the joint proposal was considered. The Provincial Government avers that the drafting process resulted in the following significant milestones:

41.1 On 10 February 2017 Legal Services circulated the first version of the Draft Nineteenth Amendment Bill to the Provincial Treasury, with requests for comment. During the course of April and May 2017 the Provincial Treasury and the Board provided their input.

41.2 On 13 October 2017 Legal Services circulated the third version of the Draft Nineteenth Amendment Bill to the Provincial Treasury, with requests for further comment. On 21 November 2017 the Provincial Treasury and the Board provided their further input.

41.3 During the remainder of November 2017, Legal Services circulated a further three versions (up to version six) of the Draft Nineteenth Amendment Bill to the Provincial Treasury, along with draft Regulations as well as various draft memoranda.

[42] The preceding background is the context through which the Provincial Government's defences to the Applicants' claims should be considered.

The Provincial Government's answer to the challenges raised by the applicants

[43] It will be recalled that, Tsogo Sun assails the impugned provisions of the Policy on the basis that they are unlawful, *ultra vires,* irrational and invalid. The first reason is that the Policy was adopted pursuant to section 2(4) read with section 2 (6), the upshot of which is that whereas the Executive Council is empowered to make policy determinations relating to the *"size and nature of the implementation"* of the industry, it is not authorised to prescribe a requirement of exclusivity in each of the five regions in the Western Cape. The Provincial Government counters the attack by stating that sections 2(4) and 2(5) of the WC Act together make the Board's powers to regulate the gambling industry subject to Cabinet's policy determinations relating to *'size, nature and implementation of the industry'*. According to it what is meant by the *"implementation of the gambling industry"* is more complex. The Provincial Cabinet's power provided for in 2(4), so avers the Provincial Government, is accordingly to determine the manner in which its plan for the gambling industry is executed, as well as to determine the nature and size of the gambling industry. Moreover, Clause 1.1(b) provides that the regional distribution of casinos in the Western Cape is *'in order to stimulate and encourage development throughout the*

Province, inter alia by the empowerment of local disadvantaged groups through both employment and equity ownership'. The stated purpose of clause 1.1 (b) is therefore that it should be a vehicle for economic upliftment in underdeveloped areas of the Province. According to the Respondents, in this way, clause 1.1(b) directly contributes to the realization of the developmental aims which Cabinet adopted on 13 September 1995 (referred. In addition, though the regional distribution of casinos, as well as the limitation of the number of casinos in well-resourced areas such as the Cape Metropole, clause 1.1(b) limits competition between casino operators and limits access to the lucrative Cape Metropole. In this way, clause 1.1(b) also determines the size of the industry, collectively and in each of the regions, as well as the protected nature of the industry. Clauses 1.1(c) and (d), on the other hand, protected the economic interests of casino license operators through a ten-year exclusivity regime envisaged by section 44A of the WC Act. During its operation, the exclusivity regime effectively protected casino operators from regulatory changes that would amend the regional distribution of casinos put in place by clause 1.1(b). in this way, clauses 1.1(c) and (d) similarly have a direct impact on the implementation of the industry, as well as its nature.

[44] Regarding Tsogo Sun's averments to the effect that a policy determination made by the Executive Council cannot override, amend or be in conflict with the WC Act which conferred on the Board the power and discretion to grant applications, and determine conditions of licences, in sections 37 and 41(2) of the WC Act. The First and Second Respondents respond to this ground by stating that, first, Tsogo Sun's case is moot, given that all exclusivity determinations expired several years ago. Second, the regional distribution of casinos in the Western Cape and the exclusivity determinations applicable to them are not matters in respect of which the Board has the power to impose conditions. Third, the Board considered the clauses in dispute and supported their inclusion in the Policy. Finally, in this regard, and in any event, the WC Act expressly makes the exercise of the Board's discretion subject to the terms of the Policy.

[45] With regard to Tsogo Sun's allegation that the Provincial Cabinet usurped the power and discretion accorded to the Board by sections 37 and 41(2) of the WC Act to determine the conditions of license, and has thus impermissibly attempted to override, amend or act in conflict with the WC Act, the First and Second Respondent retort as follows:

45.1 Section 37 of the WC Act is entitled '*Conditions applicable to licenses'* sets out in subsections 1(a) to (o) an open list of conditions which the Board may impose. Two of these are relevant:

45.1.1 Section 37(1)(f) provides that the Board may impose conditions '*relating to the premises in or on which gambling activities take place including the development and utilization thereof;* and

45.1.2 Section 37(1)(l) provides that the Board may impose conditions '*relating to the duration of a license'.* Clauses 1.1(b) to (d) do not purport to deal with the duration of casino operator licenses. The casino operator licenses in issue are granted for a period of twelve months (determined by the Board), and renewed annually (by the Board). Instead, clauses 1.1(c) and (d) deal with the length of the exclusivity determination. That is not a matter reserved for the Board by section 37(1)(l).

45.1.3 As regards the interpretation of 37(1)(f), the First and Second Respondents aver that in the face of the statutory requirement in section 45(4) of the WC Act that a casino operator license must specify the premises to which the license attaches, section 37(f) cannot mean that it reserves for the Board a discretion whether or not to determine the location of the casino operation as part of the conditions applicable to the license. The regional distribution of casinos is accordingly not a matter reserved for the Board by section 37(1)(f), which consequently applies only to other types of licenses.

[46] As regards the third basis of Tsogo Sun's allegation that the provisions of the Policy are unlawful or ultra vires in that section 81 of the WC Act empowers the Provincial Minister to make Regulations, and the Executive Council has, by making a policy determination under section 2(4) purported to exercise the Provincial Minister's power under section 81, the Provincial Government responds by stating that Tsogo Sun's complaint places form over substance. According to it, at the time the Policy was adopted, the gambling portfolio fell under the then Premier, who introduced the Policy to the Provincial Cabinet and supported its adoption. The procedural safeguards which the WC Act imposes on the making of Regulations were adhered to. There therefore has been substantial compliance with the WC Act, according to the Provincial Government.

[47] It will be recalled that, Tsogo Sun also alleges that when Cabinet made the Policy, it purported to exercise a power granted to the Provincial Minister, the

Second Respondent. Section 81(1) gives the '*responsible Member'* the power to make Regulations in respect of:

(d) the maximum permissible number of licenses of any particular kind that may from time to time be granted in a particular area;

…

(f) the granting of exclusive rights to the holder of a casino operator license for any period and in respect of any area;

(g) any other matter that may be relevant to the establishment of casinos in the Province;

The First and Second Respondents aver that when the Policy was adopted, the Member of the Executive Council responsible for the administration of the WC Act was the then Premier. The Policy was introduced by the Premier into the Provincial Cabinet, and the resolution for its adoption was supported by the Premier (along with all the other members of the Cabinet). However, the Provincial Government accepts that section 81 of the WC Act imposes specific requirements on the making of Regulations that do not ordinarily attach to the making of policy determinations. These are the following:

47.1 the making of certain Regulations, require consultation with the Board; and;

47.2 Regulations with financial implications shall only be made with the concurrence of the Minister responsible for Finance and must also be published publication in the *Provincial Gazette* is for them to be valid. The First and Second Respondents further state that In the case of the Policy, each of these requirements has been substantially complied in the sense that there has been compliance with the purpose of each of them in that:

47.1.1 the Board was consulted and provided extensive comment on the Policy;

47.1.2 the Policy was adopted unanimously and accordingly supported by the Finance Minister Mr Meiring; and

47.1.3 as required by section 2(6) of the WC Act, the Policy was published in the *Provincial Gazette*, as appears from the extract attached to the founding affidavit.

[48] Insofar as Tsogo Sun's reliance on the *Akani* judgment pronouncement, to the effect that where the Provincial Act entrusts the minister with the responsibility of determining the maximum permissible number of licences of any particular kind that may be granted in a particular area, the cabinet cannot regulate the matter by means of a policy determination, the Provincial Government avers that that does not render

the Policy unlawful*, 'so long as there is substantial compliance with the statutory safeguards and requirements applicable to Regulations, as indeed there has been'*. Furthermore, the Provincial Cabinet had already approved the wholesale revision of the regulatory framework. This framework, so aver the First and Second Respondents, will ultimately replace large parts of the Policy, including the ones at issue in this application.

[49] The fourth basis advanced by Tsogo Sun for alleging that the Provisions of the Policy are unlawful is that it draws an irrational distinction in respect of the exclusivity zone for the Cape Metropole casino and other outlying casinos whose exclusivity must be determined by the Board. The Provincial Government avers that this point is moot. Even if that were not the case, so goes the contention, there were rational grounds for allowing the Board to manage the phased introduction of casinos in the outlying regions of the Western Cape and, in so doing, determine each of their exclusivity zones.

[50] The Provincial Government states that there is yet is another reason why Tsogo Sun's application must fail. It is that the WC Act does not currently permit the relocation of an existing casino operation from one location to another by means of an amendment of the conditions of the license. A fresh license, specifying the new premises; is required. Accordingly, Tsogo Sun misconstrues the legal impediment to the outcome it ultimately seeks, namely that the Board consider and determine an application for the relocation of one of the outlying casinos into the Cape Metropole. The First and Second Respondents state that outcome cannot be achieved by way of an application under section 41(2), which is what Tsogo Sun is asking court to direct. This, according to the First and Second Respondents' contention, is particularly so because the WC Act currently does not allow for the relocation of existing casinos at all. Consequently, Tsogo Sun cannot achieve the practical result it is seeking with this application, which renders the rest of it (i.e. the parts not directly related to section 41(2) of the WC Act) academic and hypothetical (in addition to their being moot and ill-founded

[51] It will be recalled that the relief sought by Tsogo Sun is that the court should order the Board to consider an application by either one of the applicants for amendment of their license under section 41(2) of the WC Act '*so as to permit the holder (of the license) to perform its licensed activities from the Cape Metropole'.*

The Provincial Government states that this implies that the Board has the power to amend the premises at which a casino is licenced to operate. According to the Provincial Government, that is not what section 41(2) does. It says that:

51.1`Section 41(1) prohibits the transfer of licenses from the holder of the license to any other person, subject to certain exceptions. It also provides that premises licences cannot be transferred from one premises to another;

51.2 A casino operator license is not a premises license as defined in the WC Act. It is an operator license as so defined. However, it is a license which is required by section 45(4) of the WC Act to specify the premises at which the licensed activities may take place. Not all operator licenses provided for the WC Act are constrained in this way:

51.3 Section 41(2), envisages an application for amendment of a license other than a premises license '*if there is a charge in … the place at which the holder of a license wishes to perform the activities authorized thereby which would require the conditions of the license to be amended'.* Section 41(2) accordingly only envisages an amendment of the conditions of license, including any which specify the premises at which the gambling operations are authorized to take place.

51.4 The casino operator licenses relevant to this matter themselves specify the location of the premises at which the respective casinos are licensed to operate on the face of the license. The location of the respective casinos is not a condition of the licenses. This is consistent with – indeed required by – section 45(4) of the WC Act. The reference to the addresses of the licensed premises in 'each of the Applicants' licenses, is a recordal of what the license itself stipulates, not a condition of the licenses.

51.5 For this reason, the relocation of either one of the Tsogo Sun applicant's casino operations cannot be achieved through an amendment of their license conditions under section 41(2).

[52] Turning to the grounds of review raised by Tsogo Sun, the Provincial Government avers that sections 2(4) and 2(5) of the WC Act together make the Board's powers to regulate the gambling industry subject to Cabinet's policy determinations relating to *'size, nature and implementation of the industry'*. It will be recalled that Tsogo Sun contends that the clauses in issue do not deal with matters that fall within the ambit of the policy determinations authorised by sections 2(4) the WC Act. The Provincial Government retorts by stating that what is meant by the

implementation of the gambling industry is more complex. It then embarks on the definition of the word 'implementation' thus: The Online Oxford English Dictionary defines '*implementation' as 'the process of putting a decision or plan into effect; execution;* similarly, the Online Cambridge Dictionary defines it as '*the act of putting a plan into action or of starting to use something'.* The Online Merriam-Webster defines it as '*the process of making something active or effective'.*

[53] Based on the aforegoing definition, Provncial Government contends that the Provincial Cabinet's power provided for in 2(4) is accordingly to determine the manner in which its plan for the gambling industry is executed, as well as to determine the nature and size of the gambling industry. Clause 1.1(b) provides that the regional distribution of casinos in the Western Cape is *'in order to stimulate and encourage development throughout the Province, inter alia by the empowerment of local disadvantaged groups through both employment and equity ownership'.* The stated purpose of clause 1.1 (b) is therefore that it should be a vehicle for economic upliftment in underdeveloped areas of the Province. In this way, so goes the contention, clause 1.1(b) directly contributes to the realisation of the developmental aims, which Cabinet had adopted on 13 September 1995. In addition, though the regional distribution of casinos, as well as the limitation of the number of casinos in well-resourced areas such as the Cape Metropole, clause 1.1(b) limits competition between casino operators and limits access to the lucrative Cape Metropole. In this way, the Provincial Government further contends, clause 1.1(b) also determines the size of the industry, collectively and in each of the regions, as well as the protected nature of the industry. Clauses 1.1(c) and (d), on the other hand, protected the economic interests of casino license operators through a ten-year exclusively regime envisaged by section 44A of the WC Act. The Provincial Government points out that during its operation, the exclusive regime effectively protected casino operators from regulatory changes that would amend the regional distribution of casinos put in place by clause 1.1(b). Therefore, surmises the Provincial Government, clauses 1.1(c) and (d) similarly had a direct impact on the implementation of the industry, as well as its nature.

[54] One of the grounds of review raised by Tsogo Sun is that in adopting the clauses in issue, the Provincial Cabinet usurped the power and discretion accorded to the Board by sections 37 and 41(2) of the WC Act to determine the conditions of license, and has thus impermissibly attempted to override, amend or act in conflict

with the WC Act. The Provincial Government avers that Section 37 of the WC Act entitled '*Conditions applicable to licenses'* sets out in subsections 1(a) to (o) an open list of conditions which the Board may impose. According to it, only two of these are relevant in the present circumstances. First, section 37(1)(f) provides that the Board may impose conditions '*relating to the premises in or on which gambling activities take place including the development and utilization thereof.* Second, section 37(1)(l) provides that the Board may impose conditions '*relating to the duration of a license'.*

[55] The interpretation accorded by the Provincial Government to 37(1)(f) is that in the face of the statutory requirement in section 45(4) of the WC Act, a casino operator license must specify the premises to which the license attaches, and section 37(f) cannot mean that it reserves for the Board a discretion whether or not to determine the location of the casino operation as part of the conditions applicable to the license. The regional distribution of casinos is accordingly not a matter reserved for the Board by section 37(1)(f), which consequently applies only to other types of licenses.

As regards section 37(1)(l) it states that Clauses 1.1(b) to (d) do not purport to deal with the duration of casino operator licenses. This, according to the Provincial Government is particularly so because the casino operator licenses in issue are granted for a period of twelve months (determined by the Board), and renewed annually (by the Board). Instead, clauses 1.1(c) and (d) deal with the length of the exclusivity determination. That is not a matter reserved for the Board by section 37(1)(l). Besides, so continues the contention, the casino operator licences in issue expired, accordingly, the matter is moot. It follows that the exclusivity determinations have been of no force or effect, and exclusivity fees have been neither imposed nor tendered. In any event, so states the Provincial Government the regional distribution of casinos in the Western Cape is currently constrained only by the following:

55.1 every casino operator license attaches to the premises specified in the license by virtue of section 45(4) of the WC Act;

55.2. the WC Act makes no provision for the amendment of the specified premises in a casino operator license; and

55.3. clause 1.1(b) of the Policy, read with sections 2(2) and 2(4) of the WC Act, limit the regional distribution of casinos in the Western Cape to one casino in each region (and consequently preclude the Board from granting a second casino operator license in the Cape Metropole).

[56] The Provincial Government says that corollary of the aforegoing is that any relief which is said to flow from an alleged conflict between the Board's power to impose conditions and clauses 1.1(c) and (d) of the Policy, is moot.

[57] Insofar as Tsogo Sun's contention that the exclusivity determination made by the Board in the conditions is inconsistent with section 44A which provides that *'the Board shall grant to such license holder exclusivity to operate a casino within an area and for a period as determined by the Board',* the Provincial Government avers that that contention must fail for the following reasons:

57.1 First, the regional distribution of casinos in the Western Cape is a different matter to the exclusivity determination envisaged in section 44A, and as earlier contended, the latter issue is moot;

57.2 Second, the Board supported and amended the proposed clauses 1.1(c) and (d) of the Policy when it was drafted; and

57.3 Third, by virtue of section 81 of the WC Act, again as earlier contended, section 2(4) of the WC Act, section 44A does not vest the Board with a discretion regarding the period or region of exclusivity but merely mandates it to implement the exclusivity determination made in regulation or the Policy.

[58] It is well to restate that Tsogo Sun also alleges that when Cabinet made the Policy, it purported to exercise a power granted to the Second Respondent by section 81 of the WC Act to make Regulations. To recap, 81(1) gives the '*responsible Member'* the power to make Regulations in respect of:

(d) the maximum permissible number of licenses of any particular kind that may from time to time be granted in a particular area;

…

(f) the granting of exclusive rights to the holder of a casino operator license for any period and in respect of any area;

(g) any other matter that may be relevant to the establishment of casinos in the Province;

The Provincial Government avers that contrary to what Tsogo Sun alleges, at the time that the Policy was adopted, the Member of the Executive Council responsible for the administration of the WC Act was the then Premier. It is the Premier who introduced the Policy to the Provincial Cabinet, and the resolution for its adoption was supported by the Premier and all the other members of the Cabinet. However, they concede that section 81 of the WC Act imposes specific requirements on the

making of Regulations that do not ordinarily attach to the making of policy determinations. They are the following:

58.1. the making of certain Regulations, require consultation with the Board; and

58.2 Regulations with financial implications shall only be made with the concurrence of the Minister responsible for Finance.

In addition, publication in the *Provincial Gazette* is a requirement for the valid making of Regulations.

[59] The Provincial Government states that in the case of the Policy in issue, each of these requirements has been substantially complied with (i.e. there has been compliance with the purpose of each of them) in that:

59.1. the Board was consulted and provided extensive comment on the Policy;

59.2 as explained above at para 24.2, the Policy was adopted unanimously and accordingly supported by the Finance Minister Mr Meiring; and

59.3. finally, as required by section 2(6) of the WC Act, the Policy was published in the *Provincial Gazette*, as appears from the extract attached to the founding affidavit**.**

[60] With regard to the cautionary note in the *Akani* judgment, to the effect that it is undesirable to introduce a third type of statutory instrument, i.e. the Policy, into the regulatory framework that governs gambling, the Provincial Government contends that this does not render the Policy unlawful, so long as there is substantial compliance with the statutory safeguards and requirements applicable to Regulations, as indeed there has been. Furthermore, the Provincial Cabinet has already approved the wholesale revision of the regulatory framework which IS in now in train. According to Provincial Government, this framework will ultimately replace large parts of the Policy, including the ones at issue in this application.

[61] Tsogo Sun alleges that the Policy irrationally distinguishes between Cape Metropole casino, whose exclusivity zone was determined in the Policy, and the other casinos, whose exclusivity zone was left for the Board to determine. The Provincial Government reiterates that any attack based on the exclusivity regime put in place by clauses 1.1 (c) and (d) of the Policy, read with section 44A of the WC Act, is moot for the reasons already given. Even if that was not the case, so they allege, there is a rational explanation as to why the exclusivity zone for the Cape Metropole Casino was determined in the Policy while the others were left for the Board to decide:

61.1 Casino gambling in the Western Cape was to be phased in, beginning with the best-resourced region and then proceeding to regions most in need of development. The Provincial Government explains that the last casino license, in respect of the Worcester casino, was only granted in May 2005, some seven years after the Policy had been approved. In those circumstances, it was reasonable to leave the determination of the exclusivity zone applicable to the other regions for the Board to decide at later stages, based on current information;

61.2. The Board had material input into the determination of the Cape Metropole's exclusivity zone as well.

[62] For the aforegoing reasons, the Provincial Government denies that there was any irrationality in distinguishing between the Cape Metropole region and the outlying regions. For all these reasons, the Provincial Government asks that the application be dismissed with costs.

The SISA respondents' answering affidavit

[63] The fifth and sixth respondents in an affidavit deposed to by Ms Annabele Thomas, the Group Manager: Sun International (South Africa) Limited ("SIML"), advance reasons why they oppose this application. SIML is the manager of SunWest, the fifth respondent. For ease of reference, the fifth and sixth respondents will be referred to, henceforth as the SISA respondents.

[64] The background to this application has already been set out, and it is largely uncontested, but in order to understand the full context of the SISA respondents' opposition, it is necessary to give the brief background alluded to by Ms Thomas in the founding affidavit. The SISA respondents affirm that in 2015, SISA sought a review of the decision by the Cabinet of the Provincial Government of the Western Cape to abolish future exclusivity in the gambling industry, on the recommendations of the Western Cape Gambling and Racing Board. It is common cause that Tsogo Sun too launched the present application during December 2015, seeking a declaratory order to the effect that there was nothing in the applicable legislation which prevented the Gambling and Racing Board from considering an application to amend the casino licences issued in the Western Cape so as to allow their relocation to cape Town. However, both applications were stayed by agreement between the parties, namely, SISA, Tsogo Sun and the Provincial Government of the Western

Cape. This was followed by proposals to the amendment of existing regulations, which according SISA, were aimed at abolishing casino licence exclusivity for specific relocation of outlying casinos in the Cape Metropole. It is for this reason that the SISA respondents are astounded by the applicant's revival of this application in the current proceedings. The SISA respondents, oppose this application for several reasons.

[65] With regard to Tsogo Sun's contention to the effect that the provisions of the Policy Determinations are *ultra vire*s to the extent that they conflict with the WC Act, the SISA respondents oppose each of the grounds raised.

[66] They contend that the impugned provisions of the Policy Determinations are *intra vires* section 2(4) of the Western Cape Act. The reasons advanced for the contention are the following:

66.1 Section 2(4) of the WC Act provide thats the main objective of the Board is to control gambling incidental activities 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."*

66.2 Section 2(4) makes it plain that the Board's power to control gambling is subject to two constraints. The first constraint is provided by the WC Act itself. The second constraint is provided by policy determinations made by the Executive Council in relation to the size, nature and implementation of the gambling industry.

66.3 Paragraph 1.1 (b) of the Policy Determinations provides that there will be five casino operator licences in the Western Cape – one in each of the five regions. This paragraph of the Policy Determinations relates to "the size, nature and implementation" of the gambling industry, since it determines how many casinos there will be in the Western Cape (i.e. five) and where they will be located (i.e. in the five different regions). According to the SISA respondents, it therefore falls within the ambit of 2(4) of the WC Act.

66.4 Regarding paragraph 1.1 (c) of the Policy Determinations, the SISA respondents aver that this paragraph relates to *"the size, nature and implementation"* of the gambling industry, since it determines that a casino will not face competition from another casino in the same region. Thus, so they contend, it falls within the ambit of section 2(4) of the WC Act.

66.5 Paragraph 1.1 (d) of the Policy Determinations provides that the exclusivity zone for the Cape Metropolitan will be 75 kilometres radius from the City Hall in

Cape Town. The SISA respondents maintain that this paragraph of the Policy Determinations relates to "the size, nature and implementation" of the gambling industry, since it determines exclusivity that will be enjoyed by the casino located in the most lucrative of the five regions. For this reason, it falls within ambit of section 2 (4) of the WC Act.

The SISA respondents further contend that the aforegoing analysis shows that the impugned provisions of the Policy Determinations are *intra vires*.

[67] I now turn to consider the SISA respondent's contention to the effect the Policy Determinations are not inconsistent with the WC Act.

[68] It will be recalled that Tsogo Sun contends that sections 37 and 41(2), WC Act confers on the Board the power and discretion to grant applications, and determine conditions of licences, and that power and discretion cannot be removed by the Policy Determinations such as in *casu*. Tsogo Sun in its founding affidavit lists sections 37, 41 (2) and 44 A as being inconsistent with the Policy Determinations. To recap, section 37 (1) of the WC Act, provides that the Board may impose conditions in respect of any licence issued under the Act. According to the SISA respondents, the Board's power to impose conditions in terms of section 37 (1) must be read subject to section 2(4). When it is read with section 2(4), it becomes clear that the Board's power to impose conditions is subject to the WC Act and any policy determinations of the Executive Council relating to the size, nature and implementation of the industry. The SISA respondents maintain that the list of conditions set out in in section 37 (1) paragraph (a) to (o) does not include conditions relating to exclusivity. Therefore, the impugned provisions of the Policy Determinations do not deal with the Board's power to impose conditions dealing with the matters listed in 37(1) (a) to (o).

[69] The SISA respondents reason that the Board's residual power to impose conditions in terms of section 37 (1) does not include the power to impose conditions relating to exclusivity, since exclusivity is regulated by section 44 A of the WC Act. Furthermore, so goes the contention, even if the court were to find that the impugned provisions of the Policy Determinations deprive the Board of a residual power to impose conditions relating to exclusivity in terms of section 37(1), there would be no inconsistency between the Policy Determinations and the WC Act since section 2(4) provides that the Board's power to impose conditions in terms of section 37 (1) is subject to the Policy Determinations. Put differently, section 2(4) provides that the

Board may not exercise a power that it might otherwise have exercised if the Executive Council has made a policy determination relating to that matter. In addition, since the inability of the Board to exercise such a power is contemplated by section 2(4) of the Act, the existence of a policy determination does not produce an outcome that is inconsistent with the Act.

[70] The SISA respondents further contend that there is no inconsistency between the Policy Determinations and the WC Act since section 2(4) provides in express terms that the Board's powers are "subject to" the Policy Determinations. According to this contention, if Tsogo Sun' complaint is that section 2(4) may not permissibly authorise the Executive Council to make a policy directive, depriving a Board of a power that it has under the WC Act, then they were required to challenge the legality of section 2(4). They have not done so. The SISA respondents aver that it therefore must be assumed that section 2 (4) lawfully empowers the Executive Council to make a policy determination depriving the Board of a power that it would otherwise have had in terms of the WC Act. They further emphasise that Tsogo Sun's failure to challenge the legality of section 2(4) is fatal to its case.

[71] Regarding section 41 (2) of the WC Act authorising the Board to amend a licence, the SISA respondents assert that the impugned provisions of the Policy Determinations deprive the Board of the power it would otherwise have had to amend a casino licence. According to the SISA respondents, there is however no inconsistency between the Policy Determinations and the WC Act since section 2(4) provides in express terms that the Board's power to amend a licence in terms of section 41 (2) is subject to Policy Determinations. Put differently, section 2 (4), properly interpreted, states that the Board may not exercise a power of amendment in terms of section 41(2) if such an amendment is inconsistent with a policy determination of the Executive Council. Accordingly, so contend the SISA respondents, if Tsogo Sun maintains that section 2(4) may not permissibly authorise the Executive Council to make a policy directive depriving the Board of a power that it has under the WC Act, then the applicants were required to challenge the legality of section 2 (4).

[72] The SISA respondents advance the same logic and reasoning as above with regard to powers of the Board to grant a licence holder exclusivity as provided for in section 44 A (1) of the WC Act. According to this assertion, the lack of inconsistency between the Policy Determinations and WC Act is apparent from the provisions of

section 1 (c) of the Policy Determinations which specifically provides that the required exclusivity fees are to be determined by the WC Act. They aver that because section 2(4) provides that the Board's powers are subject to the Policy Determination, there therefore is no inconsistency with the WC Act.

[73] Turning now to Tsogo Sun's contention that the Executive Council has usurped the powers of the Minister, I must recap the provisions of section 81. Section 81 (1) of the WC Act provides that the Minister may make regulations on various matters, including:

73.1 the maximum permissible number of licences of any particular kind that may from time to time be granted in a particular area; and

73.2 the granting of exclusive rights to the holder of a casino operator for any period and in respect of any area.

[74] The SISA respondents contend that the legislature through section 81(1), has empowered the Minister to deal with casino operating licences by way of Regulations. But the legislature has also authorised the Executive Council to deal with the same matters by way of policy determinations relating to "*the size, nature and implementation of the industry*." Stated in another way, the legislature has authorised both the Minister and the Executive Council to deal with the same matters- the former by way of Regulations, and the latter by way of policy determinations. The SISA respondents further allege that in the present matter, the Minister has not made any regulations dealing with exclusivity. They further state that if Tsogo Sun's case is that the legislature may not permissibly authorise the Executive Council and the Minister to deal with the same topic, then the applicants ought to have challenged the legality of section 2(4). Having failed to do so, so goes the contention, it must be accepted that section 2(4) lawfully empowers the Executive Council to make a policy determination dealing with the matters that may be regulated by the Minister in terms of section 81.

[75] One of the grounds of review raised by Tsogo Sun is that paragraph 1 (d) of the Policy Determinations which deals with size of the exclusivity zone for the Cape Town Metropole casino while leaving the Board at large to determine the size of exclusivity zone for other regions, draws an arbitrary and irrational distinction between the casino in the Cape Town metropole casino and outlying casinos. The SISA respondents allege that there is nothing irrational or arbitrary with the Policy Determinations because they do not define the borders of the Cape Metropole region

as they merely provide that the exclusivity zone will be a 75 km radius measured from the City Hall of Cape Town. According to this contention, the singling of the Cape Town Metropole region in the Policy Determinations is rationally connected to a legitimate government purpose in that the intention of the Executive Council is to develop a world class casino that would attract visitors to Cape Town.

[76] Primarily, for all the aforegoing reasons, the SISA respondents ask that Tsogo Sun's application be dismissed. Insofar as Tsogo Sun's seeking an order setting aside the impugned provisions of the Policy Determinations and an order declaring that the Board is competent to consider an application under section 41(2) of the WC Act for a casino operator licence to be relocated to the Cape Town Metropole and an order directing the Board to consider such an application, the SISA respondents submit that if Tsogo Sun failed to have the impugned Policy Determinations set aside, they obviously must fail in their bid to have the Board declared competent to consider an application under section 41 (2) of the WC Act for a casino operator's licence to be relocated to the Cape Metropole region.

[77] The SISA respondents concede that a casino operator licence is not a premises licence as alleged by the Board. This according to their averments is because section 1 of the WC Act defines a "premises licence" as any licence referred to in section 27 (c), (dA) and (kA), and therefore, a casino operator's licence does fall within the ambit of these sections. In short, they agree with Tsogo Sun that a casino operator's licence is not a premises licence.

[78] According to the SISA respondents, this application should be dismissed as Tsogo Sun has not made out a proper case for the relief sought. However, should the court find the Policy Determinations to be invalid, then the remedy that is just and equitable is the suspension of the declaration of invalidity in order to allow the Executive Council to correct the defect, alternatively allow for the finalisation and implementation of the amendment legislation, in line with section 172 (1)) (b) of the Constitution.

The Provincial Governments' supplementary answering affidavit

[79] The Provincial Government filed an application seeking to have the supplementary answering affidavit deposed to by Mr David Savage to be admitted in these proceedings. In addition, they sought that the hearing of this matter be postponed *sine die* and that there be no order as to costs, alternatively, that all questions of costs stand over for later determination. None of the parties objected to

the filing of the affidavit, and the application was granted. After the matter was heard on 26 May 2020, I issued an order dismissing the application for postponement and undertook to furnish reasons for the order in the main judgment.

[80] I first summarise the contents of the supplementary answering affidavit.

[81] The factual background alluded to earlier in this judgment reveals that on 13 February 2019, the Provincial Cabinet approved the introduction of the Nineteenth Amendment Bill and on 21 February 2019, to the Provincial Parliament.

[82] In the supplementary answering affidavit, the Provincial Government outlines the events that took place after it had filed its answering affidavit on 29 April 2019, and explains that the relevant officials had been working in parallel on three draft Bills, namely:

82.1 the reduced Draft Nineteenth Amendment Bill, which deals with matters not directly relevant to the issues raised for decision in this application. The Provincial Government states that on 2 May 2019, the aforementioned Bill was published for comment under Provincial Notice 54 /2019 in Provincial Gazette 8088. As the legislative process in relation to that Bill was automatically terminated by operation of law, upon dissolution of the Provincial Parliament to allow for national and provincial general elections on 8 May 2019, the Bill had to be re-introduced to the Provincial Parliament. This was done on 30 January 2020. However, the publication of the reduced Nineteenth Amendment Bill by the Provincial Parliament for comment was delayed due to the Covid-19 pandemic, thus it occurred on 24 April 2020; and

82.2 the Draft WC Act Twentieth Amendment Bill and the Draft WC Act Twenty-First Amendment Bill, which, together, will provide the framework for the future regulation of casinos in the Western Cape and are relevant to the issues raised for decision in this application.

[83] According to the averments of the Provincial Government, in the months following the 8 My 2019 general elections, the Provincial treasury and its advisers considered a range of complex, inter-related issues arising from or relevant to the extensive comments received on the Draft Nineteenth Amendment Bill. These were the following:

83.1 the argument by Sun International against a new casino in the Table Bay region in the Cape Metropole, including that it would be likely to cannibalise the customer base of the sole existing casino in the Cape Metropole (i.e. Sun International GrandWest casino, situate in Goodwood;

83.2 the identification of the Heldeberg area in the Cape Metropole as an area which is underserviced by casino gambling infrastructure and has limited spatial overlap with the areas from which the Grand West casino draws most of its customers;

83.3 the anticipated future GGR by the casinos in the Western Cape;

83.4 the structure of the provincial gambling tax applicable to the casinos; and

83.5 the implications for the Provincial Government's total gambling tax income of a shift in gambling from the GrandWest casino to any new casino(s) which may be permitted in the Cape Metropole.

[84] The Provincial Government further divulges that on 4 December 2019, it approved the preparation of new draft legislation, which, amongst other things, would permit the Board to consider and approve the relocation of one of the existing casinos into the Helderberg area, and if the approval is granted would provide for a reduced area of exclusivity for the GrandWest casino, and would further deal with financial, taxation and other related matters. According to this explanation, to give effect to that decision, the following were prepared:

84.1 the Draft Twentieth Amendment Bill as well as the Draft Twenty-First Amendment Bill Amendment Bill;

84.2 the necessary draft formal memoranda describing the objects and content of the two Bills;

84.3 draft amendment to the Western Cape Gambling and racing Regulations (Fees and Costs), 2016;

84.4 draft amendments to the Western Cape Gambling and Racing Regulations, 1996; and

84.5 the draft notice of formally withdrawing the Policy.

[85] According to the Provincial Government, on 23 March 2020, the Board was invited to provide written comments on the then draft Twentieth Amendment Bill by 3 April 2020, and which comments were considered and incorporated in what is now the Draft Twentieth Amendment Bill. On 6 May 2020, the Provincial Cabinet considered and approved the publication for comment of the Draft Twentieth and Twenty-First Amendment Bills. On 8 May 2020, the Draft Twentieth and Twenty-First Amendment Bills, along with their explanatory memoranda and accompanying draft amendments regulations were published for comment in *Western Cape Provincial Gazette Extraordinary* No.8235.

[86] The Provincial Government avers that the Draft Twentieth Amendment Bill, if enacted, will empower the Board to consider, and if it is satisfied that the criteria prescribed in the new legislation are met, approve applications for the relocation of any licensed casinos in the Province, including applications for the relocation of one of them into the part of the Helderberg area, which is more than 75km from the current location of the GrandWest casino. Furthermore, the new legislation will also allow the Board, when it approves the relocation of any casino, to impose conditions. Such conditions may include requiring the casino operator to continue complying with the conditions of its existing casino operator's licence which requires contributions to black economic empowerment and corporate social investment in the area from which the casino is to be relocated, for a period agreed between the applicant and the relevant beneficiaries, failing which, a period of two years, calculated from date on which the relocated casino commences operations. In addition, it will create:

86.1 a 20-year exclusivity areas for all casinos in the Province and require payment of annual exclusivity taxes by operators of those casinos, the rate of the tax (i.e. either 0.25% or 2.55%) of their taxable revenue) being determined by their annual GGR in the previous year (i.e. up to R300 million and above).

86.2 in the event of a relocation to the Helderberg area, a 25 km radius for the determination of GrandWest's 20-year exclusivity; and

86.3 a new exclusivity area in the Helderberg area region of the City of Cape Town Metropole, which is outside the 25 km radius of GrandWest's exclusivity area.

[87] According to the Provincial Government, the new legislation will create a new once-off economic opportunity tax of R177.5 million in 2020 terms to be paid by the successful applicant, for permission to relocate to a casino to the Helderberg area.

The postponement application

[88] I have already indicated that the Provincial Government on 8 May 2020, applied for the postponement of this matte*r sine die* with no order as to costs. After hearing the postponement application, I issued the following order on 1 June 2021:

"1. The first and second respondent's application for postponement is refused.

2. Costs are reserved for later determination.

3. Reasons for the order will be given in the judgment on the merits."

[89] These are the reasons for the order.

[90] The main basis for the postponement application as discernible from the Provincial Government's affidavit is that (a) the new legislation, if enacted, will permit any of the casinos in the Province (i.e. any of the applicants and the fourth and fifth Respondents) to apply to relocate their casinos to any area within the Cape Metropole (i.e. the Helderberg), (b) will fix the criteria which any application for relocation must meet, (c) will empower the Board to grant one such application, and (d) will deal with the fiscal and other consequences of the granting of any such application (including the area of exclusivity of the new casino). Furthermore, upon the commencement of the Western Cape Twentieth Gambling and Racing Amendment Act, 2020, the provisions of the Policy that relates to casinos and which are at issue in this litigation, will be withdrawn. Accordingly, the new legislation, once enacted, promulgated and brought into effect, will render moot the relief sought in these proceedings.

[91] It is further contended on behalf of the Provincial Government that a postponement *sine die* will be in the interests of justice for the following reasons:

91.1 the public comment of the legislative process which, if successful, will result in amendments to the Act that will render moot the relief sought in these proceedings;

91.2 the principles of the separation of powers and of participatory democracy in our Constitution, which together require that the Provincial Parliament, following a proper process of public consultation, be given the opportunity to make legislation regulating the complex issue of the relocation of any of the outlying casinos into the Cape Metropole and the consequences thereof;

91.3 the limitations on the ordinary functioning of this Court during the current Alert Level in the national state of disaster, which, require that its judicial and administrative resources be applied to matters, unlike the present, which must be heard and determined during the national state of disaster; and

91.4 The Provincial Government further avers that none of the parties will be prejudiced if the matter is postponed *sine die* because the parties agreed that should the court find the Policy Determinations to be invalid and of no force and effect, such an order should be suspended for a year give the Provincial Government space to make the necessary legislative changes.

Tsogo Sun's response to the postponement application

[92] Tsogo Sun, in an affidavit deposed to by its attorney, Ms Hester Gestruida Brand do not oppose the admission of the supplementary affidavit of David Savage.

However, they oppose the postponement application. The basis for the opposition is mainly the Provincial Government's contention that new draft bills, which were published for comment on 8 May 2020, will, if enacted, render the present proceedings moot. According to Tsogo Sun, for the last eight years, various drafts of bills have been published to cater for the relocation of an outlying casino and none ever came to fruition. Furthermore, the draft Bills have not been formally tabled before the Provincial Legislature and have thus far been tabled for public comment and there is no guarantee that they will be enacted at all. To compound matters, so contends Tsogo Sun, after the participation process, the Legislature must deliberate on the Bills, and there is no certainty that they will be enacted in their present form.

[93] As to the second ground, namely, that based on the principles of the separation of powers and of participatory democracy, the Provincial Parliament must be given an opportunity to make legislation regulating the issue of an outlying casino into the Cape Metropole, Tsogo Sun retorts by stating that the relief sought in the present application will not preclude the Provincial Parliament from making legislation to regulate the pertinent issue for two reasons:

93.1 In its answering affidavit, the Provincial Government asks that if the court is minded to declare any part of the Policy invalid, such order be suspended for a year so as to permit the process of putting in place a new regulatory framework. The SISA respondents make an identical proposal.

93.2 Notwithstanding the fact that the order sought by Tsogo Sun would not leave a lacuna in the statutory regime, Tsogo Sun does not object to the suspension of the order for a year as sought by all the respondents.

Tsogo Sun avers that since all the parties agree that if the main application succeeds, the Provincial Legislature would be given a year to deal with this issue, there therefore is no prejudice to the separation of powers or participatory democracy arising from the relief sought.

[94] With regard to the allegation that the matter is not sufficiently pressing to be heard during the national lockdown, Tsogo Sun avers that this argument is in direct contrast to the directives of the Chief Justice and the Judge President of this Court. Tsogo Sun emphasises that in paragraphs 13 and 14 of the directives of the Chief Justice of 6 May 2020, the Chief Justice does not suggest that opposed matters should not proceed unless it is necessary for them to be determined during the state of national disaster. Instead, parties are urged to endeavour to reach agreement

regarding dispensing with oral argument and, if they do not agree, the matter should be heard by way of video-conferencing. Likewise, so continues the contention, the Judge President's directives were to the effect that Judicial Officers were to consider options to proceed with cases with minimal contact between themselves, court personnel, legal practitioners and litigants and that virtual hearings where possible were to be preferred. According Tsogo Sun, in the present matter, the parties had already agreed that a hearing via Microsoft Teams would be appropriate.

[95] As to the Provincial Government's averment to the effect that none of the parties will be prejudiced if the matter is postponed *sine die*, Tsogo Sun contends that Tsogo Holdings as far back as 11 November 2015, wrote to the Board expressing the intention of one of the applicants to submit an application to the CEO of the Board for the amendment of the casino operator licences so as to permit the performance of the licensed activities from premises in the Cape Metropole. This remains its intention, and to this end, it requires a declaratory order from the court which will allow such an application. It would be prejudicial to Tsogo Sun to allow an invalid Policy to stand. This is especially so because if the legislative process comes to naught in a year's time, the matter would have to be re-renrolled and the respondents would still seek the suspension of the declaration of invalidity for year, to the prejudice of the applicants.

The Provincial Government's reply in the postponement application

[96] The Provincial Government ripostes to Tsogo Sun's opposition to the postponement application by stating the latter's summary of the events leading to the recent publication of the draft Nineteenth and Twentieth Amendment Bills is incomplete and may create an impression that the former was lax and inactive in pursuing the legislative amendments. They then provide a detailed outline of steps taken in an attempt to bring the legislative amendments to fruition. I do not propose to outline those steps as they have been fully detailed in the Provincial Government's answering affidavit. Suffice to state that the Provincial Government emphasises that the regulation of gambling in the Western Cape is a complex undertaking as it must take into account a range of interests, some of which are in conflict with one another, including the following:

96.1 The public interest in an ensuring an optimal balance of potential socio-economic costs and benefit, including for example, opportunities (which includes job creation, tourism stimulus and infrastructure development), on the one hand and

undue stimulation of potentially socially detrimental behaviour. (including addictive gambling) on the other hand;

96.2 The Provincial Government's interest in ensuring in ensuring optimal revenue collection in the form of a gambling tax levied on casinos' Gross Gambling Revenue as well as own other potential levies, which constitute a very significant source of own income for the Provincial Government.;

96.3 The financial interest of Sun International in maintaining an area of exclusivity around its Grand West Casino;

96.4 The financial interest of Tsogo Sun in being able to compete with Sun International for the opportunity to relocate an outlying casino into part of the Cape Metropole outside the Grand West Casino's new area of exclusivity.

[97] The Provincial Government counters Tsogo Sun' assertion that for the last eight years there have been draft Bills to address the issue of exclusivity none of which came to fruition, by stating the introduction of a new legislative regime to regulate the operation of casinos in the Western Cape must take all of the aforementioned interests into account. It further states that putting such a regime in place is a complex exercise. Besides, so alleges the Provincial Government, significant progress has already been achieved because on 6 May 2020, the Provincial Cabinet considered and approved the publication for comment of the draft Twentieth and Twenty-First Amendment Bills. Likewise, on 8 May 2020, the draft Twentieth and Twenty-First Amendment Bills, along with their explanatory memoranda and various draft regulations, were published for comment. In addition, the different actions brought by the casino operator licensees and their changing stances contributed to the delay in having the draft Bills made law.

[98] According to the Provincial Government, no prejudice would be suffered by Tsogo Sun if the postponement was granted because it (Tsogo Sun), accepted that the effect of the suspension of the declaration of validity would be that the mandatory order that the Board consider and determine the application for relocation they are seeking would be deferred pending the outcome of the amendment of the regulatory framework. This means that during the one-year period of suspension Tsogo Sun has agreed to, the Board will not be obliged by an order the court may make, to accept and consider an application by Tsogo Sun for the relocation of one of its casinos into the Cape Metropole. It follows, so continues the contention, that a hearing of the matter would achieve very little, whereas a postponement *sine die*

would permit any of the parties to enrol the matter for a hearing if the current process for the regulatory framework started by the publication of the draft Twentieth and Twenty-First Amendment Bills came to nothing.

[99] The Provincial Government further reiterates that the determination of this matter ought not to be a priority given that Tsogo Sun accepts that justice and equity require that any relief granted may be suspended for a period of a year, This is particularly so in the light of the fact that the underlying problem which Tsogo Sun raises is being addressed by a legislative process which is underway and that there are other pressing matters which should be determined during the national state of disaster.

The position of the SISA respondents

[100] The SISA respondents do not oppose the postponement application and advance the following reasons for supporting it:

100.1 Expending judicial and party resources on the determination of an application that has been overtaken by these events and to consider relief that is likely to be moot is undesirable;

100.2 No prejudice arises to any party with a postponement *sine die* since the matter can always be enrolled at a later stage once the progress of the new legislative programme can be ascertained and evaluated.

100.3 Inconvenience and potential confusion will inevitably arise if this application proceeds while a comprehensive overhaul of the provincial approach to relocation of casinos is undertaken.

100.4 Determining the application now and granting the relief sought places the Provincial Government of the Western Cape and the Western Cape Gambling and Racing Board in an untenable position- it would be required to *"consider and decide"* an application for relocation in terms of stale and outdated policy considerations, and in terms of legislative and regulatory framework that has an imminent expiry date. According to the SISA respondents, the Board is likely to refuse the application given the changes on the horizon, thereby retaining the applicants '*status quo* position; and

105.5 In the sum, the determination of this application is unlikely to alter the current status and position of the parties.

[101] Accordingly, so contend the SISA respondents, this application should be postponed *sine die*, so as to enable the Provincial Government to advance through to the public comment and final promulgation stages.

[102] I now turn to evaluate the merits of this application.

Evaluation: postponement application

[103] The principles applicable to an application for the postponement of a matter have been restated in *Lekolwane v Minister of Justice* as follows:

"[17] The postponement of a matter set down for hearing on a particular date cannot be claimed as a right. An applicant for a postponement seeks an indulgence from the court. A postponement will not be granted, unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must ordinarily show that there is good cause for the postponement. Whether a postponement will be granted is therefore in the discretion of the court. In exercising that discretion, this Court takes into account a number of factors, including (but not limited to) whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties, whether the application is opposed and the broader public interest. All these factors, to the extent appropriate, together with the prospects of success on the merits of the matter, will be weighed by the court to determine whether it is in the interests of justice to grant the application." (footnotes omitted)

[104] Against this backdrop, I assess whether it is in the interest of justice to grant the postponement. In so doing, I commence with the Provincial Government's contention that the present matter ought not to be entertained during the prevailing state of national lockdown. It must be stated from the outset that the tenor of the of the directives of the Chief Justice of 6 May 2020, is not that matters should not proceed, but that contact between the parties, the court and the litigants should minimised to curb the spread of the COVID-19 virus. It is precisely for this reason that the Chief Justice in the directives recommended virtual hearings, where possible. In the matter at hand, the parties had already decided prior to the launching of the postponement application that the proceedings would the virtual, thereby complying with the directives of 6 May 2020. In my judgment, the national lockdown could as such not be the basis on which an application for a postponement is justified.

[105] Regarding the Provincial Government's argument that the postponement ought to be granted because the new draft bills were published for comment on 8 May 2020, will, if enacted, render the present proceedings moot. This contention disregards the fact that the main application raises serious issues of legality or

illegality of the Policy Determinations. Such a determination is inextricably linked to the ends of justice and good governance. For this reason, the fact that the issues will at some stage become moot can hardly meet the threshold of interests of justice.

[106] Relying on the judgment in *Mazibuko v Sisulu and Another* 2013 (6) SA 249 (CC), counsel for Tsogo Sun contended that the application for postponement is not sustainable in law. This contention touches on two issues, namely, the separation of powers and the fact that strides have already been made by the Provincial Government towards enacting legislation which deals with the exclusivity regime. Counsel for the Provincial Government submitted that Tsogo Sun's reliance on *Mazibuko* is misplaced as the said case *"dealt with an application for direct access to the Constitutional Court, which, if not granted, would have left the applicant without a remedy. It speaks to the question whether the applicant was entitled to have its case considered at all. It is not analogous to an application for a postponement like the present."*

It indeed is so that *Mazibuko* dealt with an application for direct access to the Constitutional Court, however, the basis for the application has a direct bearing on the principles I have already referred to above. At paragraph 47, when summarising the question of direct access, the court said the following:

"[47] The Speaker urged us to dismiss the direct access application because the applicant should have exhausted the internal remedies by approaching the assembly to resolve the deadlock in the programme committee before rushing to court. He also argued that there was no need for this court to make an order even if it found for the applicant on the lacuna on the rules because the assembly was reforming its rules to correct the defect. He in effect argued that the exercise of jurisdiction would offend the separation-of-powers doctrine in light of the aforegoing negotiations within the assembly."

As can be discerned from the aforegoing, the pertinent issues raised in *Mazibuko* are not dissimilar to the issues raised in *casu*, it therefore is pivotal to consider the reasoning of the Court in dealing with them. In holding that the direct access application must, in all the circumstances succeed, the Court said the following:

"69.The lack of consensus on the draft Rules is not surprising. Given their respective submissions in this Court, there are fundamental differences between the applicant and Chief Whip on whether the Rules are constitutionally deficient and therefore what the Rules should provide for in relation to a motion of no confidence

in the President. If this dispute is not resolved by this Court, the differences are likely to persist, to the detriment of a member of the Assembly who wishes to exercise the right envisaged in section 102(2).

"70 I am therefore unable to agree with the contention of the Speaker that because the parties are in the process of remedying the alleged lacuna in the Rules the direct access application should be dismissed. First, the differences between the applicant and Chief Whip make it most improbable that the lacuna will be corrected. Second, once we have found, as we have, that the Rules regulating the business of the Programme Committee are unconstitutional, we must so declare. An order of constitutional invalidity is not discretionary. Once the Court has concluded that any law or conduct is inconsistent with the Constitution, it must declare it invalid.

71 I also do not agree with the submission that a declaration of invalidity would trench upon the separation of powers doctrine. An order of constitutional invalidity would not be invasive because it is declaratory in kind. The Court would not be formulating Rules for the Assembly. The Court would be properly requiring the Assembly to remedy the constitutional defect that threatens the right of members of the Assembly." (footnotes omitted)

[107] The above conclusion makes it plain that although the *Mazibuko* matter involved the issue of direct access, it is analogous to the matter at hand. This I say because the main basis for the application for the postponement in the present matter, is that legislation to regulate the relocation of outlying casinos, is according to the Provincial Government at an advanced stage and it is therefore premature for this court to pronounce on the invalidity of the Policy Determinations created to deal with same. Furthermore, such a course would hinge on the separation of powers. I have earlier on expressed that this court is obliged to determine the issue of the legality or illegality of the Policy Determinations assailed by Tsogo Sun. It cannot shun this responsibility simply because there is legislation in the pipeline dealing with same. From these papers, it is clear that the legislation regulating the relocation of outlying casinos, has indeed been in the pipeline for several years. Furthermore, the suspension of the order gives the power back to the Provincial Government to fast track the enactment of the relevant legislation. As set out in *Mazibuko,* an order such as the one proposed in the present matter yields to, rather than encroach upon the separation of powers.

[108] Counsel for Tsogo Sun in claiming that the postponement application was not sustainable in law, also relied on *Ambabhungane Centre of Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others* 2020 (1) SA 90 (T) where the court had to decide whether to grant the relief sought, namely a (suspended) declaration of invalidity of the impugned legislation, or whether to dismiss the application. This issue overlaps with the prematurity argument, as well as the preceding separation of powers contention.

[109] Counsel for the Provincial Government contended that seeing that in the present matter, Tsogo Sun confirms its agreement that any declaration of invalidity the Court is moved to make, should be suspended by one year to allow the Provincial Government to finalise its legislation, it accepts that the effect of that suspension will be that the mandatory order it is seeking in para 4 of its notice of motion (namely that the Board consider and determine any application for relocation which its subsidiaries – the applicants – may bring under section 41(2) of the WC Act) would be deferred pending the outcome of the amendment to the regulatory framework. According to the Provincial Government, on this crucial respect the present matter is entirely distinguishable from *Amabhungane*, where the applicant sought orders with immediate effect including interim relief applicable during the suspension of invalidity. Furthermore, so goes the argument, in this way, the relief sought in *Amabhungane* had real consequences whilst by contrast, a hearing of the merits of Tsogo Sun's application at this juncture would achieve very little. For the reasons appearing hereunder, it is to my mind clear that the *Amabhungane* judgment is very much analogous to the facts of this matter.

[110] The *Amabhungane* case involved a challenge to the constitutionality of several provisions of the Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002 (RICA). The issues for determination therein were three-fold, viz, that (a) the application was premature –this was premised on the fact that the State was already working on adapting and revising RICA, (b) the relief sought violated the separation of powers between the judicial arm and other legislative and executive arms of the state – the State alleged that a determination by the court of legislation with which the State was allegedly engaged in, would constitute judicial overreach, and (c) the application raised issues in the abstract and for that reason ought not to be entertained – the issues were allegedly in the abstract in that there was no factual basis laid for the attack on RICA.

[111] Relying on *Mazibuko, supra*, the court in *Amabhungane* dismissed each of the points raised by the State and granted the relief sought, to wit, a declaration of invalidity of the provisions of RICA but suspended it to allow Parliament the space to cure the defects identified. The following paragraphs from the *Amabhungane* judgment are apposite:

"Is the application premature?

[7] The respondents' is straightforward. The state is at work adapting RICA; leave it to get on with task.

[8] First, it must be asked what the State is actually doing? In the answer given to Parliament by the Deputy Minister of Justice in 2017, vague remarks were made about consideration being given to amendments to RICA, which work would take about two years. That task was apparently not thought to be urgent as the distraction of the 2019 general election was alluded to as a reason why progress could not be quicker. The hearing took place a month after that event. When prompted by me for an up to date account of progress, an affidavit by Robbertze, a senior state law adviser, was produced during the hearing. He is the lead person in the revision of RICA. He states that research of a comparative nature was carried out. Apparently, his team's recommendation is going to be that a new statute should replace RICA rather than a series of amendments; by implication this must mean a significantly novel approach to the subject matter in RICA. A first draft, it is said, "could" be finalised by 31 August 2019 to be followed by extensive public consultation. Save as mentioned, the affidavit is scrupulously bereft of any hint of the substance of such proposed legislation.

[9] It was said that the Deputy Minister's parliamentary answers in 2017 addressed the issues and the terrain of at least some of the criticisms ventilated in the application and, so it is argued, foreshadow consideration being given to the themes covered in the applicant's affidavits. Hence the exhortation to the court not to duplicate the work.

[10] The counter to this line of argument is that the State's efforts, in this regard, do not matter to the application. No sound reason exists, it is argued, not to prosecute the application, even if the August 2019 deadline could be taken seriously. Indeed, it is argued that the ventilation of the issues raised in the application can do no less than to inform the legislative process and contribute to the open and transparent debate over the value choices inherent in this type of law-making.

[11] In this regard, the authority in *Mazibuko v Sisulu* **2013 (6) SA 249** (CC) at [70] is invoked to argue that the purported imminence of reforming legislation could be no bar to the litigation. In that case the Rules of Parliament were at issue. The Constitutional Court held that the courts have no discretion to withhold a declaration of unconstitutionality if presented with such a proven fact. The riposte to the invocation of this decision was that it is distinguishable on the facts. So it is. However, the point of importance is not similarity of the factual circumstances; rather, the point is that the Constitutional Court held that there can be no merit in delaying a challenge to the inconsistency of a statute with constitutional norms on the ground that a repair job on the statute is work-in-progress.

[12] Moreover, given the spirited resistance to almost every contention advanced by the applicant in criticising RICA, there can be no expectation that the reforming legislation, which we are told is being contemplated at this time, is in the least benign towards the criticisms advanced and solutions offered to address the criticisms.

[13] In my view, the argument of prematurity fails. If the provisions of RICA fall foul of the Constitutional norms, this court must pronounce on such issues, not prevaricate."

[112] In the light of the aforegoing remarks, it is difficult to fathom the Provincial Government's contention that the present matter is entirely distinguishable from *Amabhungane*, in that in the latter the applicant sought orders with immediate effect including interim relief applicable during the suspension of invalidity, whereas a hearing of the merits of Tsogo Sun's application on the merits at this juncture would achieve very little. This I say because the order acquiesced to by Tsogo Sun is nothing out of the ordinary when regard is had to the nature of the relief sought in the notice of motion. It is well to recall that in the *Amabhungane* matter, the court tailored the relief in line with each of the five challenges, and given that declaration of constitutional invalidity in respect of several sections of RICA, the remedy had to make provision to cure the defects, pending the enactment of legislation, and as such invoked the reading in of additional sections. The remedy sought in *casu* is straightforward and is incomparable to the approach adopted by the Sutherland J, in RICA. In my view, the distinction drawn by the Provincial Government between the orders granted in the *Amabhungane* judgment and the order sought in the present proceedings is artificial and loses sight of the actual reasons behind the orders in *Amabhungane*. Furthermore, the fact that Tsogo Sun agreed to the suspension of the determination of its applicant's application to the Board for the relocation of an

outlying casino for a year does not diminish the substance of the relief it sought in the notice of motion, and neither does it justify the postponement sought by the Provincial Government. Instead, the approach adopted by Tsogo Sun is an inevitable corollary of recognising the hallowed principle of separation of powers.

[113] It remains to be said that the Provincial Government emphasised the advanced stage of the Draft Twentieth and Twenty-First Amendment Bills which were published for comment in the Western Cape Provincial Gazette on 8 May 2020, and the powers that they give to the Board to consider and determine relocation of outlying casinos. Whereas the steps taken by the Provincial Government appear to be at an advanced stage, they do not, in my view warrant the postponement of the determination of the Policy Determinations adopted by the Executive Council. The Constitutional Court in *Mazibuko* made it clear that there can be no merit in delaying a challenge to the inconsistency of a statute with constitutional norms on the ground that a repair job on the statute is work-in-progress. To this end, I align myself with remarks made by the court in *Amabhungane*. Applying the same reasoning in respect of the impugned policy decisions, it follows that the basis for the postponement sought by the Provincial Government is legally unsustainable.

[114] With regard to the contentions made by the SISA respondents in support of the Provincial Government's application for postponement of these proceedings, for the reasons I have already given in this judgment, they, in my view are equally unmeritorious. In summary, I have held that the Provincial Government's application for postponement is based on shaky ground and cannot be said to be in the interests of justice. It follows that it must be dismissed. I find no reason why the costs should not follow the result, and as such, the Provincial Government (the first and second respondents) must pay costs jointly and severally.

Condonation

[115] In the notice of motion, Tsogo Sun sought an order granting the applicants condonation for having failed to institute an application for the relief sought in accordance with the timeframes stipulated in section 7 of the Promotion of Administrative Justice Act No.3 of 2000 (PAJA), alternatively, within a reasonable time period, and granting the Applicants leave to institute the present proceedings. As I have earlier pointed out, it is common cause that the present application was brought 16 years after the adoption of the impugned Policy. According to Tsogo Sun, the need to bring the application arose only after the Board had made a

pronouncement that it was not empowered to consider the relocation of outlying casinos to the Cape Metropole.

[116] It is trite that condonation is an exercise of a true discretion by a court, guided principally by the interests of justice. In *Corruption Watch NPC and others v President of the Republic of South Africa* 2018 (1)0 BCLR 1179 (CC) at paragraph [64], citing *Brummer v Gorfil Brothers Investments (Pty) Ltd* 2000 (2) SA 387 CC held that:

". . . it is in the interests of justice that are paramount in considering whether to grant condonation. On how the interests of justice are determined it held:

'The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and reasonableness of the applicant's explanation for the delay or defect."

[117] What must first be determined is whether PAJA applies to this matter. Section 7(1) of PAJA provides that any proceedings for judicial review must be instituted without unreasonable delay and not more than 180 days after the date on which an applicant was informed of the administrative action, became aware of the action and the reasons for it, or might reasonably have been expected to have become aware of the action and the reasons. Tsogo Sun accepts that they have not complied with the 180-days rule, thus they seek condonation in terms of section 9(1) of PAJA.

[118] The Provincial Government opposes the condonation application and laments the fact that Tsogo Sun sought to review and set aside a Policy that has been in existence for more than 16 years, and from which it (Tsogo Sun) had benefited. The SISA respondents also oppose the condonation application stating that Tsogo Sun has not made out a case for the relief sought as it has known of the Policy Determinations since the time they were awarded the casino operator licence several years ago. They reiterate that the Policy Determinations were published in August 1997, 19 years before the present application was launched, and now nearly 23 years to the time the application was heard. According to the SISA respondents, Tsogo Sun has not provided an explanation as why it delayed for such an extraordinarily long period of time before applying to review the Policy Determinations. Moreover, Tsogo Sun's desire to make more profit by relocating one of their outlying casinos cannot justify their failure to bring the application timeously.

[119] The SISA respondents further contend that in the light of the recent publication of the proposed amendment to the legislative framework, purportedly to facilitate the consideration of applications for relocation of casino licences within the Western Cape, it is not in the interests of justice to grant condonation as the relief that may be granted pursuant thereto may become moot in the near future. This, according to the contention is so when regard is had to the unreasonableness of the explanation given by Tsogo Sun. Besides, so argue the SISA respondents, the relief sought by Tsogo Sun will only apply in a future consideration and decision by the Board of a relocation application.

[120] What must first be determined is whether the delay in respect of which Tsogo Sun seeks condonation is subject to PAJA or common law. Tsogo Sun, notwithstanding reliance on section 9(1) of PAJA in its condonation application, contends, relying on the decision of the Supreme Court of appeal in *Bullock NO v Provincial Government, North West Province and Another* 2004 (5) SA 262 (SCA) para 7, that the PAJA is not applicable to this matter as the Executive Council adopted the Policy in 1997, before PAJA came into effect in 2000. I do not understand the decision in *Bullock NO*, to be setting down a general principle that PAJA is not applicable to decisions made before it came into operation. Instead, at paragraph 7, the court held that:

"The Act only came into operation on 29 November 2000 i.e. sixteen months after the Premier's decision had been taken. Accordingly, any rights which the appellants had to have that decision set aside have to be sought in item 23(2)(b) of schedule 6 to the 1996 Constitution had to be read as follows:

'Every person has the right to ─

(a) lawful administrative action where any of their rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.'

In the light of the aforegoing, the essential question should rather be whether the adoption of the impugned Policy Determinations amounts to administrative action as contemplated in the Constitution. In order to make this determination, it is necessary to have regard to the guiding principle set out in *Bullock NO*, supra:

"[15] A decision of an organ of State may relate to question of policy, and the policy itself may not be open to judicial scrutiny: *SARFU* paras [142] and [143]; *Permanent Secretary, Department of Education and Welfare, Eastern Cape and Another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC) para [18]."

[121] The matter at hand is concerned with Policy Determinations made by the Executive Council. In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1)* (CC)

"[142] As we have seen, one of the constitutional responsibilities of the President and cabinet members in the national sphere (and premiers and members of executive councils in the provincial sphere) is to ensure the implementation of legislation. This responsibility is an administrative one, which is justiciable, and will ordinarily constitute "administrative action" within the meaning of section 33. Cabinet members have other constitutional responsibilities as well. In particular, they have constitutional responsibilities to develop policy and to initiate legislation. Action taken in carrying out these responsibilities cannot be construed as being administrative action for the purposes of section 33. It follows that some acts of members of the executive, in both the national and provincial spheres of government will constitute "administrative action" as contemplated by section 33,but not all acts by such members will do so.

[143] Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor.[10][9] So too is the nature of the power, its subject matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is.[11][0] While the subject matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of section 33. Difficult

boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of section 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis."

[122] In *casu,* the Executive Council is empowered by section 2(4) of the WC Act to make policy determinations within the context of the Act. What is challenged are the policy determinations adopted by the Executive Council pursuant thereto. The issue of whether or not section 7 of PAJA has not yet been decisively dealt with in our law, but the general tenor seems to be that each case should be decided on its own facts. To this end, the Court in *Mostert v NO v Registrar of Pension Funds* 2018 (2) SA 53 SCA restated this vexed question as follows:

"[8] A word of caution may not be out of place. *New Clicks* is no authority for the proposition that the making of regulations by a minister, in general, is administrative action for purposes of PAJA. It seems, with respect, that the statements in some of the other judgments in that case, to the effect that this is what Chaskalson CJ held, were based on a misinterpretation of what he said. The learned Chief Justice said what is or is not administrative action for the purposes of PAJA is determined by the definition in section 1.[1] He analysed the regulations in question[2] in the light of the definition, concluded that legislative administrative action has not been excluded from the definition of administrative action, and said:

'It follows that the making of the regulations *in the present case* by the Minister on the recommendation of the Pricing Committee was "a decision of an administrative nature". The regulations were made "under an empowering provision". They had a "direct, external legal effect" and they "adversely" affected the rights of pharmacists and persons in the pharmaceutical industry. They accordingly constitute administrative action within the meaning of PAJA'. (My emphasis).

[9] In a separate judgment Ngcobo J expressed the view that PAJA applied to the specific power to make regulations conferred by s 22G (2)(a)-(c) of the Medicines and Related Substances Act 101 of 1965 (Medicines Act). He emphasised that he refrained from deciding whether PAJA is applicable to regulation-making in general. Two of the judges in that matter expressed their agreement with this approach while Sachs J held that PAJA was not applicable, save in the specific respect of fixing the precise amount chargeable as a dispensing fee. Moseneke J held that it was

unnecessary to decide whether PAJA applied to ministerial regulation-making, and four judges concurred in his judgment.

[10] In dealing with the applicability of PAJA to regulation-making Chaskalson CJ was therefore not speaking for the majority of the court, and, as I have tried to show, in any event confined himself in this regard to the specific regulations that the court was dealing with. It seems, with respect, that in *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* **2010 (3) SA 589** (SCA) the position was also stated too widely (para 10). The final word on regulation-making and the applicability of PAJA to it may therefore not have been spoken. And as this matter shows, not all the provisions of PAJA, and particularly s 7, are tailored for the review of a regulation."

[123] In this matter, the source and nature of the power of the Executive Council, although closely related to the implementation of legislation, cannot, in my view be characterised as administrative action as envisaged in section 33 of the Constitution. Having found that the adoption of the Policy Determinations cannot be construed as constituting administrative action, it follows that the delay rule applicable is that of common law. Tsogo Sun contended that in the pre-PAJA era, the delay rule did not apply to subordinate legislation and in this matter the court should be slow to non-suit the applicants based solely on the delay in launching this application. Besides, the issue of whether or not the Board is empowered to consider and pronounce upon applications for relocations of outlying casinos became clear when the Board expressed that it did not have the powers to make that determination. The explanation given by Tsogo Sun for the delay cannot be gainsaid. If the Board expressed for the first time that it viewed itself as being hamstrung by the Policy determination's from considering relocation of outlying casinos to the Cape Metropole when Tsogo Sun made the enquiry, it must be accepted that that is when the knowledge came to Tsogo Sun. Tsogo Sun states that it became necessary to bring the application after the pronouncement by the Board of its lack of powers, which it did. I am persuaded that granting the applicants condonation is in the interests of justice for the following reasons:

123.1 It is not only desirable, it is imperative that the status of the policy determinations made by the Executive Council be determined because the Board continues to act in terms of the Policy, and refuses to consider an amendment which violates the exclusivity regime specified in it. Put differently, the legality or illegality of

the policy determinations relating to geographical exclusivity, as I have earlier determined in this judgment, remain in force;

123.2 The applicant in *Akani* challenged a policy determination which was invalid for precisely the same reason as the determinations impugned in the current proceedings.

123.3 The nature of the relief sought by Tsogo Sun is such that it will not affect any of the past decisions made by the Board acting under the Policy.

123.4 The non-suiting of Tsogo Sun would in essence allow a casino operator to enjoy geographical exclusivity which may have been created in violation of the WC Act, perhaps perpetually.

[124] It remains to be said that although it must be accepted that the Tsogo Sun applicants had always known about the Policy as there was litigation and legislation dealing with the very issue for several years, it chose to test when it sought to exercise its rights in terms of section 41(2), and was rebuffed in that attempt, in my view, there are compelling reasons why the delay, in the interests of justice, should be condoned. It is my judgment that the applicants' delay in launching these proceedings is condoned.

[125] Having dealt with the preliminary issues, namely, the condonation and postponement applications, I revert to the main application.

Issues for determination on the merits of this application

[126] As discernible from the factual background, the issues that must be determined revolve around whether paragraphs 1.1(b) to (d) of the Policy are *ultra vires*. They can be summarized thus:

(a) Are the policy determinations imposed by the Executive Council contained in paragraph 1.1(b) to (d) of its Policy unlawful and invalid?

(b) Does the Board have the powers to consider the relocation of outlying casinos to the Cape Metropole.

(c) did the Provincial Cabinet usurp powers accorded to the Board?

(d) did the Provincial Cabinet usurp the Minister's regulation-making powers?

Analysis

[127] In order to fully comprehend the determination of the aforegoing issues, it is necessary to re-encapsulate the merits of this application. Tsogo Sun asks the court to declare that clauses 1.1 (b) to (d) of the Policy are *ultra vires*, invalid and of no force and effect and specifically requests the court to:

127.1 declare that the Board is competent to consider and determine an application under section 41(2) of the WC Act for a casino operator's licence to be amended so as to permit the holder to perform its licences activities from the Cape Metropole; and

127.2 after issuing the declaratory as envisaged above, direct the Board to consider and determine an application by either one of the first to third applicants which currently hold licences to operate casinos in outlying areas to relocate one such casino to the Cape Metropole.

[128] To recap, clause1.1 (b) of the Policy provides that the five casino licences allocated to the Western Cape shall be distributed, one in each of the five regions, (c) that the aforesaid licence shall be exclusive for a period of 10 years and (d) the exclusivity zone for the Cape Metropole casino, in relation to other casinos, shall have a 75-meter radius, calculated from the Cape Town City Hall. In short, there are two different types of exclusivity contained in the Policy regime:

128.1 First there is a temporal exclusivity (contained in paragraph (c); and

128.2 Second, the geographic exclusivity in respect of each region (paragraph (b) stipulates that there may only be one casino issued for each region whereas (d) singles out the Cape Metropole as a special case by prescribing its geographic territory of exclusivity.

It is common cause that the temporal exclusivity has expired for each licence. The issue relating to clauses 1.1(c) and (d) of the Policy, as correctly argued by the Provincial Government are due to the effluxion of time, moot. It follows that they are no longer operative and therefore do not bind the Board in any way. However, the geographic exclusivity in clause 1.1 (b) continues to apply. This much is clear from the Board's view that it cannot exercise its powers to amend a licence in a manner which is at odds with the Policy, with the result that it was precluded from allowing a second casino to operate in the Cape Metropole. The Board specifically stated that:

"It would breach the policy determinations, (that one casino licence be issued in each of the five regions demarked for the Western Cape."

Besides the Board's attitude, the Provincial Government acknowledges in the postponement application affidavit that the issue clause 1.1 (b) has not been affected by the effluxion of time. The *ultra vires* challenge therefore specifically relates to clause 1.1 (b).

[129] Tsogo Sun contends that first, the policy determinations of geographic exclusivity relating to *"size, nature and implementation of the industry"*, are in excess of the authority of the Executive Council. Second, they unduly fetter various powers granted to the Board by the WC Act. Third, they impermissibly usurp the regulation-making powers vested to the Minister by section 81, and that there can be no substantial compliance with the requirements as alleged by the Provincial Government. In addition, by treating the Cape Metropole as a special case by prescribing its geographical zone of exclusivity while leaving the determination for the other casinos to the Board is irrational. Below, I deal with each of the three contentions.

Does the Executive Council have the powers to make the impugned policy determinations?

[130] In order to determine the extent of the Executive Council's policy-making powers it is necessary to first have regard to the specific powers granted to the Board to regulate gambling, and then examine the specific authority given to the Minister. As correctly argued on behalf of Tsogo Sun by Mr Budlender SC, to interpret the Executive Council's policymaking powers without first having regard to the specific powers vested in the Board and the Minister, would be get things the wrong way, around as borne out by a contextual reading of the framework of the WC Act and the *Akani* judgment. This approach is in line with the judgment in *City of Johannesburg Municipality v Gauteng Development Tribunal* 2010 (2) SA 554 SCA at 562 where Nugent JA, in dealing with the delineation of powers of the national and provincial government said the following:

"[35] The construction that was adopted by the court below and by Rabie J, and that was advanced before us by counsel for the respondent, all proceed by inferential reasoning from the proposition that the functions with which we are now concerned are embraced by the concept of 'development,' a functional area that falls within the concurrent legislative authority of national and provincial government, and thus by inference fall to be excluded from the functional area 'municipal planning'. That line of reasoning seems to me to approach the matter the wrong way round,

[36] It is to be expected that the powers that are vested in government at national level will be described in the broadest of terms, that the powers that are vested in provincial government will be expressed in narrower terms, and that the powers that are vested in municipalities will be expressed in the narrowest terms of all. To reason

inferentially with the broader expression as the starting point is bound to denude the narrow expression of any meaning and by so doing to invert the clear constitutional intention of devolving power on local government."

[131] Before I examine the powers of the Board in terms of the WC Act, I remind myself of the court's approach to statutory interpretation as restated by Majiedt AJ (as he then was)in *Cool Ideas 1186 v Hubbard and Another* 2014 (4) (3 SA 474:

"[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a). (footnotes omitted)

(See also *Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 467 (CC)).

[132] Section 2(4) of the WC Act sets out that the main object of the Board shall be to control 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. Section 2(6) provides that any policy determination of the Executive Council in terms of subsection (4) shall be published in the Provincial Gazette for general information. This was done in the present matter.

[133] Crucially, section 2 (5) provides that the Board shall have all powers that are necessary to achieve its main object and perform its functions under the Act, including the powers in section 12. More relevantly, section 12(3) provides that the Board shall have the powers to grant, amend, refuse, transfer, suspend or revoke licences under this Act, whilst section 12(4) sets out the Board's powers to impose, amend, suspend, or revoke conditions in respect of any licence at any time. Section 35(3) provides that the Board shall not approve an application for a casino licence where:

133.1 The premises are not or will not be suitable for the purpose for which they will be used under the licence;

133.2 the development is undesirable within the specific geographical environment with reference to social, religious, educational, cultural, economic, environmental, transport and land use aspects;

133.3 the granting of the licence is against the public interest and not in accordance with the objectives of the Act;

133.4 if in the Board's opinion, the possibility exists that the granting of the application may cause a monopolistic situation to arise is aggravated;

[134] Section 44A empowers the Board to grant "a licence in an area and for a period as determined by the Board." Of note, is that the section 82(1) empowers the Board to make rules relating to the exercise of its powers and the performance of its functions, including *"any matter pertaining to an application for a licence"* (section 82(1)(a); *any matter which in terms of this Act, is required or permitted to be determined*" (section 82(1)(f); and *"in general, any matter in respect of which it is necessary or expedient to make rules in order to achieve the objects of this Act"* (section 82 (1) (g).

[135] It was contended on behalf of Tsogo Sun that the impugned paragraph of the Executive Policy went beyond matters in respect of which it was entitled to make policy in terms of section 2 (4) of the WC Act in relation to the size, nature, and implementation of the industry. According to this contention, whereas, generally, the Board is empowered control all gambling activities in the province subject to the policy determinations, this does not mean that the Executive Council has the authority to make policy determinations on any matter whatsoever. This is so, continues the contention, because most of the Board's discretionary powers must be exercised in accordance with "this Act". Section 1 defines "this Act" to include only "the Schedules and any regulation or rule made or issued thereunder" and the policy determinations adopted by the Executive Council in section 2(4) and 2(6) are explicitly no included in the definition. For this reason, the provisions relating to Executive Council's policy-making authority must be restrictively interpreted such that the aforesaid authority does not extend to those instances where the Western Cape Act has conferred specific discretionary powers on the Board in terms of "this Act". of the Western Cape Act specifically provides that they must be exercised in

accordance with *"this Act".* According to Tsogo Sun, the effect of a broader interpretation would fetter on the Board's discretionary powers and functions.

[136] The Provincial Government retorts by stating that there is a neither textual nor other cause for such restrictive interpretation, the consequence of which would render the power granted to the Executive Council nugatory. Mr Breitenbach SC emphasised on behalf of the Provincial Government that sections 2(4) and 2(5) of the WC Act together make the Board's powers to regulate the gambling industry subject to Cabinet's policy determinations relating to *'size, nature and implementation of the industry'*.

[137] The aforegoing summary of the statutory powers of the Board amply demonstrates that it is fully empowered to grant a licence holder exclusivity to operate a casino within a specific area and period as may be determined by it. It therefore is plain that the geographic exclusivity regime created by clause 1.1(b) of the Policy breaches the careful allocation of powers to the Board by the WC Act as it effectively usurps the Board's powers to make a determination in terms of section 44A. This is impermissible. as the Executive Council's role in issuing policy determinations is subsidiary to the primary authority of the Board to regulate and control gambling in the Western Cape. This is particularly so because policy determinations relating to the *"size and nature if the industry"* may not override, amend or be in conflict with the WC Act. This includes the Board's power and discretion to grant licences and determine the conditions of licences in terms of section 2(3) and (4), 37and 42 of the WC Cape Act. The Executive Council lacked the necessary *vires* to adopt the Policy. Besides when regard is had to the old section 41 which makes it plain the transfer of any licence to any other premises was prohibited, it becomes clear that the current section 41(1) prohibits transferring "premises licence" not a "casino licence".

Section 41(2) therefore makes it clear that where a licensee wishes to change premises, it must apply to the Board for the amendment of the licence. The licence can therefore be amended to change premises. What clause 1.1(b) of the Policy does, is to take away the power and discretion of the Board to give effect to section 41(2). Clause 1.1(b) is also in breach of the principles laid down by the Supreme Court of Appeal in *Akan*i.

[138] In *Akani*, the Court dealt with the limit of the Executive Council' policy making powers under the WC Act. The relevant facts are briefly that the appellant, *Akani,*

and the respondent, Pinnacle Point, had both applied the Board (Southern Cape Region) for the award of a casino licence in terms of the Western Cape Act. After considering the applications, the Board selected Pinnacle Point as the successful applicant. However, the Board later disqualified Pinnacle Point because it had failed to obtain the requisite financial guarantee from a financial institution. The financial guarantee requirement had been specified in the Executive Council's Policy. The Board considered itself bound by the Policy because of section 2(4) of the Act. Pinnacle Point challenged the Board's decision to disqualify it on the basis that the policy determination was beyond the Executive Council's powers. The Court pointed out that:

"laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between Legislature and Executive will disappear."

With regard to the Board's powers, the Court commented thus:

"[5] The provincial Act established the boar (s2(1)) and provides that the right to carry on any gambling within the Province vests exclusively in the board (ss(2)). This provision is made subject to ss(4), which states that the main objective of the board is to control gambling activities. . .

The board is then granted all powers necessary to achieve its main objective and perform its function under 'this Law" (ss (5)).

In addition, the Court said that:

"One thing, however, is clear: policy determinations cannot override the terms of the Provincial Act for the reasons already given. Where, for instance the provincial Act entrusts the minister with the responsibility of determining the maximum permissible number of licences of any particular kind that may be granted in a particular area (s81 (1) (d)), the cabinet cannot regulate the matter by means of a policy, something it did. Likewise, where s 37 (1)(l) empowers the board to impose conditions relating to the duration of licences, the cabinet cannot prescribe to the board by way of a policy determination that, for instance, casino licences shall be for a period of ten years, something it did. In other words, the cabinet cannot take away with one hand that which the lawgiver has given with another.

The court further held that the policy determination in issue imposed an absolute obligation on applicants for licences to lodge circumscribed guarantees before the grant of the licence:

"emasculates the board to the extent that it will never be able to exercise its powers and discretion under s 37(1)(j) to require guarantees from someone other than a bank or other financial institution would be acceptable is no longer that of the board and also relating to the time limits and extensions of time. In other words, by an executive act, a legislative act was amended, diluted or undone. This was done beyond the powers of the cabinet.

[139] In the light of the aforegoing, it is my judgment that an interpretation that resonates with the purpose of the WC Act is that the adoption of clause 1.1(b) of the Policy overrides the terms of the Act. Furthermore, the clause fetters the Board's discretion to act in accordance with the powers accorded to it by the WC Act. It follows that on the aforegoing basis, the exclusivity regime imposed by the Executive Council in paragraph 1.1(b) the Policy is unlawful and invalid.

[140] Notwithstanding the preceding findings, I must still consider the argument raised by the Provincial Government that section 2(4) must not be restrictively interpreted in the context of the interpretation of the word *'implementation'.* The issues of interpretation somewhat overlap. The proper context for this contention as can be discerned the Provincial Government's answering affidavit is that when regard is had to the dictionary meaning of the word *'implementation'* the Provincial Cabinet's power provided for in 2(4) is accordingly to determine the manner in which its plan for the gambling industry is executed, as well as to determine the nature and size of the gambling industry. According to this contention, the Provincial Cabinet's power provided for in 2(4) is accordingly to determine the manner in which its plan for the gambling industry is executed, as well as to determine the nature and size of the gambling industry. Furthermore, so goes the contention, Clause 1.1(b) provides that the regional distribution of casinos in the Western Cape is *'in order to stimulate and encourage development throughout the Province, inter alia by the empowerment of local disadvantaged groups through both employment and equity ownership'.* The stated purpose of clause 1.1 (b) is therefore that it should be a vehicle for economic upliftment in underdeveloped areas of the Province. In this way, clause 1.1(b) directly contributes to the realisation of the developmental aims which Cabinet

adopted on 13 September 1995 (referred to in para 12 above). Moreover, though the regional distribution of casinos, as well as the limitation of the number of casinos in well-resourced areas such as the Cape Metropole, clause 1.1(b) limits competition between casino operators and limits access to the lucrative Cape Metropole. In this way, clause 1.1(b) also determines the size of the industry, collectively and in each of the regions, as well as the protected nature of the industry. The Provincial Government further contends that Clauses 1.1(c) and (d), on the other hand, protected the economic interests of casino license operators through a ten-year exclusively regime envisaged by section 44A of the WC Act. During its operation, the exclusively regime effectively protected casino operators from regulatory changes that would amend the regional distribution of casinos put in place by clause 1.1(b). In this way, clauses 1.1(c) and (d) similarly had a direct impact on the implementation of the industry, as well as its nature.

[141] Sun International, like the Provincial Government, contends that the Board's exercise of its discretionary powers and performance of its functions is subject to the Cabinet's Policy. According to the argument, *"section 2(4) provides that the Board may not exercise a power that it might otherwise have exercised if the Executive Council has made a policy determination relating to that matter. Since the inability of the Board to exercise such power is contemplated by section 2(4) of the Act, the existence of a policy determination does not produce an outcome that is inconsistent with the Act."* Furthermore, so goes the contention, if the applicants' complaint is that the section may not permissibly authorise the Executive Council to make a policy directive depriving the Board of a power that it had under the WC Act, then the applicants were required to challenge the legality of section 2(4).

[142] I have already indicated that the Executive Council's policy making powers may not fetter the Board's exercise of its statutory authority. In my judgment, it is not necessary for the applicants to challenge the legality of section 2 (4). This is so because, properly construed, the WC Act specifically demarcates powers in terms of section 12 which are to be exercised under "this Act", and this does not include policy determinations. Furthermore, the Court in *Akani* emphasised that the Executive Council's powers to make policy are not unlimited, for:

"[W] section 37 (1) (l) empowers the board to impose conditions relating the duration of licences, the cabinet cannot prescribe to the board by way of a policy

determination that, for instance, casino licences shall be for a period of ten years, something else it did."

The above remarks are equally applicable to the circumstances of this matter in relation to the exclusivity imposed by the Executive Council. It would be remiss to interpret the provisions of section 2(4) as giving the Executive Council powers to regulate any matter relating to gambling in the province, without having regard to the powers afforded to other role players. It is also well to recall that in *Akani*, the Court reaffirmed the constitutional principle of separation of power between the executive and the legislature, and a contextual interpretation of statutes.

[143] Tsogo Sun argues that the above interpretation proffered by the Provincial Government is inconsistent with the National Act. This necessitates an examination of the relevant provisions of the National Act

[144] Section 53 of the National Act provides that:

146.1 when considering an application for a licence, the Board must consider the socio-economic impact of the proposed licence on the community and may impose justifiable conditions on the licence to address this issue (s53(1)(b) and (c); and

146.2 on an annual basis, the Board may impose further or different reasonable and justifiable conditions to the extent necessary to address this issue (s 53 (2) (b).

[145] In addition, in terms of section 54:

147.1 when considering an application for a casino licence, the Board must determine whether approving the application is likely to substantially affect competition in the gambling industry generally, or in respect of the proposed activity within the Province (s 54 (1) (a); and

147.2 the Board must refuse the application unless there are overriding public interest reasons for approving it, if it appears that the approving the application would result in the applicant, alone or in conjunction with a related person, achieving market power (s 54 (2).

[146] The above provisions affirm that the National Act contemplates that the Board has the discretionary power to consider the following factors:

(a) the potential socio-economic impact on a community;

(b) issues of competition.

The upshot of this is that the Executive Council's exclusivity regime fetters the Board's powers as I have already determined. Furthermore, the dictionary

interpretation approach of the word '*implementation'*, adopted by the Provincial Council, lacks the proper context of the structure created by the WC Act and the National Act, and primarily focuses on the outcomes that may accord with a particular executive objective. Besides, based on *Akani*, policy determinations rank below the Act, ministerial regulations, and the Board's rules within the legislative framework.

[147] As correctly argued by counsel for Tsogo Sun, the Provincial Government's argument that paragraph 1.1 (b) of the Policy determines the size of the industry "*collectively, and in each of the regions, as well as the protected nature of the industr*y", by prescribing the regional distribution of casinos and the limitation of casinos in well-resourced areas such as the Cape Metropole, is erroneous. This is so because the maximum "size of the industry" – that is five casinos – has been predetermined for the Western Cape by the Minister in terms of the National Act. While section 2(4) possibly empowers the Executive Council to make a policy determination which reduces that number, the provision does to give it authority to determine the size of the casino in specific areas in the Western Cape.

Did the Executive Council usurp the Minister' powers?

[148] The question that must be answered under this heading is whether the Executive Council, by enacting clause 1.1(b) usurped the Minister's regulation-making powers.

[149] Tsogo Sun contends, as set out in its founding affidavit that a further reason why the policy determinations are *ultra vires* the WC Act is that the Executive Council has purported to exercise functions vested in the Minister by section 81(1) (d) and (f). This section empowers the Minister to make regulations in respect of the number of licence that may be granted in a particular area as well as the granting of exclusive rights to the holder of a casino operating licence for any period and in respect of any area. In line with this contention, if a maximum number is to be determined per region basis, that must be addressed in ministerial regulations for it to be considered in the Board's exercise of statutory power to invite and determine applications for casino licences.

[150] It is undisputed that the Minister did not make any regulations. Instead, the Executive Council, through the impugned Policy purported to do so. According to Tsogo Sun, this is impermissible.

[151] Sun International, retorting to Tsogo Sun's argument, contends that the WC Act empowers both the Executive Council and the Minister to deal with these issues in regulations and policy determinations, respectively. This argument is based on the same premise advanced earlier on, to the effect that section 2(4) of the Act must be interpreted as empowering the Executive Council to regulate any matter relating to gambling in the province, without regard to specific powers granted to other actors by the Act, and that in the absence of a challenge to the provision, it must be assumed lawful.

[152] The Provincial Government concedes that the Policy determinations ought to have been included in Ministerial regulations but argues that this matters not because the Policy was introduced by the Premier, who was responsible for the administration of the WC Act at the time – in short, there was a "*a manner and form problem*" with regards to clause 1.1(b). Counsel for the Provincial Government during argument further conceded that, if the approach in paragraph 7 of *Akani* is followed, clause 1.1 (b) of the Policy was not lawfully enacted. Notwithstanding the concessions, Counsel for the Provincial Government argued that there had been substantial compliance with the requirements of section 81 of the WC Act and that *Akani* had been overtaken by more recent decisions.

[153] The contentions advanced by both the Provincial Government and Sun International are, for reasons appearing hereunder, unsustainable.

[154] First, 'manner and form' are formal requirements that must be met in order for the public power to be validly exercised. *In Doctors for Life v Speaker of the National Assembly* 2006 (6) SA 416 (CC) at paragraph 208 in the context of a challenge to legislation, the Court held thus:

"It is trite that legislation must conform to the Constitution in terms of both its content and manner in which it was adopted. Failure to comply with manner and form requirements in enacting legislation renders the legislation invalid. And courts have power to declare such legislation invalid."

In *Minister of Justice v Harris* 2001 (4) SA 1297 (CC) a para 18 the Court held thus:

"What is clear is that they consciously opted to locate the notice in the framework of section 3(4) of the National Policy Act. The result is that it is not now open to the Minister to rely on section 5(4) of te Schools Act to validate what was invalidly done under section 3(4). The otherwise invalid notice issued under the National Policy Act

can therefore not be rescued by reference to powers which the Minister might possibly have had but have failed to exercise under the Schools Act."

Likewise, in *Liebenberg NO v Bergrivier Municipality & Others* 2013 (5) SA 246 (CC) at paragraph 44, Jafta J, in his minority judgment (but without disagreement from the majority judgment on this principle) held that:

"In our law, administrative functions performed in terms of incorrect provisions are invalid, even if the functionary is empowered to perform the function concerned by another provision. In accordance with this principle, where a functionary deliberately chooses a provision in terms of which it performs an administrative function and it turns out that the chosen provision does not provide authority, the function cannot be saved from invalidity by the existence of authority in a different provision."

The above restatement of the law was relied upon in the unanimous Supreme Court of Appeal decision in *Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another* 2018 (1) SA 200 at paragraph 58 when it stated that *"the Constitutional Court was equally emphatic concerning the invocation and reliance on a statutory power that was inapposite*".

[155] I now turn to determine the proper interpretation of section 81 in the light of the competing contentions.

[156] Section 81 of the WC Act states that the power to make regulations is vested in *"the responsible member"* who is defined as *"the member of the Executive Council responsible for the administration of this Act"*. In addition, in terms of section 81, the Policy determinations ought to be made by way of a regulation and not a policy determination. That much is clear from the aforesaid provisions, and any interpretation suggesting otherwise would be incongruent with the WC Act. As restated in *Akani,* regulations and policies are different legal instruments and policy is subject to the regulations. It therefore is plain that the regulation-making power cannot be exercised by anyone else, be it an individual or a body of which the member is a part, and even if he or she agrees with the decision. Furthermore, the decisions referred to above amply demonstrate that a decision under a wrong section is unlawful. Furthermore, there is no indication that the Provincial Legislature intended to give the Executive Council the power to regulate these issues by way of Policy. In any event, for a power to have been lawfully exercised, it must be exercised by the right actor, using the correct mechanism. It follows that a claim of

substantial compliance must, as a fundamental consequence of the law be founded on the basic requirements for the exercise of that power having been met. In this case, they have not been met.

[157] In so far as Sun International's argument to the effect that section 2(4) of the Act must be interpreted as empowering the Executive Council to regulate any matter relating to gambling in the province without regard to specific powers granted to other role players, I have already considered and found why such an approach is untenable when regard is had to the *Akani* judgment. The suggested approach is also not constitutionally compliant as the Executive Council may not exercise its subsidiary policy-making power in a manner which usurps the regulation-making powers of the Minister.

[158] Second, the Provincial Government suggests that the fact that the Policy was brought into existence in a manner which is similar to how regulations are promulgated raises its status to that of a regulation. For reasons I have already alluded to, it plainly does not.

[159] It remains to be said that the Provincial Government suggested that the *Akani* judgment has been overtaken by more recent jurisprudence. No specific reference was made to any case. In fact, in *Ahmed v Minister of Home Affairs* 2019 (1) SA (CC) at paragraph 38, the Constitutional Court cited it in support of the following reasoning:

"If the Directive overrides, amends or conflict with the provisions and/or scheme of the Immigration Act, then it is unlawful. Similarly, the Directive may not be in conflict or inconsistent with the Constitution. The making of a directive is the exercise of public power, and all public power must be exercised lawfully. The Director-General of the Department can only make directives that fall within the four corners of the empowering legislation (in this case, the Immigration Act). For the Director-General to issue a directive that contradicts or extends beyond the powers given to him by the Immigration Act would be to act without legal authority and violate the rule of law."[2]

[2] See also Nelson Mandela Bay Municipality v Amber Mountain Investments 3 (Pt) Ltd 2017 (4) SA 272 (SCA) 24; University of Free State v Afriforum 2017 (4) SA 283 (SCA) at para 3; run Property Development (Pty) Ltd v City of Cape Town 2015 (2) SA 584 (CC) at para 45.

As can be deduced from the aforegoing, clause 1.1(b) of the Policy is undoubtedly *ultra vires* and must be so declared.

[160] The above finding is dispositive of the matter. However, in the light of the fact that the issue of substantive irrationality of on the 75 km limit in clause 1.1(d) was raised, notwithstanding the declaration of mootness I have made, for the sake of completeness, and considering that I may be wrong in making the aforesaid finding, I turn to consider Tsogo Sun's contention that treating the Cape Metropole differently is irrational.

*Was treating the Cape Metropole as a special case irrational**?***

[161] It will be recalled that paragraph 1.1 (d) of the Policy provides that the Cape Metropole's exclusivity zone is 75 kilometers radius, while paragraph 1.1 (e) provides that the exclusivity zone of *"other casinos shall be determined by the Board"*. Tsogo Sun further contends that the Provincial Government has not proffered any objective basis for the distinction made in the policy.

[165] Rationality is explained in *Minister of Home Affairs v Scalabrini Centre Cape Town and Others* 2013 (6) SCA 421 thus:

"[65] But an enquiry into rationality can be a slippery path that might easily take one to inadvertently into assessing whether the decision was one the court considers reasonable. As appears from the above, rationality entails that the decision is founded upon reason – in contradistinction to one that is arbitrary – which is different to whether it was reasonably made. All that is required is a rational connection between the power being exercised and the decision, and a finding of objective irrationality will be rare."

[162] The Provincial Government argues that it was reasonable for it to determine the exclusivity zone for the Cape Metropole and leave the rest to the Board for the following reasons:

166.1 Gambling in the Western Cape was to be phased in gradually, beginning with the Cape Metropole as the best resourced region, and then proceeding to the other regions which needed development. To illustrate this reason, the Provincial Government points out that the casino licence in respect of Worcester was granted seven years after the Policy was adopted.

166.2 The Board had material input into the determination of the Cape Metropole exclusivity. To this end, the Provincial Government attached comments received from the Board.

[163] Tsogo Sun scoffs at both reasons stating that they are not supported by the evidence on which the Provincial Government relies for the distinction. Regarding the first reason, it contends that besides the casino operator licence issued in respect of the Worcester casino, other licences were issued in close proximity to the licence issued for the Cape Metropole: the Caledon licence was issued five months later; and the Myknos licence was issued ten months later, furthermore, both casinos began operating before Grandwest casino in the Cape Metropole did. Tsogo Sun argues that the Provincial Government has provided absolutely no explanation for the determination of exclusivity zone to the Board in respect of other casinos which were brought into operation contemporaneously with the Cape Metropole. For this reason, concludes, Tsogo Sun the facts before court do not support the gambling was to be phased in. As to the second reason advanced by the Provincial Government, Tsogo Sun states that the comments received from the Board attached to the Provincial Government's answering affidavit reveal that even before the Board was given an opportunity to provide input, the Executive Council had already decided to treat the geographic exclusivity in the Cape Metropole differently from other casinos. Furthermore, while the Executive Council took the Boards comments into consideration into account in respect of certain details, the Board made no comment on the issue why the Cape Metropole was to be treated differently. Moreover, the Board, contrary to the Provincial Government's contention had no 'material input' into the Executive Council's decision to make a distinction between the Cape Metropole and the other casinos.

[164] It indeed is, as contended by Tsogo Sun so that the Provincial Government has provided absolutely no explanation for the determination of exclusivity zone to the Board in respect of other casinos which were brought into operation contemporaneously with the Cape Metropole. There are no objective facts supporting the contention that there was to be a gradual phasing in the light of the evidence to the effect that the Myknos and Caledon casinos began operating at the same time as the GrandWest casino in the Cape Metropole. It therefore was not reasonable for the Executive Council to determine the exclusivity for the Cape Metropole and leave the rest to the Board. The corollary of that is inevitably that the

reasons advanced by the Provincial Government as to why the distinction of the geographic exclusivity of the Cape Metropole casino and other casinos was drawn by the Executive Council is not rationally connected to the purpose of the empowering provision. Neither has the Provincial Government put up a legitimate government purpose.

[165] With regard to the second reason, the papers reveal that the Executive Council initially proposed a different way of determining the Cape Metropole's: *"The distance between the Cape Metropole and other casinos should not be less than 100 kilometres calculated from the City Hall of Cape Town via the nearest major road*." It also proposed that the *"distance between other casinos to be negotiated between the Board and other casino licence applicants."* The Executive Council did not provide any reason to the Board why it made the distinction. It is true that the Executive Council adopted the Board's recommendation of the 75 kilometre radius from the City Hall but that does not suggest that its recommendation was informed by the rationale provided to it for the exclusivity geographical zone of the Cape Metropole. It therefore cannot be said that the Board had any material input into why the Cape Metropole was to be treated differently.

[166] Sun International has suggested reasons why the Executive Council made the distinction. They are twofold. First, it states that the Executive Council *"wished the casino in the Metropole to be a tourist attraction that would attract visitors to the City of Cape Town"* and second that the "*South African experience (and, indeed the experience in some foreign jurisdictions) suggests that an urban casino is much more than a gaming floor: it is a cluster of entertainment venues and hotel facilities that functions as a tourist attraction even for visitors who do not gamble".* According to this argument such a facility would require substantial investment. Therefore, so contends Sun International, the "*singling out*" of the Cape Metropole was rationally connected to the government purpose of encouraging the development of a "*world class*" casino to attract visitors to Cape Town, and that since it is most unlikely that other casinos in remote areas will attract visitors to Cape Town, the Executive Council was entitled to leave it to the Board to determine their zones of exclusivity.

[167] The justification suggested by Sun International cannot stand. First, it has not been confirmed by the Provincial Council. Second, it is not only undesirable, but manifestly impermissible for Sun International to attempt to proffer an explanation for the decision of the Provincial Government which had already been given. This is

exacerbated by the fact that Sun International was not part of the decision-making and may not *ex post facto* justify it. In *National Lotteries Board v South African Education Project* 2012 (4) SA 504 (SCA) at para [27], the court held that further reasons are *ex post facto* justifications, not the true reasons for the decision, and accepting them would be unfair to an applicant for judicial review. The court further endorsed the following approach of the English Appeal Court in *R v Westminster City Council, Ex Parte Ermakov* [1995] 2 All ER 302 (CA) at 315h-316d

'[T]he purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have any ground for challenging an adverse decision. To permit wholesale amendment or reversal of the stated reasons is inimical to this purpose. Moreover, not only does it encourage a sloppy approach by the decision-maker, but it gives rise to potential difficulties . . . {1}In many cases it might be suggested that the alleged ture reasons were in fact second thoughts designed to remedy an otherwise fatal error exposed by the judicial review proceedings. That would lead to application to cross-examine and possibly for further discovery, both of which are, while permissible in judicial review proceedings, generally regarded as inappropriate. Hearings would be made longer and more expensive.'

[168] Flowing from the aforegoing, it is plain that even the Executive Council had the power to determine the exclusivity zones itself, it has not explained why it decided to specify the radius of the exclusivity zone for the Cape Metropole itself, and leave the determination of the rest to the Board. It follows that the distinction is arbitrary and falls to be set aside.

[169] The Provincial Government in its answering affidavit highlighted the fact that the exclusivity determination in the case of the GrandWest casino expired 5 December 2010 and in the case of the Worcester casino, on 8 May 2016. Since the expiry, the exclusivity determinations have been of no force or effect, and exclusivity fees have been neither imposed nor tendered. As a result, any relief which is said to flow from an alleged conflict between the Board's power to impose conditions and clauses 1.1(c) and (d) of the Policy, is moot. I have already found that clause 1.1© and 1.1(d) are no longer operative and as such the Board is not bound by them.

Does the Board have the power to amend the location of a casino?

[170] The determination of whether the Board has the power to amend the location of a casino is necessitated by Board's declaration that it is not empowered to effect such amendments, and the resultant orders sought by Tsogo Sun to the following effect:

170.1 That the Board has the competency to consider and determine an application in terms of section 41(2) of the WC Act for a casino operator licence to be amended so as to permit the holder to perform its licensed activities from the Cape Metropole.

170.2 That the Board be directed to consider and decide any application by the Tsogo applicants in terms of section 41(2).

[171] In making that determination, I must examine the various provisions of the WC Act since there is no provision dealing directly with the issue. Section 41(2) provides that:

"if there is a change in the circumstances in which or, in the case of any licence holder, other than the holder of a premises licence, the place at which the holder of a licence wishes to perform the activities authorized thereby which would require the conditions of the licence to be amended, the holder thereof shall apply to the Chief Executive Officer for the amendment of the licence, which application shall be accompanied by the prescribed new licence application fee."

Section 37 (1) (f) and (l) empowers the Board to impose various conditions in respect of a licence, including conditions:

"(f) relating to the premise in or on which gambling activities take place including the development and utilization thereof"; and

(l) relating to the duration of the licence."

The Act furthermore empowers the Board to amend both a licence itself and the conditions which attach to it. Sections 12(3) and (4) of the Act provides that the powers and functions of the Board shall be:

"(3) to grant, renew, amend, refuse, transfer, suspend or revoke licences under this Act;

(4) to impose, amend, suspend or revoke conditions in respect of any licence at any time."

[172] Tsogo Sun contends that the Board's authority to amend a licence "under this Act" as set out in the aforegoing provisions must include the power to amend the premises specified in the licence to which it attaches. Furthermore, so goes the contention, the provisions of section 41(2) imply that the Board is empowered to

permit a change in the place at which the casino licence holder is to perform the licensed activities.

[173] The Provincial Government advances three reasons why the interpretation proffered by Tsogo Sun is untenable. It states first, that because section 45(4) requires a casino operator licence to specify the premises to which the licence attaches, the Board *"has no discretion to determine the location of the casino operation as part of the conditions applicable to the licence"* in terms of section 37(l)(f), which applies only to other types of licences. Furthermore, the WC Act makes no provision for the amendment of the specified premise in a casino operator licence. Second, the Provincial Government argues that the power of the Board to impose a condition in a licence relating to its duration, does not relate to the determination of exclusivity. Third, the Provincial Government asserts that the issue is moot because of the exclusivity period has expired and since then exclusivity determinations have been of no force and effect.

[174] Regarding the argument that the WC Act makes no provision for the amendment of the specified premise in a casino operator licence, this question cannot be answered by way of reference to section 45(4) only, the entire scheme of the Act must be examined. To this end, Ngcobo J (as he then was) said the following in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 CC paragraph 90:

"[90] The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous. Recently, in *Thoroughbred Breeders' Association v Price Waterhouse***[73]**, the SCA has reminded us that:

"The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernible meaning. As was said in *University of Cape Town v Cape Bar Council and Another* **1986 (4) SA 903** (A) at 914D-E:

'I am of the opinion that the words of s 3(2)(d) of the Act, clear and unambiguous as they may appear to be on the face thereof, should be read in the light of the subject-matter with which they are concerned, and that it is only when that is done that one can arrive at the true intention of the Legislature.'

The well-known passage in the dissenting judgment of Schreiner JA in *Jaga v Donges NO and Another; Bhana v Donges NO and Another* 1950 (4) *SA* 653 (A) at

662G-663A was also quoted with approval. It is of course clear that the context to which reference is made in the latter case must include the long title and chapter headings."

[175] Earlier on in this judgment I outlined the authority of the Board with reference to the empowering provisions of the WC Act as well the seminal judgment of *Akani*. In addition, the Board is empowered by the WC Act to determine the premises in the licence: section 35(3)(a)(iii) requires the Board to determine whether the premises in an application will be suitable for the licensed activity, and section 12(3) empowers the Board to grant a licence, which must include the description of the premises in terms of section 45(4). The WC Act has not conferred this power on any other body. Section 12 (3) authorizes the Board to amend the licence. When regard is had to all the powers granted to the Board by the WC Act, as enumerated in this judgment, the sensible contextual interpretation of section 41(2), in my view, must be that Board has the power to amend the location of a casino operator licence.

[180] Regarding the third point raised by the Provincial Government to the effect that the power of the Board to impose a condition in a licence does not relate to the determination of exclusivity, my view is that this approach is incorrect because section 44A vests the Board with the power to determine exclusivity, which power it must exercise together section 37(l)(1) in determining the duration of the licence. I therefore hold that the Board has the power to amend the location of a casino specified in a licence.

[176] I now turn to consider the Board's stance that the Tsogo applicants are holders of a "premises licence" in terms of the WC Act, as opposed to a casino operator licence.

Are the applicants holders of a premises licence?

[177] It will be recalled that Tsogo Sun seeks a declaratory order to the effect that the Tsogo applicants are holders of a casino operator licence in the light of the Board's assertion that they are holders of a premises licence. This assertion is informed by the fact that in terms of section 41(2) of the WC Act only a *"licence holder other than the holder of a premises licence"* is allowed to apply to amend the licence and its conditions. That means that the Board's view is that the Tsogo applicants, are holders of *"a premises licence"*, and are not entitled to apply for its amendment and its conditions. In terms the Act, a *"premises licence*" is: any licence

referred to in section 27(c), (dA), (j) and (Ka)[3], and a casino operator licence is not part of that list, and is defined as a licence issued in term of section 45.

[178] Both the Provincial Government and Sun International accept that the Tsogo applicants are holders of a casino operator licence and the exclusion in section 41(2) is therefore not applicable. It is clear that the Board misdirected itself when it held that the Tsogo Sun applicants are holders of a premises licence. The declaration to this effect sought by Tsogo Sun, is justified.

Conclusion

[179] In summary, I have held that the Provincial Government has not made out a proper case for the granting of the application for the postponement, as such, it must therefore be dismissed with costs. Insofar as Tsogo Sun's application for condonation of the late filing of this application, I have found that it is in the interest of justice to grant the condonation. In so finding I also held that in this review application PAJA is not applicable and that the issue of condonation had to be determined against the backdrop of the common law principles applicable and that it was justified and in the interest of justice to grant it. As to the merits, I have found that the impugned Policy determinations which create the exclusivity regime are invalid and of no force and effect, and as such ought to be declared as such. The parties had agreed that should this court find the Policy to be invalid, such an order should be suspended for one year, so that a new regulatory policy for gambling can be put in place. According to my judgment, the Board has the powers in terms of the Act to consider and determine an application by any of the applicants to relocate an outlying casino to the Cape Metropole. Furthermore, I have found that a casino operator licence is not a premises licence. With regard to costs, the applicants sought costs against the respondents who opposed this application on a joint and several basis, including the costs of two counsel. There is no basis on which the general rule that costs follow the results should not apply. Furthermore, due to the complexity of the matter, the costs of two counsel are, in my view, justified. These costs include the costs of the postponement application.

[180] In the result, the following order is issued:

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[3] Section 27 provides:"The licences under this Act shall . . . (c) be limited to gambling machines premises licences. . . . (dA) bingo premises licences; (J) totalizator premises licences; . . . (Ka) bookmaker premises licences".

180.1 Clause 1.1(b) of the Western Cape Gambling and Racing Policy Determinations issued on 29 August 1997 is hereby declared to be invalid and of no force and effect.

180.2 Clauses 1.1(c) and 1.1(d) of the Western Cape Gambling and Policy Determinations issued on 29 August 1997 are no longer operative because of effluxion of time and the Board is therefore not bound by them.

180.3 The Board is declared to be competent to consider and determine an application under section 41 (2) of the Act;

180.4 The Board is directed to consider an application brought by one of the applicants in terms of section 41(2) of the Act;

180.5 It is declared that a casino operator licence is not a premises licence as envisaged in terms of section 41 (2) of the Act.

180.6 The declaration of invalidity of clause 1.1(b) is suspended for a period of a year so that a new regulatory policy for gambling can be put in place;

180.7 The first and second respondents, as well as the fifth and sixth respondents are ordered to pay the costs of this application and the costs of two counsel jointly and severally.

180.8 The first and second respondents are ordered to pay the costs of the application for postponement, and the costs for two counsel jointly and severally.

NDITA; J