IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER 4793/19

[REPORTABLE]

In the matter between;

GOLDRUSH GROUP MANAGEMENT (PTY) LIMITED	Applicant

And

THE CHAIRPERSON OF THE WESTERN CAPE GAMBLING AND RACING BOARD	First Respondent
THE WESTERN CAPE GAMBLING AND RACING BOARD	Second Respondent
VUKANI GAMING WESTERN CAPE (PTY) LIMITED t/a V SLOTS	Third Respondent
GRAND GAMING WESTERN CAPE (RF) (PTY) LIMITED t/a GRAND SLOTS	Fourth Respondent
MEMBER OF THE EXECUTIVE COUNCIL IN THE PROVINCE OF WESTERN CAPE RESPONSIBLE FOR FINANCE	Fifth Respondent

JUDGMENT DELIVERED ELECTRONICALLY DATED 20 APRIL 2021

KUSEVITSKY,J

Introduction

[1] This is an application to review and set aside a decision, taken during or about November 2017, by the Western Cape Gambling Board, ("the Board"), to award the Second and the Third Respondents 1000 limited pay-out machines ("LMSs). The decision, which amounts to an administrative action, materially and adversely affected the Applicant, it claimed in this application for review. Consequently, it sought an interim interdict to stop the First and Second Respondents from implementing the decision.

[2] The Application was brought in two parts, Part A and Part B. Part A, which was brought on an urgent basis, was for the most part abandoned by the Applicant, the only live issue remaining between the parties is the question of costs relating to the urgency of the application. Part B was fully ventilated, the initial hearing of which was delayed as as result of the Covid-19 Pandemic.

[3] For the sake of convenience, I will refer interchangeably to the First and Second Respondents as the Board, and to the Third and Fourth Respondents as V-Slots and Grand Slots respectively.

Background

[4] The Western Cape Gambling and Racing Board was established by section 2 of the Western Cape Gambling and Racing Act, 4 of 1996 ("The WCGRA") and has the right to carry on any gambling or racing activities incidental thereto. The National Gambling Act, No 7 of 2004, ("the NGA") establishes uniform norms and standards applicable to the national and provincial regulation and licencing of gambling activities.

[5] Provincial licensing authorities are defined in section 1 of the NGA as "*a body established by provincial laws to regulate casinos, racing, gambling or wagering*". The Board was established in terms of section 2(4) of the WCGRA as the provincial licensing authority for the Western Cape. Section 2(4) provides:

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

[6] Section 31 of the WCGRA provides that applications for, *inter alia*, limited gambling machine operator licences (which are also known as route operator licences), may only be applied for pursuant to an *invitation* from the Board duly published in the media. The route operator licence is regulated in section 27(b) of the WCGRA.

[7] Publication of the invitation to submit applications is regulated in the national regulations (regulation 17) which provides that when a licensing authority intends to invite applications, the necessary notices shall be published in the manner prescribed.

The Decision

[8] Thus it came about that the Board, in 2003 advertised and invited applicants in terms a request for Proposal (" RFP"), to make application for 3 000 limited pay-out machines[1] ('LPMs') which were available for allocation to at least three route operators.

[9] Section 26 of the NGA imposes an obligation on the Minister of Trade and Industry, who bears the executive authority for the administration of the Act, to regulate the LPM industry. Regulations were also published,[2] by the Minister which stipulate amongst other things the maximum number of LPMs which may be licenced in each province. In terms of regulation 2(2)(i), 9 000 LPMs were authorised in the Western Cape.

[10] In terms of the RFP, 3 000 LPMs were available for allocation to at least three route operators in the Western Cape. If the Board only allocated LPMs to two operators, the Board retained the right to subsequently allocate the remaining 1000 LPM's (of the 3000 LPM's) either to the existing route operators or to re- advertise and invite applications for the remaining 1 000 LPMs. I will return to this aspect later.

[1] A limited pay-out machine is defined in section 1 of the NGA as "a gambling machine with a restricted prize as described in section 26.

[2] The Minister made regulations on LPMs which were published in Government Gazette 21 945 dated 21 December 2000.

[11] Five applicants applied, including Third and Fourth Respondents. The Board however only approved two route operators, namely V-slots and Grand Slots and allocated to each of them 1 000 LPMs.

[12] Then in November 2017, the Board decided to allocate the remaining available 1 000 LPM's to the existing two route operators, V-Slots and Grand Slots proportionally and did not re-advertise and invite other applicants to apply for the 1 000 LPM's.

The Applicant's standing to bring this application

[13] It is this decision by the Board to allocate the 1 000 LPMs proportionally to V-Slots and Grand Slots and not to re-advertise and invite applications to apply for a route operator licence in respect of the 1 000 LPMs, which constitutes an administrative decision, which materially and adversely affected Goldrush, it was contended, as Goldrush, as a reputable and responsible player in the gambling industry, would have applied for a route operators license in respect of the 1 000 LPMs and would have had a good prospect to be successful.

[14] The above decision by the Board in November 2017 is referred to as the impugned decision for purposes of this application.

[15] Goldrush maintains that is entitled to bring this application in terms of Section 6(1) of PAJA[3] because, in the first instance, it has a sufficient interest in its own right as a participant in the gambling industry, as well as an interested party , which would have applied for a route operator's licence for the available 1 000 LPMs – and would

[3] Promotion of Administrative Justice Act 3 of 2000

have had a good prospect to be successful - if the Board had not taken the impugned decision not to re-advertise the 1 000LPM's and not to invite applications for route operators to apply for the LPM's.

[16] Goldrush also maintains that it has a public interest in having the impugned decision subjected to judicial scrutiny and set aside on the basis that procedural fairness and fair and lawful requirements in the Act, National Act and PAJA were flouted.

[17] Goldrush also manages route operators and site operators in the North West Province, Limpopo Province, KwaZulu –Natal and the Free State on behalf of entities in which it holds substantial interests. It says it commenced with its operations as a management company in the gambling industry over 20 years ago and has shown itself to be responsible and reputable in the gaming industry.

[18] It is common cause that Goldrush was not a party to the initial bid process of 2003 and did not submit an application.

[19] The Applicant contends that the Board failed to insist that applications to amend the existing licences of V-Slots and Grand Slots be made in terms of the Act; to advertise the amendment of the licences for the additional 1 000 LPMs in the Gazette; to permit interested parties to have adequate notice of the nature and purpose of the administrative action and to participate in the proceedings to either also apply or to make representations in a public participation process, as is envisaged in section 34(2)(a) of the WCGRA. It contends that the Board acted irregularly in not advertising the available 1 000 LPMs and that the irregularity was material.

[20] All of the Respondents challenge the grounds of review advanced by the Applicant and more specifically, raise two *in limine* points. Firstly, they question the Applicant's standing to bring these proceedings. Secondly, they question the undue delay in bringing the review application.

First and Second Respondents' submissions

[21] The Board contends that the decision to roll out the additional 1 000 LPM's flows from the RFP. The Applicant did not apply for a route operator licence in response to the RFP and neither did they challenge that process. During 2004, the Board issued two route operator licences, one each in favour of the Third and Fourth Respondents, which authorises the licence holder to roll out 1 000 LPM's in the Western Cape.

[22] On 29 August 2017, the Board resolved to approve that each licence holder be granted an additional 500 LPM's. They say that that decision flowed from the Board's 2004 decision and was compatible with the RFP published in 2004.

Third Respondent's submissions

[23] V-Slot similarly contends that the Board was not legally obliged to advertise for a third route operator licence. It says that the RFP issued in 2003 explicitly sets out how the Board intended to proceed: The relevant portion is the following:

> "*If, once the industry has become established, it appears then the market and the social and economic conditions then prevailing in the Province will accommodate the allocation of further limited gambling machines, the Board may offer further machines to existing licensed Operators, against the payment of such further fees as may be provided for by legislation at that time, after consulting industry role-players. Should the Board elect to follow this course and should the existing*

licensed Operators not to take up the offer to expand their operations, the Board may invite licence Applications from the other entities."

[24] Thus when the Board resolved on 29 August 2017 to approve that each route operator be granted an additional 500 LMP's, this decision flowed directly from the RFP.

[25] V-Slot also maintains that the interest asserted by Goldrush is based on an assumption that had the Board not awarded the additional LPM's to the existing route operators, the Board would have advertised a third route operator licence and Goldrush would have been entitled to apply for such route operator licence. They say that there is no evidence that the Board would have advertised for a third operator licence had it not taken the impugned decision and thus Goldrushs' basis for its standing is therefore purely hypothetical .

[26] Grand Slots echoes these sentiments. Both parties relied on *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others [2012] 3 All SA 57 (SCA)* which sets out the applicable principles that the alleged interest by a litigant, in order to demonstrate standing, must be real and not hypothetical. The court held as follows:

"[41] These cases make it plain that constitutional own-interest standing is broader than the traditional common law standing**,** but that a litigant must nevertheless show that his or her rights or interests are directly affected by the challenged law or conduct. The authorities show:

(a) To establish own-interest standing under the Constitution a litigant need not show the same "sufficient, personal and direct interest" that the common law requires, but must still show *that a contested law or decision directly affects his or her rights or interests, or potential rights or interests.*

(b) This requirement must be generously and broadly interpreted to accord with constitutional goals.

(c) The interest must, however, <u>be real and not hypothetical</u> or academic.

(d) Even under the requirements for common law standing, the interest need not be capable of monetary valuation, but in a challenge to legislation purely financial self-interest may not be enough – the interests of justice must also favour affording standing.

(e) Standing is not a technical or strictly-defined concept. And there is no magical formula for conferring it. It is a tool a court employs to determine whether a litigant is entitled to claim its time, and to put the opposing litigant to trouble.

(f) Each case depends on its own facts. There can be no general rule covering all cases. In each case, an applicant must show that he or she has the necessary interest in an infringement or a threatened infringement. And here a measure of pragmatism is needed." (*own emphasis*)

[27] From the above, it is clear that it is sufficient for a litigant to show that a contested decision directly affects not only its rights or interests, but also *potential* rights or interests. This would mean, if one has regard to Goldrush's argument, that it *would have* applied to be a route operator for the available 1 000 LPM's had the Board not taken the decision to not re-advertise, that Goldrush has acquired standing by virtue of a *potential* interest in the outcome of the decision.

[28] This of course pre-supposes that Goldrush as an entity, would have been competent, to acquire those rights.

[29] According to the above principles, potential interests are sufficient to establish standing, if they are real and not hypothetical. However if one has regard to Goldrush's argument, it is undoubtedly speculative. Other than the Applicant's say-so, there is no evidence to suggest that it *would have*, applied. But the enquiry should be taken further. It is all very well for Goldrush to say that it *would have*, applied. But was it able to?

[30] In the founding affidavit, Goldrush describes itself as a participant in the gambling industry and also manages route operators and site operators in the North

West Province, Limpopo Province, KwaZulu-Natal and the Free State on behalf of entities in which it holds substantial interests. It also states that it commenced operations as a *management company* in the gambling industry over 20 years ago. In the answering affidavit, Goldrush also states that it holds a national manufacturers and suppliers licence of gaming equipment; has vast experience in the gambling industry and has been involved in the Goldrush gaming companies in the Goldrush group since its incorporation in 2006.

[31] The date of incorporation is noteworthy. This means that Goldrush was not established at the time that the Board called on invitations in reply to its Request for Proposals in 2003 and which is why there could be no grounds to challenge that decision, a contention raised by the Respondents.

[32] Be that as it may, the Applicant describes itself as a management company. The Respondents argue that because of its role as a *manager* of route operators, that it would not have necessarily qualified to be awarded a route operator licence. They say that its mere participation in the gambling industry does not constitute a sufficient interest of the kind that is required to show standing.

[33] However, if one has regard to the RFP, a clear distinction is made between an *Applicant*, and a *Successful Applicant* in the definition section. An 'Applicant' is described as any registrant who has responded to the Board's invitation to apply for a limited gambling machine operator licence contained in the RFP, by submitting a Proposal. A 'Successful Applicant', on the other hand, is described as those Applicants to whom the Board has decided to grant a licence, subject to compliance with any conditions which the Board may stipulate, within such period as the Board

may determine. Successful Applicants should also, according to the RFP, have the proven ability to finance and operate the Project. It also states that *"[i]t shall be an advantage if the Applicant is in a position to satisfy the Board that it has, either directly or indirectly, via its controlling shareholder, holding or associated companies or management contractor…, gained experience in operating a Project of a similar magnitude*."

[34] From a plain reading of these requirements, it seems evident to me that the successful applicant would be a company, with sufficient financial ability; had gained the relevant experience *via* its controlling shareholding, associated companies or management contractor. On its own version, Goldrush is a management company. No evidence was provided that proved that it would have qualified to apply as a applicant, more so that it would have been *successful*. Most certainly, as I have stated before, a distinction is made between applying – and being successful. Even if the allocation was re-advertised, Goldrush could have applied – but there is no evidence before me to suggest that it would have been successful, other than Goldrush's say so. And this crucial element, in my mind, extinguishes any potential rights that may have accrued to Goldrush, as such a deduction – '*that it would have been successful'*- is speculative and hypothetical and precisely against what the decision in *Giant Concerts* wards against. Similarly, as in *Giant Concerts*, the Applicant has not demonstrated that it had any serious commercial interest in the venture. Simply put, the giant leap from applying to being granted the award is speculative and does not grant Goldrush an interest to confer standing and to challenge the decision.

The next question is whether Goldrush is able to obtain standing in the public interest?

[35] Section 38(d) of the Constitution permits a litigant to act in the public interest.

[36] According to the Fourth Respondent, there is no evidence that Goldrush has genuinely launched this litigation in the public interest. In support of this contention, I was referred to *Ferreira v Levin NO and Others*[4] where O'Regan J, in her minority judgment, stated at para 24 thereof the following:-

> "[the Court] will be circumspect in affording applicants standing by way of section 7(4)(b)(v) [now section 38(d)] and will require an applicant to show that he or she is genuinely acting in the public interest. Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court. These factors will need to be considered in the light of the facts and circumstances of each case".

[37] They contend that none of these factors have been addressed in the papers. I agree.

[38] I was also referred to the *ratio* of Yacoob J who endorsed the *ratio* of O'Regan J in *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (7) BCLR 775 (CC) at par 18. There the Constitutional Court emphasised that the issue is always whether a person or organisation acts genuinely in the public interest. According to the Constitutional Court, a distinction must be made between the subjective position of the person or organisation claiming to act in the public

[4] Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Other 1996 (1) SA 984 (CC)

interest on the one hand, and, whether it is, objectively speaking, in the public interest for the particular proceedings to be brought.

[39] It is clear from the reading of the papers, that the sole motivation for the review is the Applicant's self-interest in the outcome of the decision.

Was the delay in instituting this review unreasonable?

[40] In terms of section 7(1) of PAJA, proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned 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. According to the Applicant, they became aware of decision only in December 2018.

[41] When deciding whether there has been an unreasonable delay, the Court makes a value judgment dependent on the facts and circumstances of the particular case. In *Associated Institutions Pension Fund Associated Institutions Pension Fund v van Zyl* 2005 (2) SA 302 (SCA), it was emphasised that the Court does not exercise a discretion when considering this issue, but makes a value judgment based on the facts.[5] It also emphasised the duty on an applicant to take all reasonable steps to investigate the reviewability of administrative decisions as soon as they are aware of the decision.[6]

[42] In this regard, the Supreme Court of Appeal explained in *Beweging vir*

[5] Para 47.

[6] Para 51.

Christelik-Volkseie Onderwys and others v Minister of Education and Other[7] that:-

> "In general terms, the purpose of the delay rule was, in Louw v The Mining Commissioner, Johannesburg, rather quaintly intimated to be to non-suit a litigant who "wishes to drag a cow which has been long dead out of the ditch". More recently, this Court, in Gqwetha v Transkei Development Corporation Ltd and others, gave a fuller explanation of its purpose and function. Nugent JA (for the majority) said the following of the rule:
>
> '[22] It is important for the efficient functioning of public bodies (I include the first respondent) that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule - reiterated most recently by Brand JA in Associated Institutions Pension Fund and Others v Van Zyl and Others 2005 (2) SA 302(SCA) at 321 – is two-fold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Miller JA in Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 41E-F (my translation):
>
> > 'It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed – interest reipublicae ut sit finis litium. . . . Considerations of this kind undoubtedly constitute part of the underlying reasons for the existence of this rule.'
>
> [23] Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight (Wolgroeiers Afslaers, above, at 42C)."

[43] The Fourth Respondent submits that Goldrush has delayed unreasonably in bringing this application for the following reasons: the impugned decision was taken by the Board in August 2017; the Applicant does not state when it became aware of the impugned decision and its position was not clarified in reply. It submits that the law does not permit a litigant to be supine and then belatedly institute a review; it must take reasonable measures in order to ascertain what the state of affairs is. In this regard, the Applicant failed to take any measures until December 2018 in order

[7] Beweging vir Christelik-Volkseie Onderwys and others v Minister of Education and other [2012] 2 All SA 462 (SCA) at para 45.

to determine the allocation of the further 1 000 LPMs; this notwithstanding the terms of the RFP.

[44] It argued that it was also clear that the Applicant has delayed unreasonably in instituting this application, based on what has been set out in its answering affidavit.

[45] On 4 December 2018 the Applicant addressed correspondence to the Board requesting confirmation, *inter alia*, as to whether the Board has or intends to increase the number of LPMs.

[46] On 12 December 2018 the Applicant addressed further correspondence to the Board requesting reasons for its decision. In that letter it states that at least five reasons were given as to why the Board's decision was unlawful. The Applicant undertook to institute a review application within 30 days from the date of the letter and sought reasons for the purposes of instituting such an application. The Applicant requested an undertaking from the Board in order to "avoid having to bring an urgent application to interdict the allocation and authorisation of the further LPMs to the existing licence holders pending the outcome of the review application". The Applicant requested a response as a matter of urgency.

[47] On 21 December 2018 the Board responded to the Applicant advising that it could not accede to the request for an undertaking on the basis that a decision had already been taken during November 2017. It says that despite this, the Applicant took no further measures until some 2,5 months later.

[48] On 5 March 2018, the Applicant addressed correspondence to Grandslots and V-Slots advising, *inter alia*, that unless an undertaking was given by 8 March

2019, the Applicant would take all steps necessary to protect its interests, including the launch of a review with Part A interdictory relief. On 8 March 2019 Grandslots responded rejecting the undertaking sought.

[49] Notwithstanding the above, the application was only instituted on 25 March 2019.

[50] An applicant does not have a minimum period of 180 days within which to institute a review. It must institute without unreasonable delay. As the Applicant has not sought condonation nor explained its delay, the consequence of a finding that it delayed unreasonably is decisive, it argued.

[51] Goldrush states that it was unaware of the impugned decision and also unaware of the facts and reasons which led to the impugned decision, until December 2018. It also contends that, as it was not a party to the initial application for route operator licences in terms of the RFP, and the additional 1 000 LPM's were not advertised in 2017, Goldrush was unaware of the impugned decision. It says that when the Board made the decision, it failed to inform Goldrush of its decision- however they fail to state on which basis the Board was obliged to notify a party, who was not party to the proceedings, of its decision.

[52] Goldrush then, in broad terms, states that it did not fail to institute review proceedings not later than 180 days after the date when it was informed of the impugned decision as envisaged in section 7 (1)(a) of PAJA.

[53] In its reply, it merely averred that "*it has dealt fully with the events when the impugned decision came to its attention and that there was no other way in which*

the Applicant could have been aware of the decision before the date it became aware of it". However, in a further supplementary affidavit filed, the Applicant annexed a power point presentation, as proof that it had met with the CEO of the Board, on 13 December 2017, to discuss the desirability of a third operator to operate as a route operator in the Western Cape. They maintain that the CEO of the Board did not disclose to them that the Board had already made the impugned decision to allocate the additional LPM's to the existing operators about three months before.

[54] It is common cause that the application for review was filed on 25 March 2019. The Applicant further does not disclose when and how it obtained knowledge in December 2018 of the Board's 2017 decision. The Power Point presentation is undated but curiously, under the heading "*Conclusion*", the presentation ends with the following:

> *"Our appeal is for the Board to amend its LPM policy to 3 Operators."*

[55] It is not in dispute that the Board approved two route operators for the roll-out in 2003 and then made a decision to allocate a further 1 000 LPM's between them in August 2017. It therefore cannot be coincidental that a pitch was made by the Applicant to the Board, on its version, on 13 December 2017 to appeal to the Board to consider amending its policy to three operators. Any other deduction would be absurd, since the Board's policy had been two operators since the allocation in 2003, and had been the case for 14 years hence. Thus the timing of the so-called presentation, some 4 months after the impugned decision was taken by the Board, together with the 'appeal', leads to the inescapable conclusion that the Applicant

must have known about the decision at or about December 2017.

[56] According to First and Second Respondents, the Applicant has failed to disclose how and when it obtained knowledge in December 2018 of the Board's decision taken in August 2017. I was referred to the matter of *Opposition to Urban Tolling Alliance and others v The South African National Roads Agency Ltd and Others*[8], which summarised the principles that apply to delays under PAJA:

> "At common law application of the undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned. Up to a point, I think, s 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding 180 days as per se unreasonable. Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable per se. It follows that the court is only empowered to entertain the review application if the interests of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been 'validated' by the delay. That of course does not mean that, after the 180 day period, an enquiry into the reasonableness of the applicant's conduct becomes entirely irrelevant. Whether or not the delay was unreasonable and, if so, the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not."

[57] The Board argues that the decision under attack in the present proceedings was taken more than 2½ years ago. The Applicant's failure to make full disclosure on when exactly and how it obtained knowledge thereof strongly suggests that it became aware thereof at an earlier date than claimed. It has not brought its case within the confines of PAJA, nor has it sought condonation for the failure to do so.

[8] [2013] 4 All SA 639 (SCA) at para 26

They claim that no case has been made out in terms of section 9(2) of PAJA. Since the Applicant has failed to adequately deal with the delay, least still make out a case for condonation, this court is not duty bound to consider the validity or not of the impugned decision.

[58] The delay rule is a principle that flows directly from the rule of law and its requirement for certainty. The Constitutional Court has held that there is a strong public interest element in both certainty and finality of administrative decisions and the exercise of administrative functions[9]. It is also a long-standing rule that a legality review must be initiated without undue delay and that courts have the power (as part of their inherent jurisdiction to regulate their own proceedings) to either overlook the delay or refuse a review application in the face of undue delay.[10]

[59] In *Valor IT v Premier, North West Province and Others*[11], the following was stated with regard to delay:

> 'Whether a delay is unreasonable is a factual issue that involves the making of a value judgment. Whether, in the event of the delay being found to be unreasonable, condonation should be granted involves a 'factual, multi-factor and context-sensitive' enquiry in which a range of factors – the length of the delay, the reasons for it, the prejudice to the parties that it may cause, the fullness of the explanation, the prospects of success on the merits – are all considered and weighed before a discretion is exercised one way or the other.'

[60] Now as stated before, there is no application for condonation before me. The investigation into the reasonableness of the delay has nothing to do with the Court's discretion, whether, in all the circumstances of the case, the delay was reasonable.

[9] Altech Radio Holdings (Pty) Ltd and Others v City of Tshwane Metropolitan Municipality (1104/2019) [2020] ZASCA 122 (5 October 2020) para 16; Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal [2013] ZACC 49; 2014 (5) SA 579 (CC) PARA 47; Associated Institutions Pension Fund v Van Zyl 2005 (2) SA 302 at 46

[10] Altech *op cit* at para 18; Khumalo *op cit* at par 44

[11] [2020] ZASCA 62; [2020] 3 All SA 397 (SCA) para 30; Altech *ibid* para 20

On the facts, no full explanation for the delay has been advanced. I am therefore of the view that on the first leg of the enquiry, the delay is, in my view, unreasonable.

Should the delay, given all the circumstances, be condoned?

[61] The second leg of the enquiry is to consider, in assessing whether the delay should be overlooked, is whether there is potential prejudice to the affected parties and the prospects of success on the merits. It is trite that a failure to bring a review within a reasonable time may cause prejudice to a respondent.

[62] In reviewing and considering whether to set aside an administrative decision, courts are imbued with a discretion, in the exercise of which relief may be withheld on the basis of an undue and unreasonable delay causing prejudice to other parties, notwithstanding substantive grounds being present for the setting aside of the decision.[12]

[63] In the first instance, the decision was taken at the end of 2017, almost 3 ½ years ago. The application for review was launched almost 2 years later. No doubt the Third and Fourth Respondents would have implemented the practical measures pursuant to the decision.

[64] The question is whether there is success on the merits. I am not going to repeat the submissions made by the Respondents in reliance of their contention that that they were not legally obliged to advertise for a third operator licence - this by

[12] OudeKraal Estates (Pty) Ltd v The City of Cape Town and Others (25/08); [2009] ZASCA 85 (3 September 2009)

virtue of what was contained in the RFP which set out how the Board proposed to deal with further allocation of LPM's. I do however want to investigate the reasonableness of the Board, in following that procedure.

[65] According to the RFP, the initial invitation was that a licence with a maximum of three operators would each be allocated 1 000 limited gambling machines to be exposed for play in the Province. If fewer than three Applicants were found suitable for licencing, then the Board reserved the right to increase the number of machines allocated per Applicant proportionally, subject to the Norms, or to re-advertise and invite other applications.

[66] The RFP also duly considered future expansion. The RFP stated that *'[p]rospective Operators should also take note of the options which the Board has identified regarding the possible future expansion of the industry in the Western Cape. If, once the industry has become established, it appears that the market and the social and economic conditions then prevailing in the province will accommodate the allocation of further limited gambling machines, the Board may offer further machines to existing licenced Operators…. Should the Board elect to follow this course and should the existing licenced Operators not take up the offer to expand their operations, the Board may invite licence applications from other entities*."

[67] First of all, it seems to me that the provision of re-advertising was only made in the event that the existing Operators did not take up the offer to expand their operations. This approach seems reasonable on the face of it. Fewer than the initial allotted LPM's were granted to the successful applicants. It seems probable that the Board had this provision in place as a measure of expedience, having satisfied itself

that the current Operators were reputable and experienced, that the remaining LPM's would be offered to them. The Board also made sure to insert provisions, that in the event that the existing Operators chose not to take up the Offer that an invitation would be extended to other entities, through the provision made for re-advertising.

[68] According to the Fourth Respondent, even though the Board retained a discretion in the manner in which it dealt with the further roll-out of the LPM's, it was argued that V-Slots and Grand Slots had a legitimate expectation, based on the RFP to expect the Board to provide them with a right of first refusal. The objective facts however do not support this contention.

[69] Regulation 3(1) provides that, subject to sub-regulation 2, the maximum number of LPMs which may be allowed by a provincial licencing authority to be operated on a single site, must be five. This is commonly known as a Type A licence. Regulation 3(2) provides that the Board may on good cause shown and upon application by a provincial licencing authority, approve the operation of LPMs in excess of 5 machines and not subject to the *provisio* that "*such application must be made in respect of every site for which limited pay out machines in excess of five is sought*." This is referred to as a Type licence.

[70] Regulation 13 makes it clear that the roll out of the LPM's would be done in three successive and distinct stages and the next phase could only be commenced once the first phase had been implemented. Initially, a provincial licencing authority may roll out no more than 50% of the total number of LPMs allocated to that province in Phase 1. Phase 2 provides that a provincial licencing authority may roll out no more than a further 35% of the total number of LPMs

allocated to the province. It also states that Phase 2 shall not commence until the regulation 13(2) criteria dealing with a socio-economic impact study have been met to the satisfaction of the National Minister.

[71] The Board maintains that it did not allocate the full number of LPMs permitted under Phase 1, which would have been 4 500. It originally decided to award 3 000, but ended up awarding only 2 000 and ultimately, a further 1 000 in August 2017.

[72] The Board contends that it offered the additional 1 000 LPM's to the existing licence route operators, because the RFP had required them to; and in any event, that these route operators had a legitimate expectation for the Board to offer them any additional licences. I will start with the latter contention.

[73] Objectively, there is no evidence on the record, that the Third and Fourth Respondents expected the Board, to without more, offer any additional licences to them in terms of the RFP. To the contrary. According to the Board, on 14 June 2013, the Fourth Respondent addressed correspondence to the Board, enclosing a proposal that the Board, *inter alia*, increase the allocation of LPM's to existing route operators. In that proposal , Grand Slots recommended that the Board consider increasing the number of LPMs allocated to each of the route operators in the province to 1 500, which, it states, will still retain the total machines licenced below the 50% threshold required by the regulations and would not require a socio-economic impact study. If Grand Slots had a legitimate expectation to have been awarded additional licences in terms of the RFP, they most certainly did not pursue it when that request was ostensibly refused.

Interestingly however, the proposal also contained the following with regard to the possibility of inviting licence applications from other prospective route operators. It stated:

> "We do not believe that it will be in the province's interests to invite licence applications from other prospective route operators given that the Grandslots and V-Slots are entrenched in the market and will have a significant advantage over any newcomer. As a result newcomers will find it difficult to establish commercially viable businesses and to deliver on the provinces objectives for licensing of LPM's.

[74] In terms of the RFP[13], the Board was obliged to consider SMME development, the extent to which the project provides opportunities for the development of Small, Medium and Micro business enterprises.

[75] We know that on 14 June 2017, and pursuant to a meeting held on 3 May 2017 between the Board and Grand Slots, that the Board invited Grand Slots to submit a written proposal to the Board, which it duly did, requesting an additional allocation of LPMs. In terms of this recommendation, it *inter alia* requested the Board consider an incremental increase of licences to each route operator once the initial allotted number of licences had been rolled out in accordance with bid commitment and any subsequent amendments.[14]

[76] V-Slots made similar representations, highlighting the Board's articulated objectives in respect of the LPM industry by 'enhancing economic growth and development in the Western cape, particularly through the stimulation of the small and medium-sized business sectors'.[15] V-Slots ended the proposal by

[13] Clause 3 under Economic and Community benefits

[14] paragraph 2 of Grandslots letter dated 14 June 2017

[15] paragraph 10 of their undated proposal

acknowledging that they knew that the Board was considering submissions made by their fellow route operator and requested '*as part of its assessment regarding the possibility of the expansion of the LPM sector, that they respectfully request that, to the extent that this process results in the adoption and implementation of a new policy position, that such policy be crafted in a manner as to ensure parity of treatment between both route operators, in order to ensure that the playing field remains level'*.

[77] From the content of these letters, it is not readily apparent that the route operators, as a matter of course, assumed that they were entitled to or expected to be awarded, any additional LPM licences that may have become available. This is also apparent from the Minutes of the Board meeting of 19 July 2017 where there was an acknowledgement that a request had been received by Grand Slots and V-slots (reiterating that the latter had submitted a request in the past but had been requested to re-submit an updated representation.) The Minute also recorded that they did not believe that there was any expectation for the Board to resolve the matter. Thus, the argument that the Board was constrained to offer the additional LPMs' to only the Third and Fourth Respondents cannot be sustained.

[78] On 1 August 2017, the Board resolved to approve an additional 500 LPMs to each route holder. Based on the proposals and the Minutes of the various meetings, it is apparent that the Board had the belief that it was competent for them to have offered the additional LPM's to the existing route operators, without advertising same, since they were still well below the 50% threshold required by

the National Gambling Regulations in terms of Phase1 of the roll-out. It also meant that an additional socio-economic impact study would not be required.

[79] According to the Board, three further impact studies were in fact conducted. However the motivation it seemed for the allocation, revolved more around the expedience of the process – and the belief that the Board assumed that what they were doing, was right. But was it procedurally fair?

[80] It is trite that a court does not have wide ranging discretion to substitute its opinion for that of the functionary. The standard of review is that of rationality, as laid down in the Constitutional Court in *Pharmaceutical Manufacturers Association of SA and another: in re Ex parte President of the Republic of South Africa and others*[16] where the court held[17] that the exercise of public power by functionaries should not be arbitrary and that decisions must be rationally related to the purpose for which the power was given.

[81] The rationality threshold is laid down in *Pharmaceutical Manufacturers* as follows:*[18]*

> "Rationality in this sense is a minimum threshold requirement applicable to the exercise of all pubic power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful. The setting of the standard does not mean that the courts can or should substitute the opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately. A decision that is

[16] 2000 (2) SA 674 (CC).

[17] At paragraph 85.

[18] At paragraph 90.

objectively irrational is likely to be made only rarely but if this does occur, a court has the power to intervene and set aside the irrational decision."

[82] Rationality is a less onerous standard than that of reasonableness.[19] A rationality review is essentially "*about testing whether there is a sufficient connection between the means chosen and the objective sought to be achieved*".[20]

[83] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*[21] the Constitutional Court considered the proper meaning of section 6(2)(h) of PAJA in light of the constitutional obligation upon administrative decision makers to act "*reasonably*".

[84] The approach to be adopted when a court is asked to review and set aside a decision by a functionary is formulated as follows in *Allpay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer, SASSA*[22]:

"[28] Under the Constitution there is no reason to conflate procedure and merit. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established.

[29] Once that is done, the potential practical difficulties that may flow from

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[19] See *Bel Porto School Governing Body v Premier, Western Cape and Another* 2002 (3) SA 265 (CC) at paragraph 46; In *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC), different results followed depending on the applicable standard. Yacoob J held that the standard was rationality which the legislation met whereas O'Regan J considered that the standard was the higher one of reasonableness.

[20] *Minister of Defence and Military Veterans v Motau and* Others 2014 (5) SA 69 (CC) paragraph 69.

[21] 2004 (4) SA 490 (CC).

[22] 2014 (1) SA 604 (CC) at paras 28-30.

declaring the administrative action constitutionally invalid must be dealt with under the just and equitable remedies provided for by the Constitution and PAJA. Indeed, it may often be inequitable to require the re-running of the flawed tender process if it can be confidently predicted that the result will be the same.

[30] Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between 'mandatory' or 'peremptory' provisions on the one hand and 'directory' ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this Court O'Regan J succinctly put the question in ACDP v Electoral Commission as being "whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose"."[23]

[85] In my view, there does not seem to be any *mala fides* in having adopted that process. Was it rational and procedurally fair for the Board to have assumed that it was perfectly acceptable to award the same two route operators with licences, despite their own pledge to support small and medium enterprises? The answer in my view, is no. If one has regard to the earlier proposal by Grandslots to the Board, there was a clear intention to monopolise the LPM industry in the province. This issue must have been discussed, since it did not feature in the updated proposal of June 2017. According to the Applicant, if one has regard to the basis of allocation of licences by the Board – that they exhibit a good compliance record – then they would continue to be awarded licences to the detriment of other hopeful route operators. This, they say, is contrary to section

[23] *African Christian Democratic Party v Electoral Commission & Others* 2006 (3) SA 305 (CC) at paragraph 25.

54 of the National Gambling Act in that the allocation of the additional LPMs ' was likely to substantially affect competition in the gaming industry generally in respect of the proposed activity in the province, and that approving the application would result in the Applicant, alone or in conjunction with a related person, achieving market power.'

[86] Thus, the impugned decision, not only supported the market power and monopoly of the two operators, but also ensured that they were the only two route operators in the province. This was contrary to section 54 of the National Gambling Act and procedurally unfair as envisaged in section 6(2)(c) of PAJA. The Board was obliged to consider these factors. On this basis alone, I would be obliged to err in favour of the Applicant in this regard and find that the Board's decision is reviewable under section 6(2)(e)(iii) of PAJA on the basis that it failed to properly consider relevant considerations in deciding to approve Grand Slots and V-Slots additional licences. In the circumstances, I find it unnecessary to traverse the remaining grounds of review.

The effect

[87] As I have stated before, the question of prejudice is always factor in considering whether a court is to exercise its discretion in a review. In *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal*[24] , the Constitutional Court held as follows:

"[46] Section 237 of the Constitution provides that:

[24] (CCT 10/13) [2013] ZACC49; 2014 (3) BCLR 333 (CC); 2014 (5) SA 579 (CC) (18 December 2013)

"All constitutional obligations must be performed diligently and without delay."
Section 237 acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. The principle is thus a requirement of legality.

[47] This requirement is based on sound judicial policy that includes an understanding of the strong public interest in both certainty and finality. People may base their actions on the assumption of the lawfulness of a particular decision and the undoing of the decision threatens a myriad of consequent actions." (own emphasis)

[88] There is therefore need for parties to have certainty when they contract with organs of state. There needs to be predictability and finality in decision–making between contractants and organs of state. In *Pepkor Retirement Fund v Financial Services Board 2003 (6) SA 38*, the court observed the following:

"[32] Hitherto, where jurisdiction is not in issue and there is no obvious transgression of the boundaries within which the functionary has been empowered to make decisions, our courts have not permitted a review solely on the basis of a material mistake of fact on the part of the person who made the decision. Judicial intervention has been limited to cases where the decision was arrived at arbitrarily, capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter: *Johannesburg Stock Exchange v Witwatersrand Nigel Limited and Another* **1988 (3) SA 132** (A) at 152C-D; *Hira and Another v Booysen and Another* **1992 (4) SA 69** (A) at 93B-C. There are decisions in other jurisdictions, however, which go further.

"[47] In my view a material mistake of fact should be a basis upon which a court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should (subject to what is said in para [10] above) be reviewable at the suit of *inter alios* the functionary who made it - even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision. The doctrine of legality which was the basis of the decisions in *Fedsure, Sarfu* and *Pharmaceutical Manufacturers* requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly ie on the basis of the true facts; it should not be confined to cases where the common law would categorize the decision as *ultra vires*.

[89] What therefore becomes of Applicant's questionable standing and delay in its filing of its application, pursuant to my finding that the November 2017[25] decision was procedurally unfair and unreasonable?

[90] It was said in *Giant Concerts* that the issue of *locus standi* is separate from the merits and will usually be dispositive of an own interest litigant's claim.[26] The Court went on to say that—

> "an own-interest litigant may be denied standing even though the result could be that an unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether *this* particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only if 'the right remedy is sought by the right person in the right proceedings.'
>
> However, this Court immediately qualified the general principle that an own-interest litigant's challenge of a public decision may be dismissed solely on the basis that the litigant lacks *locus standi*. It said:
>
> > "To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest." (own emphasis)

[91] I am therefore of the view that in the interest of justice, and despite the Applicant's shortcomings dealt with earlier, that the Applicant's application for review must succeed. I am however of the view, that given the passage of time, that the roll-out of the additional LPM's would already have been implemented, or substantially implemented. It would therefore be prejudicial for the site operators if their *status quo* were to be disturbed by these findings.

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[25] The actual date of resolution was 29 August 2017

[26] Areva at paragraph 40 of Zondo J's judgment

[92] With regard to costs, the Respondents argued that the costs pursuant to the urgent interdict sought in Part A should be borne by the Applicant, given that there was no urgency and that, in any event, I was advised that the interdict was abandoned. The Applicant is therefore not entitled to these costs.

[93] In the circumstances, I make the following order:

1. The decision taken by the Western Cape Gambling Board in November 2017[27] to allocate the remaining 1 000 limited pay out machines proportionally to the Third and Fourth Respondents as licenced operators is reviewed and set aside.

2. This order shall not affect existing LPM's that have already been allocated and installed at licenced site routes pursuant to the 2017 decision.

3. In the event that there are non-operational LPM licences that are licenced and have not been allocated to a site, the Board is ordered to advertise same should it be prudent to do so.

4. Save for the costs of Part A, the First, Second, Third and Fourth Respondents are ordered jointly and severally to pay the costs of the application.

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DS KUSEVITSKY

Judge of the High Court, Western Cape Division

[27] According to the Notice of Motion, however the actual date is 29 August 2017

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