Republic of South Africa

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

Case No. A660/2022

Before: The Hon Ms Justice Goliath (Deputy Judge President)
The Hon. Ms Justice Baartman
The Hon. Mr Justice Binns-Ward

Date of hearing: 31 October 2022
Date of judgment: 3 November 2022

In the matter between:

THE CHAIRPERSON OF THE WESTERN CAPE GAMBLING AND RACING BOARD	First Appellant
THE WESTERN CAPE GAMBLING AND RACING BOARD	Second Appellant
VUKANI GAMING WESTERN CAPE (PTY) PTD T/A V-SLOTS	Third Appellant
GRAND GAMING WESTERN CAPE (RF) (PTY) LTD t/a GRAND SLOTS	Fourth Appellant

and

GOLDRUSH GROUP MANAGEMENT (PTY) LTD	First Respondent
MEC FOR FINANCE (WESTERN CAPE)	Second Respondent

JUDGMENT

BINNS-WARD J (GOLIATH DJP and BAARTMAN J concurring):

[1] This matter is an appeal as provided for in terms of s 18(4)(ii) of the Superior Courts Act 10 of 2013.

[2] On 20 April 2021 the court a quo handed down judgment in an application by the first respondent, Goldrush Management (Pty) Ltd ('Goldrush'), for the review and setting aside of a decision by the second appellant, the Western Cape Gambling and Racing Board, made in August 2017, to amend the limited gambling machine operator licences issued in 2004 to the third and fourth appellants in terms of s 26 of the Western Cape Gambling and Racing Act 4 of 1996. Such licences authorised each of those appellants to operate up to 1000 limited payout machines ('LPMs') on third parties' premises specially licenced for that purpose in terms of s 47 of the Act (so-called site licences). (A '*limited payout machine*' is defined in s 1 of the Act to mean '*a gambling machine outside of a casino in respect of the playing of which the stakes and prizes are limited as prescribed by regulations made in terms of the National Act* [viz. the National Gambling Act 7 of 2004]'.) The amending decision increased the number of LPMs that each of the licensees was authorised to operate on licenced sites to 1 500.

[3] The relief sought in Goldrush's notice of motion before the court a quo was divided into two parts. The first, Part A, sought an order '[p]*ending the final determination of Part B, interdicting the First to Fourth Respondents from taking any steps, alternatively further steps, to implement the First and/or Second Respondent's decision taken in November* (sic) *2017, to allocate the remaining 1000 limited payout machines proportionally to the Third and Fourth Respondents, as licensed (sic) route operators in the Western Cape ("the impugned decision")*'. The second part of the notice of motion, Part B, pertained to the application to review and set aside the impugned decision.

[4] Goldrush did not proceed for relief in terms of Part A of its notice of motion, thereby effectively abandoning its application for interim interdictory relief prohibiting the

implementation of the impugned decision pending the final determination of the judicial review application.

[5] Goldrush succeeded in its application for the review and setting aside of the impugned order. The judgment of the court a quo is listed on SAFLII, sub nom. *Goldrush Group Management (Pty) Limited v Chairperson of the Western Cape Gambling and Racing Board and Others* [2021] ZAWCHC 86 (20 April 2021). Insofar as currently relevant, the court a quo's order provided as follows in that regard:

1. *The decision taken by the Western Cape Gambling Board in November 2017 to allocate the remaining 1000 limited payout machines proportionally to the Third and Fourth Respondents as licenced operators is reviewed and set aside.*
2. *This order shall not affect existing LPMs that have already been allocated and installed at licenced site routes pursuant to the 2017 decision.*

(The order also contained a paragraph 3 the meaning and effect of which is not clear, but which on any approach is dependent for its operation on the abovementioned paragraphs 1 and 2 and therefore stands or falls together with those paragraphs.)

[6] The respondents in the review application, being the chairperson of the Gambling Board, the Gambling Board and the current holders of the only route operator licences that have been granted in the Western Cape (the latter being the third and fourth respondents respectively in the court a quo) applied for and were granted leave to appeal by the court a quo against the whole of its judgment and order. The appeal lies to the Supreme Court of Appeal. Goldrush was granted leave to cross-appeal. Amongst the issues on which Goldrush sought leave to cross-appeal were the court a quo's findings that it lacked standing to bring the review and that it had in any event delayed unduly in instituting the review proceedings.

[7] In addition to its application for leave to cross-appeal, Goldrush also applied, in terms of s 18(3) of the Superior Courts Act 10 of 2013, by notice of motion dated 21 May 2021, for the following substantive relief:

> '*2. The order of Kusevitsky J dated 20 April 2021 under the above case number is declared to be operative and executable pending finalisation of the respondents' applications for leave to appeal to this Honourable Court, and pending any further appeal or application for leave to appeal to any other Court.*
>
> *3. As a consequence thereof, pending finalisation of the respondents' applications for leave to appeal to this Honourable Court, and pending any further appeal or application for leave to appeal to any other Court, the first and second respondents may not grant or allocate any further site licences in respect of limited payout machines pursuant to the 2017 decision beyond those allocated as at 20 April 2020.*'

[8] For reasons that are not evident on the record the court a quo's judgment on the applications for leave to appeal and cross-appeal and Goldrush's application in terms of s 18(3) of the Superior Courts Act was handed down only on 9 June 2022. Insofar as currently relevant, paragraph 3 of the order made by the court in those applications acceded to Goldrush's s 18(3) application in the following terms:

> '*3. The Order dated 20 April 2021 is declared operative and enforceable until the final determination of all present and future appeals and cross-appeals in respect of the Order*'.

[9] It was well established at common law that the general effect of an appeal or an application for leave to appeal was to suspend the operation of the judgment at first instance until the determination of the appeal. The Court did, however, have the statutorily invested

power, on application, to exempt its order from that general effect. The circumstances and manner in which it might do so were authoritatively discussed and defined in the judgment of the late Appellate Division in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544-5. The position at common law has been displaced and the matter is now regulated by s 18 of the Superior Courts Act, which, insofar as relevant to the current matter, provides as follows:

> ***Suspension of decision pending appeal***
>
> *(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.*
>
> *(2) ....*
>
> *(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.*
>
> *(4) ....*
>
> (5) ....'

[10] The respondents in the court a quo (to whom I shall hereafter refer as the appellants) have exercised the automatic right of appeal afforded to them in terms of s 18(4)(ii) of the Superior Courts Act against the aforementioned order made by the court a quo in terms of s 18(3), and it is of those appeals that this court is now seized. We are enjoined by s 18(4)(iii) to deal with them '*as a matter of extreme urgency*'.

[11] Whereas under the dispensation that obtained prior to s 18 the court enjoyed what Corbett JA, in *South Cape* supra, described as '*a wide general discretion*' as '*part and parcel of the inherent jurisdiction which the Court has to control its judgments*', under the currently applicable statutory regime a court may order that its decision not be suspended pending the decision of an application for leave to appeal or an appeal only if each and every one of the requirements specified in s 18 has been satisfied. Those requirements are proof by the applicant (in this case, Goldrush) (i) of the existence of exceptional circumstances, (ii) that it will suffer irreparable harm if the court does not grant the order and (iii) that the other parties will not suffer irreparable harm if the court so orders.

[12] But even if all the requirements of s 18(1) and (3) are satisfied, and the absolute threshold established thereby consequently met, the decision whether or not to grant an exceptional order in terms of s 18 remains within the discretion of the court. As this court stated in *Minister of Social Development, Western Cape and Others v Justice Alliance of South Africa and Another* [2016] ZAWCHC 34 (1 April 2016) at para 26 (footnotes omitted):

> '*It is important to emphasise, as counsel on both sides acknowledged, that notwithstanding their introduction of an absolute threshold in the sense just discussed, the provisions of s 18 do not result in the exercise of judicial discretion in the wide sense being excluded in the determination of applications for leave to execute or for orders ad factum praestandum to operate pending an appeal. Even if what I call the double-edged requirements on irreparable harm and that of exceptionality are satisfied, the court retains 'a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised'. Considerations of what is just and equitable in the peculiar circumstances remain relevant in that context.*'

[13] It is in the exercise of that discretion that the court will have regard, as best it is able in the given case,[1] to the applicant's prospects of success in the pending or prospective appeal because those bear on the issue of exceptionality. Insofar as a different view was expressed in *Incubeta* (at para 26), the matter has been settled by the Supreme Court of Appeal's endorsement of the position stated in *Minister of Social Development*; see *University of the Free State v Afriforum and Another* [2016] ZASCA 165 (17 November 2016) at para 15, [2017] 1 All SA 79 (SCA), 2018 (1) SA 428 (SCA) at para 15.

[14] In *Minister of Social Development*, it was also held (in para 2) that the determination of an application in terms of s 18(3) involved the exercise of judicial discretion in the wide sense. It follows that the scope for interference with it on appeal if the appellate court is of a different view is greater than in a case in which a true or strict discretion by the court of first instance is entailed; cf. *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 ZASCA 58 (29 May 1996), [1996] 3 All SA 669 (A), 1996 (4) SA 348 (A) and *Trencon Construction (Pty) Ltd v Industrial Development Corporation of SA Ltd and Another* [2015] ZACC 22 (26 June 2015); 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 at para 83-90.

[15] The requirements that need to be satisfied to obtain an order in terms of s 18(3) work to some extent in an interlinking way; it is exceptional when an appeal is pending that a litigant will suffer irreparable harm if it is unable to enforce a judgment in its favour from a lower court before the issue is finally determined. Were it otherwise, it seems unlikely the common law rule concerning the suspension of the effect of such judgments would exist. The delay in being able to enforce a judgment in one's favour will frequently be inconvenient and even prejudicial,

[1] In *Knoop NO and another v Gupta (Tayob Intervening)* [2020] ZASCA 163 (9 December 2020); [2021] 1 All SA 726 (SCA); 2021 (3) SA 88 (SCA), at para 50, Wallis JA remarked that because of considerations of urgency a court seized of an appeal in terms of s 18(4)(ii) will possibly not have before it the full record of proceedings at first instance, and consequently be unable to assess prospects of success other than from the judgment of the court a quo. That has never been my experience sitting in such appeals, but if the problem does present in a given case the appellate court's ability to consider the prospects of success will necessarily be limited. In my view, that consideration does not detract from the long established principle that, generally, prospects of success are a relevant consideration.

but that is not the same as '*irreparable harm*' (or '*onherstelbare skade*' which is term used in the Afrikaans text). Contextually, '*irreparable harm*' denotes that an irremediable injury will be sustained if the exceptional remedy is not afforded. The interrelationship between the double-sided 'irreparable harm' requirements in s 18(3) and the exceptionality requirement in s 18(1) is illustrated by Sutherland J's statement in *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* [2013] ZAGPJHC 274 (16 October 2013; 2014 (3) SA 189 (GSJ), at para 22, that '*[t]he circumstances which are or may be "exceptional" must be derived from the actual predicaments in which the given litigants find themselves*'.

[16] The irreparable negation of an established right if the judgment were not immediately enforceable would be a clear example of irreparable harm, so it is appropriate to consider what right or interest it was that Goldrush sought to protect by the review application. In argument before this court, Mr *Roux* SC for Goldrush submitted that the implicated right was the right to involvement in a process of public participation that Goldrush contended had to precede any amendment to the route operator licences that had been awarded to the third and fourth appellants. He argued that the right in question arose from s 4 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). If that is indeed so, it cannot, in my view, cogently be suggested that a delay pending the final determination of the review on appeal would impinge on the right. On the contrary, were the appeal against the judgment in the principal case to be dismissed, the continued roll out of additional LPMs in terms of the amended licences could not proceed under the impugned decision until a lawful amendment of the licences had been effected in terms of a fresh decision by the Gambling Board preceded by a public participation process.

[17] It is evident on the facts that the roll out of additional LPMs is a drawn-out process. Suitable sites and site operators have to be identified and a licencing process in respect of each new site has to be gone through, in every case with its own process of public consultation. The

gradualness with which the roll-out of additional LPMs is likely to proceed is borne out by the evidence that, 17 years after the granting of their respective licences, one of the current route operators has yet to realise its allotted initial allocation of 1000 LPMs and the other has only recently achieved full realisation of its quota. It is also evident that as new sites are contracted for the roll out of LPMs, some established sites fall by the way for one or other reason. The incidental attrition of previously established sites further slows down any progress that the route operator licensees can make towards fully utilising their allocated quotas.

[18] I refer to this because, in its s 18 application, the irreparable harm contended for Goldrush was not any infringement of its right to participation in a process of public consultation but rather the financial loss it would suffer were it deprived of the opportunity to become a third licenced route operator in the Western Cape. Its case was that a process of public consultation would allow it to motivate for the additional 1000 LPM allocation determined upon by the Gambling Board to be allocated to a third licensee instead of being divided equally between the third and fourth appellants, being the two existing licensees. The financial loss posited for the purposes of its allegation of irreparable harm was predicated on it obtaining the additional licence and thereupon being confronted with the fact that some of the additional LPM opportunities allocated in terms of the impugned decision would by that stage already have taken up by the third and fourth appellants.

[19] The case thus made out in Goldrush's s 18(3) application does not bear scrutiny. It is entirely speculative and hypothetical (as the court a quo itself held at para 34 of the principal judgment) and does not come near to satisfying the requirement that it be proven as a matter of probability that Goldrush <u>will</u> suffer irreparable harm if the court a quo's order is not put into effect immediately notwithstanding the appeals against it that are pending.

[20] Even were it to be held on appeal in the principal case that a process of public consultation should have preceded the decision to amend the third and fourth respondents'

licences and that the impugned decision falls to be set aside because there had not been such a process, it does not follow that a third route operator would be licenced. Or even if one were, that Goldrush would be the successful applicant for the third route operator licence.

[21] There is in fact nothing in the evidence to indicate on the probabilities one way or the other that the Gambling Board's proposal to amend the third and fourth appellants' licences by increasing each of their respective current allocations by 500 LPMs could not be confirmed after a process of public consultation. It is telling in that regard that the original invitation to apply for route operator licences issued by the Gambling Board in 2003 contemplated the grant of three licences for a total of 3000 LPMs, but reserved the right of the Board to appoint only two with the LPM allocation of 3000 to be divided equally between them. The amendment effected to the third and fourth appellants' licences in terms of the impugned decision essentially gives effect to that original idea.

[22] It should also have weighed with the court a quo that Goldrush's abandonment of its application for interim interdictory relief pending the final determination of the review application was inconsonant with Goldrush's contention that it would suffer irreparable harm if relief were not granted in terms of s 18(3). As the appellants' counsel were at pains to emphasise, Goldrush sought by way of s 18(3) to achieve, in effect, the same relief as that which it had earlier abandoned when it decided not to move for the relief it had originally sought in terms of Part A of its notice of motion. Its conduct in abandoning the interim interdictory relief sought in terms of Part A was irreconcilable with any genuine apprehension of irreparable harm pending the final determination of its review application.

[23] For these reasons it is clear, in my view, that Goldrush did not satisfy the requirement of proving that it would suffer irreparable harm if the court a quo's order were not made of immediate effect notwithstanding the pending appeals. Owing to the intrinsic link between

satisfying that requirement and the criterion of exceptional circumstances, its application consequently fell short on that requirement too.

[24] In the context of those fatal flaws little practical purpose would be served by examining the other grounds on which the appellants contended that the court a quo had been wrong to grant Goldrush's application in terms of s 18(3). It does bear mention, however, that the judgment of the court a quo gives no indication that any consideration was given, for the purpose of exercising the court's discretion in the determination of the s 18(3) application, to Goldrush's prospects of success in the pending appeal and cross-appeal review application. In my view, the omission was a stark one in the peculiar circumstances of the case.

[25] Firstly, the court a quo had found that Goldrush had acted with undue delay in instituting the review proceedings. The court held that, as a matter of probability, Goldrush had knowledge of the impugned decision by December 2017, yet it instituted judicial review proceedings only 15 months later, in March 2019. As the review was one brought under the PAJA, the review proceedings had, at the very latest, to be instituted within 180 days after Goldrush came to know of the impugned decision. The application was, however, instituted outside that 180-day outer limit. Absent condonation for the late institution of the proceedings, which, in terms of s 9 of PAJA, could be obtained only by agreement between the parties or from a court on application, the court a quo had no jurisdiction to entertain the review; see *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency and Others* [2013] ZASCA 148 (9 October 2013), [2013] 4 All SA 639 (SCA) at para 26. In the current case the parties had not agreed to an extension, no application was made for one and, unsurprisingly in the circumstances, the court did not make an order in terms of s 9. It follows that unless the appellate court in the principal case is persuaded that the court a quo was misdirected in its finding that the application was unreasonably delayed, the appeal by the

respondents in the court a quo is very likely to succeed on the point that the court a quo lacked jurisdiction to entertain the review.

[26] Secondly, the court a quo found that Goldrush lacked standing to bring the review application. Very exceptionally, the court nevertheless proceeded to determine the application on the stated basis that the matter was one in which the public interest cried out for relief. In this regard the court a quo, in essence, followed para. 34 of the Constitutional Court's judgment in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* [2012] ZACC 28 (29 November 2012); 2013 (3) BCLR 251 (CC), in which Cameron J wrote (footnote omitted):

> *'... 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". 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.*'

[27] There was, however, little to nothing in the papers to support a conclusion that the public interest cried out for relief in this matter and the judgment of the court a quo did not identify what about the case was considered sufficiently exceptional to call for the review to be entertained notwithstanding the applicant's identified lack of standing. The only relevant interest disclosed on the papers was the own interest of Goldrush. Insofar as Goldrush did

argue that a failure by the Board to allocate any additional LPMs to a third route operator rather than proportionately to the two existing route operators went against the enjoinders in ss 53 and 54 of the National Gambling Act that socio-economic and competition issues be considered when considering an application for a licence, I agree with the submission by Mr *Jamie* SC for the third respondent that in the given case there is nothing to suggest that the increase in the LPM quotas allocated to the existing route operator licensees was likely to substantially affect competition in the gambling industry generally or in respect of the particular activity concerned and that the relavant socio-economic considerations bearing on the provision of business opportunities to small and medium enterprises related to the potential afforded by the increase in permitted LPMs to site operators, not to route operators. (Site operators are businesses such as bars and similar enterprises who contract with route operators to allow up to a maximum of five LPMs to be operated at their respective premises. Such contracts can be concluded only if the business proprietor concerned obtains a site licence authorising the installation and operation of the LPMs at its premises.)

[28] The forementioned delay and standing issues pose material challenges to the ability of the court a quo's decision on the review application to withstand appellate scrutiny, irrespective of the merits of the case. In my judgment, they should have made the court a quo all the more hesitant to grant exceptional relief under s 18(3) of the Superior Courts Act even if Goldrush otherwise appeared to have satisfied all the requirements for such relief (which for the reasons discussed earlier it did not).

[29] For all the foregoing reasons I have concluded that the appeal in terms of s 18(4) has to succeed. An order will therefore issue in the following terms:

1. The appeal in terms of s 18(4)(ii) of the Superior Courts Act 10 of 2013 ('the Act') against the decision of the court a quo directing that its decision in case no. 4793/2019

not be suspended pending the decision of any appeal from it is upheld with costs, including the fees of two counsel where such were engaged by each of the appellants.

2. The order of the court a quo in the application in terms of s 18(3) of the Act is set aside and replaced with an order in the following terms:

   'The application in terms of s 18(3) of the Superior Courts Act is dismissed with costs, including the fees of two counsel where such were engaged by each of the respondents'.

A.G. BINNS-WARD
Judge of the High Court

P.L. GOLIATH
Deputy Judge President

E.D. BAARTMAN
Judge of the High Court

APPEARANCES

First and second appellants' counsel:	**R.T. Williams SC**
First and second appellants' attorneys:	**Fairbridges Wertheim Becker Attorneys, Cape Town**
Third appellant's counsel:	**I. Jamie SC** **M. Adhikari**
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