REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case Number: 6027/2017P

In the matter between:

RIVER PALACE TAB CC t/a RIVER PALACE TAB **Applicant**

and

KWAZULU-NATAL GAMING AND BETTING BOARD **First Respondent**

GRAND GAMING KZN (PTY) LTD **Second Respondent**

ORDER

The application is dismissed with costs.

JUDGMENT

Delivered on 08 August 2018

Mbatha J

Introduction

[1] The applicant is River Palace Tab CC t/a River Palace Tab, a close corporation (CC) duly incorporated and registered according to the close corporation laws of the Republic of South Africa and having its principal place of business at first floor, 11 Nasik Road, Merebank, Durban, KwaZulu-Natal. The first respondent is the KwaZulu-Natal Gaming and Betting Board ('the Board'), a Schedule 3 Part C public

entity in terms of the Public Finance Management Act[1] read with the KwaZulu-Natal Gaming and Betting Act[2] ('the KZN Act') and whose address for service is 330 Langalibalele Street, Pietermaritzburg, KwaZulu-Natal. The second respondent is Grand Gaming KZN (Pty) Ltd, a company duly incorporated and registered according to the company laws of the Republic of South Africa having its principal place of business at 309 Umhlanga Rocks Drive, La Lucia Ridge, Durban, KwaZulu-Natal. It is cited for its interest in the matter. No relief is sought against the second respondent.

[2] On 7 February 2017 the applicant's application for a licence to operate five Limited Payout Machines (LPM's) was declined by the Board on the basis that it was in breach of the provisions of reg 107 of the KwaZulu-Natal Gaming and Betting Regulations ('the Regulations').[3] As a result of the decision of the Board the applicant brought this application in terms of Rule 53 of the Rules of the Superior Court. The substantive relief sought by the applicant before this court is twofold: First, the applicant seeks an order reviewing and setting aside the decision of the Board to refuse its application for a Type 'A' Site Operators Licence ('the licence') to operate five LPM's. Secondly, it seeks an order of this court substituting the decision of the Board with one awarding the licence to it.

The relief sought by the applicant is opposed by the Board on the basis that no case has been made out for the relief sought and the application should be dismissed with costs.

Background to the applicant's application to the Board

[3] It is common cause that the applicant made an application to the Board for a licence to operate five gaming machines from the ground floor premises at 11 Nasik Road, Merebank, Durban. The brothers Derosh and Dilvir Sewraj each own a fifty percent members share in the applicant. On the upper level of the same premises River Palace Tattersalls owned by their father Mr Shrikumar Sewraj operates five gaming machines in terms of a Type 'A' Site Operators Licence. It has been averred by the applicant that the two business outlets are on different floors, have separate dedicated entrances, though located in the same building. The premises on which

[1] 1 of 1999.
[2] 8 of 2010.
[3] KwaZulu-Natal Gaming and Betting Regulations, 2012.

the applicant and River Palace Tattersalls operate are owned by Dilvir Investments CC, in which Shrikumar has the majority interest.

[4] The applicant's application was considered by the Board's Licencing and Registration Committee (the Committee), which compiled an investigative report on the merits of the application. Furthermore, the following findings were made: that the applicant was previously owned by Shrikumar, who transferred his members interest in the applicant to his sons Derosh and Dilvir, on 9 June 2016, at no cost to them; that the applicant shares the same trade name River Palace and that the applicant and River Palace Tattersalls share the same premises owned by Shrikumar, the licensee, through his CC, Dilvir Investments CC. No rental for the premises is paid by the applicant to Dilvir Investments CC. The report further disclosed that Derosh and Dilvir became co-owners of the applicant in 2014. In 2013 Derosh was employed as a manager at River Palace Tattersalls. Dilvir was employed as a manager at the Wentworth Hotel.

[5] The committee also noted that the applicant complied with the provisions of the KZN Act in that its primary business was a betting outlet, with a valid business licence number issued by the Ethekwini Municipality for Totalisator Agency. The committee's view was that the existence of the licensed site under Shrikumar t/a River Palace Tattersalls, with five LPM's situated in the same premises with the applicant operating on separate floors would not be a bar to the applicant's application. It concluded that the provisions of reg 107(3) do not prohibit the granting of a licence to the applicant but requires a discretion of the Board whether to approve the application or not. In the light of the aforementioned information the senior licensing and registration officer on 27 and 28 October 2016 recommended that the application by the applicant for five LPM's be approved.

[6] The report and the recommendation of the committee were subsequently tabled before the Chief Executive Officer (CEO) of the Board. On 8 December 2016, the CEO, having considered the application, made a recommendation to the Board that the application be refused on the basis that the applicant intends to operate a site situated in the premises where a site operator licence has already been granted to another site operator, being Shrikumar t/a as River Palace Tattersalls, that the site operator was *'associated with'* the applicant and that the effect of granting another

licence to operate a site would be in contravention of reg 107(1), which allows only a maximum of five LPM's on the premises to a single entity. The meaning of the words 'associated with' forms the crux of this application as I will demonstrate later.

[7] On 10 January 2017 the Licensing, Registration, Monitoring, Control and Compliance Committee (LRMCC) compiled a report on the basis of the findings by the CEO, particularly on the effect of granting the licence to the applicant and recommended the refusal of the application to the Board. The Board on 7 February 2017 subsequently rejected the applicant's application, on the following grounds:

'a. the applicant and the licensee share the same trading name, River Palace;

b. the licensee is a relative of the members of the applicant;

c. the licensee, Mr Shrikumar Sewraj, transferred the membership interest of the close corporation at no cost to his sons Mr Derosh Sewraj and Dilvir Sewraj;

d. the premises are owned by Shrikumar Sewraj, the licensee, through his CC, Dilvir Investments CC and the applicant does not pay rent for the use of the premises.'

Legislative framework

[8] The relevant legislation governing the granting of the LPM licences is the KwaZulu-Natal Gaming and Betting Act 8 of 2010; the KwaZulu-Natal Gaming and Betting Regulations, PN 64 of 2012, *PG* 983, date of commencement 29 June 2012; the National Gambling Act 7 of 2004 and the National Gambling Regulations GN R.1342, *GG* 26994, 12 November 2004.

(a) The National Act's purpose as stated in the preamble to the Act provides for the co-ordination of concurrent national and provincial legislative:

'competence over matters relating to casinos, racing, gambling and wagering, and to provide for the continued regulation of those matters; for that purpose to establish certain uniform norms and standards applicable to national and provincial regulation and licensing of certain gambling activities; to provide for the creation of additional uniform norms and standards applicable throughout the Republic; to retain the National Gambling Board; to establish the National Gambling Policy Council; to repeal the National Gambling Act, 1996; and to provide for matters incidental thereto.'

(b) The KwaZulu-Natal Gaming and Betting Act 8 of 2010 provides in its preamble

'for the Regulation of gaming, horse racing and betting in the Province of KwaZulu-Natal; restrictions on gaming and betting; the establishment of a provincial Gaming and Betting Board; the licensing of persons conducting casinos and bingo games; the licensing of

gaming machine operators, racecourse operators, totalisators and bookmakers; the registration of certain persons; the imposition of fees, taxes, levies and penalties on the various gambling activities; the appointment and authorisation of inspectors and their powers and duties; the establishment of a Horse Racing and Betting Transformation Fund; and to provide for matters connected therewith.'

(c) The KwaZulu-Natal Gaming and Betting Regulations were issued in terms of the KwaZulu-Natal Gaming and Betting Act 8 of 2010. The Regulations cater for the issues relating to the appointment of the Board, various licence applications, and issues specifically dealing with Limited Payment Machines, including Type 'A' site operator licences and other issues relating thereto.

(d) Regulation 107 which forms the subject matter of this application provides as follows:

'**Maximum number of limited payout machines.-**

(1) Subject to the provisions of this regulation, the maximum number of limited payout machines which may be made available for play in or on the licensed premises of a type "**A**" site operator or independent site operator, is five.

(2) Where an applicant is the owner of several separate sites which are situated in the same premises or building and such applicant applies for type "**A**" site operator licences or independent site operator licences, in respect of more than one of such sites, the Board may grant the application in respect of one or more of the sites and the maximum of five limited payout machines per site may be approved for each site.

(3) Whenever an applicant applies for a type "**A**" site operator licence or independent site operator licence, in respect of a single site owned by him or her and which is situated in premises where site operator licences or independent site operator licences have already been granted to other site operators or independent site operators who are not associated with such applicant, the Board may grant the application in respect of such premises: Provided that the total number of limited payout machines in any single *bona fide* sports club, public bar, licensed tavern or licensed betting outlet does not exceed the maximum of five as contemplated in sub-regulation (1).

(4) Where an applicant conducts more than one primary business from the same site, such as, but not limited to, a sports club and a public bar, such businesses are regarded as one business for the purpose of an application for a type "**A**" site operator licence and in the event that the licence is granted, the total number of limited payout machines specified in the licence must not exceed the maximum of five prescribed in sub-regulation.'

[9] In the notice of motion the applicant has confined itself to the following grounds of review: (a) the alleged failure by the Board to recognise the separate

legal personality of the applicant from the entities owned by Shrikumar, River Palace Tattersalls and Dilvir Investments CC (s 6(2)(d) of PAJA);(b) the lack of authorisation on the part of the CEO of the Board to take a decision or make a recommendation (s 6(2)(a) of PAJA); (c) the alleged taking into account of irrelevant considerations by the Board (s 6(2)(e)(iii) of PAJA) and (d) that the Board's decision was arbitrary, capricious and irrational. (s 6(2)(e)(vi) and s 6(2) (f)(iii)(bb)-(dd))

Applicant's submissions

(a) The alleged failure by the Board to recognise the separate legal personality of the applicant from the entities owned by Shrikumar, River Palace Tattersalls and Dilvir Investments CC (s 6(2)(d) of PAJA)

[10] It was argued on behalf of the applicant that the Board failed to take into account that the applicant is a separate juristic entity, that it conflated the entities Dilvir Investments CC (the owner of the premises) and the applicant, that the Board confused the juristic personality of the applicant with the legal personalities of Dilvir Investments CC and River Palace Tattersalls. In that regard the Board has sought to pierce the corporate veil in circumstances where there is no fraud or abuse of the corporate entities. The confusion regarding the corporate and juristic personality of the applicant and that of its former member led to the resolution by the Board to reject the applicant's application for a licence to operate five LPM's on the proposed premises. Therefore the mistake of fact led to the mistake of law.

[11] The applicant submitted that the Board failed to appreciate that there are two separate and distinct premises with separate entrances on separate floors of the building, which is adequate for purposes of the application.

(b) The alleged taking into account of irrelevant considerations by the Board (s 6(2)(e)(iii) of PAJA)

[12] Counsel for the applicant stated that the Board pointed out that Derosh is the site key employee of the applicant and at the same time the site key employee of the licensee, River Palace Tattersalls, which is of no consequence as the record reflects that the manager of River Palace Tattersalls is Shrikumar. The Board confused the

son from the father and confused premises from a site and that all this confusion was unnecessarily caused by the Board in its attempt to pierce the corporate veil. Counsel for the applicant argued that if the applicant was treated as a juristic entity separate from its members the granting of the licence to the applicant will not have the effect that the site would have an excess of five machines in contravention of reg 107(1). The Board misconstrued and failed to comprehend the provisions of reg 107(1).

[13] The applicant further submitted that the Board was bound by the reasons set out in the Extract of the Minutes of the Board meeting held on 7 February 2017 and cannot supplement them ex post facto, as it purports to rely on a new ground that the applicant is associated with a licensed site operator situated in the same premises, as this would result in the overlap between the applicant for the licence and the current licensee at the premises. Be that as it may, in addressing the issue of the association, it was submitted on behalf of the applicant that since the KZN Act does not have a definition for the word 'associate', the court should import the definition of the word 'associate' from the National Gambling Act, Section 1, which defines the word 'associate' as follows:

> '(a) an employer;
> (b) a co-shareholder of a private company contemplated in section 20 of the Companies Act, 1973 (Act No. 61 of 1973);
> (c) a co-member of a Close Corporation contemplated in section 2 of the Close Corporations Act, 1984 (Act No. 69 of 1984); and
> (d) a person to whom one has granted or from whom one has received a general power of attorney;'

In that regard counsel for the applicant submitted that the aforementioned definition excludes the applicant, as a result there is no infringement of reg 107(3).

(c) The lack of authorisation on the part of the CEO of the Board to take a decision or make a recommendation (s 6(2)(a) of PAJA)

[14] The applicant also submitted that the CEO had no powers to decide or make a recommendation to the Board and that the errors which vitiated the CEO's thinking permeated the Board's decision which is reviewable in terms of s 6(2)(d), (e)(iii), (e)(vi), (f)(ii)(aa), (bb), (cc), and (dd) of PAJA. The applicant contends that reg 107

permits multiple licenses in separate sites in the same building, even in cases where one applicant owns those sites.

(d) That the Board's decision was arbitrary, capricious and irrational. (s 6(2)(e)(vi) and s 6(2) (f)(ii)(bb)-(dd)).

[15] Lastly, it was submitted that the Board acted contrary to its own decision in a similar application that served before it brought by a company called Krummeck. In that matter the applicant, a licensee, was a co-owner or fifty percent member of Kevdon CC t/a Village Tavern Car Wash R Coffee Shop which was licensed to operate five LPM's on the same site. The site was a single story structure which had been demarcated as Shop 1 and Shop 2, but the applicant in that case was awarded a second licence. Thus its decision in this application was arbitrary, capricious and irrational.

The Board's submissions

[16] The Board submitted that the applicant misinterpreted the provisions of reg 107(1) which provides that in the ordinary course, a single premises, may only have five LPM's on the property, not each site as contemplated by the applicant. According to the Board the entire building in 11 Nasik Road, Merebank, irrespective of its separate floors and separate entrances, constitutes licensed premises.

[17] It was submitted on behalf of the Board that reg 107(1) expressly states that there may not be more than five LPM's on the licensed premises. The only exception is created by reg 107(2), where it is in respect of an application by an existing site operator or by reg 107(3) in respect of the applicants who are not associated with the existing site operator.

[18] Regulation 107(3) grants the Board a discretion to grant a licence for a site situated in the premises where other licenses have already been granted to other operators not associated with the applicant. One needs to define what *'not associated with'* means in the context of the legislation. It is the Board's case that the words should be given their ordinary and commercially suitable meaning.[4] The Board

[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 SCA see specifically para 18.

referred to the meaning in *The Shorter Oxford English Dictionary* which describes 'association' as 'The act of associating or being associated' and *The Concise Oxford English Dictionary*[5] which defines 'association' as '[a] connection or cooperative link between people or organizations.'

[19] Counsel for the Board went on further to state that the words *'not associated with such applicant'* must be read in line with the preamble to the KZN Act, which provides for 'the regulation of gaming…; restrictions on gaming and betting; …'. Regulation 107(3) goes on further to say that the Board may grant the application in respect of such premises, which gives it the power to exercise its discretion whether to grant or refuse the application. This takes me to the consideration of the submissions made by the various parties herein.

[20] It is common cause that our law recognises that a company or a CC acquires an independent legal personality from its shareholders, directors or members. When the veil is pierced, the separate legal personality of the company or CC falls away. The rights and liabilities of the company are treated as those of its shareholders, directors and members in their personal capacity. The piercing of the corporate veil occurs if the shareholders are improperly using the separate legal personality of the juristic entity.[6] In *Knoop NO & others v Birkenstock Properties (Pty) Ltd & others*[7] it was held that the corporate veil may be pierced where there is proof of fraud or dishonesty or other improper conduct in the establishment or the use of the company or the conduct of its affairs. In the judgment of *Shipping Corporation of India v Evdomon Corporation and another*[8] Corbett CJ stated that the court required proof of 'an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs' before a court can pierce the corporate veil. The piercing of the veil is an exceptional remedy.

[21] The judgment in *Airport Cold Storage (Pty) Ltd v Ebrahim and others*[9] dealt with the provisions of s 65 of the Close Corporations Act, which provides that where the incorporation of a CC or any act by it, constitutes 'a gross abuse of the juristic personality of the corporation as a separate entity' the court may declare that the CC

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[5] 2ed (2010).
[6] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168.
[7] [2009] ZAFSHC 67.
[8] 1994 (1) SA 550 (A) at 566E.
[9] 2008 (2) SA 303 (C) paras 11 and 53.

is ‘deemed not to be a juristic person in respect of such rights, obligations or liabilities of the corporation’ as the court specifies. In this case the court applied the section as the member of the CC had ignored the juristic nature of the CC whenever it suited him. Therefore the sole member was found to be personally liable for the CC’s debts towards a particular creditor.

[22] However, in general, the principle remains that the CC is a separate legal entity from its members. Therefore the piercing of the veil can only occur where there is unbecoming conduct from the members of the CC. This principle was reaffirmed by the Supreme Court of Appeal in *Hülse-Reutter and others v Gödde*[10] where the court held that the court has no general discretion to disregard the existence of the CC simply because it would be ‘just or convenient’ to do so. In this regard the applicant’s contention is that there has been an error of law on the part of the Board.

[23] The courts have been guarded in defining the circumstances in which the court would pierce the corporate veil. The Board considered the facts which prima facie appear to be an attempt at piercing the corporate veil. However, one has to consider the factors that need to be considered in the interpretation of reg 107(3).

Review in terms of PAJA

[24] The general powers of the court to interfere with the exercise of a discretion in the administrative decision are set out in s 6(2) of PAJA. Section 6(2)(h) provides that ‘A court or tribunal has the power to judicially review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could so exercise the power or performed the function.’ *In Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*[11] the court addressed the issue of reasonableness as follows:

‘Even if it may be thought that the language of section 6(2)(h), if taken literally, might set a standard such that a decision would rarely if ever be found unreasonable,[12] that is not the proper constitutional meaning which should be attached to the subsection. The subsection

[10] 2001 (4) SA 1336 (SCA) para 20.
[11] 2004 (4) SA 490 (CC) para 44.
[12] See, for example, the discussion in P Cane *An Introduction to Administrative Law* 3 ed (Clarendon Press, Oxford 1996) at 209; and also C Hoexter *The New Constitutional & Administrative Law, Volume II Administrative Law* (Juta, Cape Town 2002) at 187.

must be construed consistently with the Constitution[13] and in particular section 33 which requires administrative action to be 'reasonable'. Section 6(2)(h) should then be understood to require a simple test, namely, that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach.'

In the same judgment the Constitutional Court further held that what constitutes a reasonable decision will depend on the facts of each case. In determining the reasonableness of the decision the court has to consider the nature of the decision; the identity and expertise of the decision maker; the range of factors relevant to the decision; the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.

[25] For this court to determine if the Board sufficiently considered the application before it, in the exercise of its discretion, I have considered the facts which the Board took into account in coming to a decision: The main factor which I find to be significant is that of the lease agreement between the applicant and the premises owner of Dilvir Investments. Shrikumar acted in his personal capacity to sign the lease as a majority member of Dilvir Investments. This factor in my opinion compromises the separate legal personality of the applicant.

[26] In that regard the first point of call should lie with the interpretation of the provisions of reg 107(3), being the empowering provision that the Board took into account in consideration of the application. My view is that the entire provisions of reg 107 should be read conjunctively to give effect to the intention of the legislature and the purpose of the regulation. Regulation 107(1) provides that the maximum LPM's per licensed premises, should not exceed five; reg 107(2) refers to the applicant who is the owner of several separate sites situated in the same premises or building, who at the discretion of the Board may be granted an application in respect of one or more sites and the maximum of five LPM's per site; in reg 107(3) the applicant may be granted a licence at the discretion of the Board in respect of a site owned by him situated in premises where other site operators have already been granted licences to operate as long as such site operators are not associated with the applicant and reg 107(4) caters for a situation where the applicant conducts more than one primary business from the same site, which shall be considered as one

[13] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 21-26.

business for the purposes of an application for a Type 'A' site operators' licence. In the event that such licence is granted, the number of LPM's will not exceed the maximum number prescribed in reg 107(1).

[27] Regulation 107(1) in limiting the number of LPM's shows that the intention of the legislature was that the LPM's were never intended to be the primary business of any licence holder, hence the Board has a discretion to exercise in circumstances where reg 107(2), (3) and (4) are applicable.

[28] I have considered whether the phrase *'not associated with'* should be given the definition of 'associate' as stated in the National Gambling Act, which defines the word 'associate' as 'an employer; a co-shareholder of a private company contemplated in section 20 of the Companies Act, 1973 (Act No. 61 of 1973); a co-member of a Close Corporation contemplated in section 2 of the Close Corporations Act, 1984 (Act No. 69 of 1984); and a person to whom one has granted or from whom one has received a general power of attorney;'. It does not define the phrase *'not associated with'* which means 'unconnected with' and not connected or linked with other people or organisations. 'Associate' in the National Act denotes a different meaning to the definition in the National Gambling Act. I accept the Board's contention that it should be interpreted purposively[14] in the context of the regulations and the empowering Acts.[15]

In general where there is a conflict between the provincial and the national legislation, the national, legislation takes precedence over the provincial legislation as provided for in s 104 of the Constitution.(*The MEC: Department of Education, North West Province and another and FEDSAS*[16]). It is my opinion that when the interpretation of *'not associated with'* is determined, the meaning attributed to 'associate' in the National Act was not intended to refer to reg 107(3).

The interpretation advanced by the applicant is in conflict with the purpose of the Act and the Regulations. It is trite that where there is concurrent legislative competency and the National and Provincial Acts overlap the provisions of the Act must be read

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[14] *Department of Education & another v Hoerskool Ermelo & another* [2009] ZACC 32; 2010 (2) SA 415 (CC) paras 55-56. See also *MEC for Education, Gauteng Province & others v Governing Body, Rivonia Primary School & others* [2013] ZACC 34; 2013 (6) SA 582 (CC) para 36.

[15] '[R]ead in context and having regard to the purpose of the provision and the background to the preparation and production of the' regulation - *Natal Joint Municipal Pension Fund v Endumeni Municipality* para18.

[16] [2016] ZASCA 192.

in the way that best reflects the overall national objectives in a manner compliant with the objectives of the Constitution. (see *FEDSAS*)
The factors outlined by the Board as pointing to the association are indicators to the association of the proposed business and the existing one. Regulation 107(3) need to be read in line with the National Gambling Act and the KZN Act which regulate the granting of the LPM licences in line with the emphasis placed on the expansion of LPM's as a primary business due to its socio-economic problems.

[29] Having unpacked what the *phrase 'not associated with such applicant'* means, I find that this is not a kind of an industry where a person can run a string of LPM's like the chicken franchises where there is unrestricted competition or where the applicants can obtain licences without any form of restraint. The legislation controls the mushrooming of such industries due to its socio-economic impact on the population. The fact that it requires that there be a primary business before the licence is granted is indicative of this strict regulation.

[30] The Board's approach in considering the effect of the association was not misplaced. The Board rightfully rejected the application as it would have had the undesirable effect of a single site with ten LPM's, in contravention of reg 107(1). Though the Board has a discretion in terms of reg 107(3), the exercise thereof is conditional upon the applicant not being associated with any existing licence holder on the same premises. The applicant's association with River Palace Tattersalls would have resulted in the circumvention of the provisions of regs 106 and 107 and s 54 of the National Gambling Act. The objective highlighted by s 26 of the National Act, is relevant to the way the Board exercises its discretion, being limiting the scourge of poverty caused by gambling. It would also have the undesirable effect of having more than the maximum number of allowed LPM's per site. I am quite convinced that the applicant and River Palace Tattersalls are inextricably linked to one another. The phrase *'not associated with'* should be given the meaning as advocated by the Board which indicates 'a connection or cooperative link between persons or organizations'. Though the applicant, Dilvir CC and River Palace Tattersalls are separate legal entities, the Board has shown that the association between the entities as well as the association between the members of the entities would be in breach of reg 107. The applicant failed to show that the Board acted unreasonably, with mala fide and irrationally.

[31] The provisions of s 26 of the National Gambling Act which I referred to above regarding LPM's provides as follows: 'S 26(1) Cognisant of the potentially detrimental socio-economic impact of a proliferation of limited payout machines, the minister must regulate the limited payout machine industry in accordance with this section…' These cannot be regarded as irrelevant matters.
Section 56(5) provides that 'When considering an application made in terms of subsection (1) or (2) the Board must consider the economic, social development and competition issues contemplated in ss 53 and 54 of the National Gambling Act.'
Section 30(7) which is in line with the National Act provides that 'When considering an application made in terms of subsection (1) (the application for a licence) the Board must consider the economic, social development and competition issues contemplated in ss 53 and 54 of the National Gambling Act. Section 54(2) provides that after considering the provisions of subsection (1) must refuse application…if it appears that approving the application would result in the applicant alike or in conjunction with a related person, achieving marketing power. These provisions affirm that a restrictive interpretation be given to the provisions of reg 107(3). I have therefore given the legislative interpretation which takes into account the purpose of the enactment, as confirmed by the Constitutional Court in the *Mohunran & another v The National Director of Public Prosecutions & another*.[17]

[32] The applicant gives the impression that it is entitled to the granting of the licence irrespective of the provisions of s 107(3) whereas the discretion conferred on the Board requires the weighing of the facts before it, the consideration of the empowering provision where there already exists LPM's, the proportionality clauses limiting the maximum number of LPM's per site and other factors. The objective test is applied to discern if the administrative action is reasonable or not.[18] The Board has satisfied the court that it exercised the discretion in line with the aforementioned principles and I cannot find that the Board's decision is reviewable.

[33] There was no confusion by the Board as to the separate and distinct legal entities of the applicant and the licensee, Shrikumar. The main issue being whether there is an association between the applicant and the existing licensee. The Board's

[17] 2007 (4) SA 222 (CC) paras 77-81.
[18] *Trinity Broadcasting Ciskei Independent Communications Authority of SA* [2003] 4 All SA 589 (SCA).

decision was based on the totality of the evidence before it. The applicant relies on the recommendation by the senior licencing registration officers, who recommended the granting of the application at the discretion of the Board (My emphasis). Their report indicates that they were alive to the unique situation which presented before them as it appears in the following paragraphs of their report:

'11.2 MATTERS WHICH DO NOT RESULT IN DISQUALIFICATION BUT NEED TO BE NOTED BY THE BOARD

11.2.1 There is an already licensed site, Shrikumar Sewraj t/a River Palace Tattersalls, with five (05) LPMs, situated in the premises with the applicant, River Palace tab CC t/a River Palace Tab. The licensee operates on the ground floor of the building while the applicant operates on the first floor of the building. The premises are owned by Mr Shrikumar Sewraj, the licensee, through his CC, Dilvir Investments CC and the applicant does not pay rent for use of the premises.

The licensee, Mr Shrikumar Sewraj, is the father of the members of the applicant, namely: Mr Derosh Rohul Sewraj and Mr Dilvir Sewraj.

River Palace Tab CC t/a River Palace Tab, the applicant, was previously owned by Mr Shrikumar Sewraj, the licensee, who voluntarily transferred the ownership of the business to Mr Derosh Rohul Sewraj and Mr Dilvir Sewraj, the sons at no costs on 09 June 2016 presumably to avoid the provisions of Regulation 107(4) which states as following:

'Where an applicant conducts more than one primary business from the same site, such as, but not limited to, a sports club and a public bar such businesses are regarded as one business for the purpose of an application for a Type 'A' site Operator licence and in the event that the licence is granted, the total number of limited payout machines specified in the licence must not exceed the maximum of five.'

However in terms of Regulation 107(3) of the Regulations issued in terms of the KZN Gaming and Betting Act 08 of 2010-

'Whenever an applicant applies for a Type 'A' site operator licence or independent site operator licence, in respect of a single site owned by him or her and which is situated in premises where site operator licences or independent site operator licences have already been granted to other site operators or independent site operators who are not associated with such

applicant, the Board may grant the application in respect of such premises, provided that the total number of limited payout machines in any single site does not exceed the maximum of five.'

The applicant, River Tab CC t/a River Palace Tab, is associated to the licensee, Shrikumar Sewraj t/a River Palace Tattersalls, owing to the following grounds:

(a) The applicant and the licensee share the same trading name, River Palace;

(b) The licensee is the father of the members of the applicant;

(c) The licensee, Mr Shrikumar Sewraj, transferred the membership interest of the close corporation at no cost to his sons, Mr Derosh Rohul Sewraj and Dilvir Sewraj;

(d) Lastly, the premises are owned by Shrikumar Sewraj, the licensee, through his CC, Dilvir Investments CC and the applicant does not pay rent for the use of the premises.

Therefore, the provisions of Regulation 107(3) of the KZN Gaming and Betting Regulations do not prohibit the granting of the licence to the applicant but requires a discretion of the Board whether to approve the application or not. The Board has already set a precedent in a similar application, Kevin Krummeck t/a Village Tavern, where an appeal against the refusal of the application was upheld and the Board granted the application.

11.2.2 Signage restricting access to minors to be installed at the entrance, upon approval of the licence by the Board.

11.2.3 The line of supervision of the LPMs is obstructed. CCTV system is required in the gaming area and must be reflected on the floor plan.'

The applicant can therefore not rely solely on their recommendation which was qualified and subject to the consideration by the Board.

[34] It is important that when one reads the provisions of reg 107, that one takes into account the definition of 'premises' in the KZN Act which defines 'premises' to include 'land and any building, structure, vehicle, ship, boat, vessel, aircraft or

container' as against the definition of 'site'. The definition of 'site' in the Regulations refers to 'premises licensed for the placement of one or more limited payout machines under authority of a site operator licence or an independent site operator licence.' Regulation 107(1) refers to the licensed premises which may only have a maximum of five LPM's. Regulation 107(3) contemplates more than one site being granted a licence within the same premises, however, that is not the only consideration that has to be taken into account by the Board.

Having considered all the above it is my view that the Board did not misconstrue the provisions of reg 107 nor did it make an error of law in so far as the interpretation of the provisions of reg 107(3) is concerned. It adhered to the general requirement that there must be a maximum of five LPM's, save only in circumstances where the applicant owns several separate sites in the same premises, where the Board may in the exercise of its discretion, grant the application for more than one site and may grant a licence for a site in the premises where other licenses have been granted to other operators who are not associated with the applicant.

[35] The main object of the provision being to regulate the industry but giving a discretion to the Board in the circumstances where five LPM's are already in place, the effect thereof on the community and the applicant and the significance of the ruling in the matter. Having considered that, I have come to the conclusion that the Board has shown sufficient grounds for rejection of the application through the interpretation of the provisions of s 107(3), that it did not consider irrelevant issues in taking into account the purpose of the Acts and the Regulations thereto and that it has not been shown that it acted irrationally.

Authority of the CEO

[36] In terms of s 6(2)(a) of PAJA the court has the power to judicially review an administrative action if the administrator who took the decision was not authorised to do so by the empowering provision, acted under a delegated power which was not authorised by the empowering provision or was biased or reasonably suspected of being biased. This is the challenge raised by the applicant whose submission is that the CEO took a decision for the Board.

The composition of the Board must consists of fit and proper persons and who must in terms of section 8(2) cumulatively have appropriate knowledge or experience in

legal matters, including the application or administration of law, accounting and financial management and other fields. The applicant has not shown that the highly qualified Board lacks the necessary expertise to rely on the CEO for further decisions. The applicant prefers to rely on the recommendation of a preliminary investigative committee, a committee established in terms of s 18(1) to assist the Board in the performance of its functions and conduct research into any matter falling within the jurisdiction of the Board in terms of the Act. Such committees are chaired by a chairperson, who defers to the Board that takes the final decision. The decision by the investigative committee is not binding on the Board and is subject to the exercise of a discretion by the Board.

[37] Section 22 of the KZN Act deals with the delegation of powers, duties and functions by the Board to the CEO and provides that where appropriate the Board may in terms of s 22 (1)(a)(i) 'to grant a site operator or independent site operator licence, to impose conditions on the issue of such a licence and to amend, substitute or rescind any condition,… .' I must emphasise that 'where appropriate' can only mean that such powers can be exercised within the specific confines of the delegated authority only.

This is expressly stated in s 22(2) which provides that 'Any delegation in terms of subsection (1) does not prevent the Board from exercising such power or performing such duty or function itself.' In this case the applicant's case was tabled before the Board, which took a decision. The CEO did not take a final decision. She made a recommendation to the Board, which is clear in that the LRMCC compiled a report on the basis of the findings by the CEO, which was tabled before the Board which had to consider the provisions of reg 107. Regulation 107 confers authority on the Board, and not on the CEO, in determination of such issues. It is only the Board that made a final decision.

I therefore find that her recommendation can never be equated with a decision taken by the Board.

The Krummeck Decision

[38] The *Krummeck* matter upon which the applicant relied on as a precedent for its application is distinguishable from the applicant's case. In the *Krummeck* case the CEO made a decision rejecting the application in terms of s 22 of the KZN Act. *Krummeck* then appealed to the Board as the decision was made by the CEO in

terms of s 140(1) of the KZN Act and reg 184(1). The Board upheld the appeal. I agree with counsel for the Board that mere inconsistency does not constitute a ground of review in the absence of a procedural or substantive unfairness. The Board exercised its discretion which this court will not interfere with.[19]

[39] The argument advanced on behalf of the applicant that they were not informed that they were bypassing the provisions of reg 107, is irrelevant as, reg 107 is the empowering provision in so far as the consideration of the application was concerned. The grounds stated by the Board to the applicant are not different reasons, as they embody what needs to be considered in the determination of what the phrase *'not associated with'* means in terms of reg. 107(3).

The substitution remedy (s 8(1) of PAJA)

[40] In light of the conclusion that I have reached in the above paragraphs, I do not deem it necessary to traverse this aspect any further. Suffice to state unequivocally that the applicant has failed to make out a case on all the grounds of review it relied upon. Thus, I do not consider it necessary to consider the remedy sought by the applicant.

[41] In the result, the application is dismissed with costs.

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Mbatha J

[19] *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642 at 651-652.

Date of Hearing:	04 May 2018
Date of Judgment:	08 August 2018

Appearances

For Applicant:	Adv G Harrison / P Nortje
Instructed by:	McNaught & Company Suite 1 555 Bluff Road Durban c/o Stowell and Company 295 Pietermaritz Street Pietermaritzburg
For First Respondent:	Adv PJ Wallis
Instructed by:	PKX Attorneys Suite 36 3 On Cascades Crescent Pietermaritzburg
Second Respondent:	Grand Gaming KZN (Pty) Ltd 309 Umhlanga Rocks Drive La Lucia Ridge Durban