IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case no: 80/04

In the matter between

THE GAUTENG GAMBLING BOARD	**APPELLANT**
and	
SILVERSTAR DEVELOPMENT LIMITED	**FIRST RESPONDENT**
RHINO HOTEL AND RESORT LIMITED	**SECOND RESPONDENT**
THE MEMBER OF THE EXECUTIVE COUNCIL OF THE PROVINCE OF GAUTENG FOR FINANCE AND ECONOMIC AFFAIRS	**THIRD RESPONDENT**
THE PREMIER OF THE PROVINCE OF GAUTENG	**FOURTH RESPONDENT**

Coram: **HOWIE P, FARLAM, CLOETE, HEHER JJA and MAYA AJA**

Heard: **25 FEBRUARY 2005**

Delivered: **29 MARCH 2005**

Summary: **Review – court *a quo* substituting its decision for that of administrative tribunal – when justifiable.**

JUDGMENT

HEHER JA

HEHER JA:

[1] When a court reviews and sets aside the decision of an administrative tribunal it almost always refers the matter back to that body to enable it to reconsider the issue and make a new decision. Occasionally the court does not give the administrative organ a further opportunity. Instead it makes the decision itself. This is such a case. The court *a quo* having reviewed and set aside a refusal by the appellant ('the Board') to award a casino licence to the first respondent ('Silverstar') directed the Board to grant the licence. It refused leave to appeal against both orders but this Court granted such leave. The Board later abandoned its challenge against the setting aside of its decision. The dispute between the parties is now confined to whether the court *a quo* was right in assuming the decision-making function.

[2] The National Gambling Act, 33 of 1996 lays down uniform norms and standards which apply to casinos, gambling and wagering in the Republic. Section 13(1)(j)(iii) of the Act limits the number of casino licences which may be granted to 40 of which the Gauteng province is entitled to six. The function of granting licences is left to the provinces.

[3] Gambling in Gauteng is regulated by the Gauteng Gambling Act, 4 of 1995 ('the Act'). The Board was established in Chapter 2 of the Act to oversee and control gambling activities in the province. One of its functions is to invite, investigate and consider applications for casino licences (s 19). Section 31 (in its form before substitution by s 12(a) of Act 6 of 2001 with effect from 31 December

2002) provided as follows:

'(1) The Board shall, subject to the provisions of section 30 and after having duly considered the application for a licence, any representations made in relation to the application, the applicant's written response thereto, if any, any further information furnished or obtained in terms of section 23, the inspection and police reports contemplated in sections 25 and 26, and any other evidence tendered to the Board in terms of section 29 or otherwise, grant the application, subject to sub-section (2), on such conditions as the Board may determine, or refuse the application.

(2) The Board shall not grant a casino licence, route operator or additional gaming licence except with the concurrence of the Executive Council.'

In short, these provisions empowered the Board either to refuse an application or, with the concurrence of the Executive Council ('Exco'), to grant it.

The background to the appeal

[4] In April 1997 the Board issued a public invitation for applications for casino licences in Gauteng. The invitation said that the Board intended to grant 'up to a maximum of six casino licences' with the concurrence of Exco. It did not specify the areas in which the casinos were to be located.

[5] The Board received 23 applications by the closing date in June 1997. It embarked on a comprehensive process of evaluating the applications according to the criteria in ss 40 and 41 of the Act. Part of the sifting involved the hypothetical subdivision of the province into six geographic areas for purposes of comparison and evaluation. The reasons for doing this seem to have been that the applications received fell comfortably into the subdivisions, that up to six licences could be issued and that the division appeared justified by sensitivity studies carried out by

the applicants, which involved the available ‘gaming spend’ and their prospective market shares of it, and their viability. The areas which the Board identified were the Vaal, Johannesburg South/Centre, West Rand, East Rand, Johannesburg North/ Midrand and Pretoria.

[6] The Board compared each applicant for a licence within an area with the other applicants in that area in relation to each of the criteria. Having regard to these comparisons it placed the applicants in a preferred order for the appropriate area. Then it created four clusters (identified by names of animals) of five or six applicants (the preferred applicants from each area) the object being to achieve balanced groupings which would serve the province as a whole and the areas in question. Finally the Board selected from the clusters that one which it considered best achieved those objects.

[7] Silverstar and Rhino Hotel and Resort Limited (‘Rhino’) were the only applicants for licences in the West Rand area. In the comparative process both emerged with credit. The Board had no adverse comment on either. It found that the selection of one of them would not have an impact on any other successful licensee within the other areas.

[8] At the completion of its deliberations early in 1998 the Board prepared a memorandum which outlined the process it had followed and set out the advantages and disadvantages of all the applicants within the scheme of evaluation that I have described. In relation to the West Rand area the Board set out its conclusion as follows:

‘174. After considering all the findings the Board concludes that Rhino’s project should be ranked higher than that of Silverstar. Its location in a rural area which is economically depressed, weighed favourably with the Board.’

[9] The Board then included Rhino in all four of the clusters and it was, of course, an element of the Giraffe cluster which the Board considered would best meet the needs of the province. The approbation of the Board in relation to the contribution which Rhino would make was expressed in the same form in the context of each cluster *viz* the rehabilitation and revitalization of a declining area in the West Rand and the bringing of leisure facilities to that area.

[10] During the period from February to April 1998 the Board held six meetings with Exco to seek concurrence in the grant of casino licences to the applicants in the Giraffe cluster. One of the issues on which they disagreed was the appropriate licensee for a casino in the West Rand area. The Board supported Rhino while Exco favoured Silverstar. They considered the possibility of not granting a sixth licence at all. The Board contended strongly against that. Its reasons were that it was satisfied that the gaming spend in Gauteng province could sustain six licences and the applicants had conducted their studies on the basis that six licences would be granted. The Board argued that the withholding of a licence would create commercial uncertainty and the applicants had a ‘legitimate expectation’ that six licences would be issued. Exco was persuaded and the Board and Exco jointly resolved to issue six licences.

[11] As Rhino afterwards fell out of contention (for reasons which will be

explained) Exco's motivation for preferring it is *per se* no longer of relevance. What does still matter is why the Board was opposed to Silverstar since the Board continues to contend that the setting aside of its preference for Rhino does not necessarily justify the selection of Silverstar in its place.

[12] At a meeting with Exco on 25 February 1998 the Board's objections to Silverstar were explained. The Board now adheres to the views which it expressed at that time and which were embodied in the report prepared for the enlightenment of Exco which is referred in para [8]. These were:

1. Silverstar provides little development and requires a lot of gambling machines.
2. Rhino's capital commitment is commensurate with its expected revenue; implicitly Silverstar's commitment exceeds its projected revenue.
3. Rhino offers better facilities.
4. The market does not require a 1000-seater conference facility as proposed by Silverstar. (However, the memorandum prepared by the Board in summary of its evaluation process speaks of Silverstar offering '800 square metres of conference facilities subdivisible into four rooms'.)
5. Silverstar is highly geared. If the generation of income from the casino does not meet expectations the project will not be viable.
6. The projected revenue of Silverstar exceeds the market spend in the area.

[13] At a further meeting with Exco on 22 March 1998 the Board enunciated the following objections to granting a licence to Silverstar:

1. Silverstar relies on cash flow from a temporary casino pending the completion of its project. If it is unable to meet its margins it will not survive.
2. Silverstar is dependent on a third party loan.
3. Silverstar's gross gaming revenue is out of proportion to the cost of the project being 1:1 instead of the norm of 2:1.
4. While Rhino undertakes to donate a police station, a clinic and an agri-village to the community, Silverstar offers only a portion of land linking its project to the Witwatersrand Botanical Gardens.
5. Rhino has proximity to a world heritage site, an advantage which Silverstar cannot match.
6. The inclusion of Silverstar in a cluster will result in more machines in the province thereby exceeding the available market spend of R2,9 billion. (Silverstar apparently proposed to provide about 1275 gaming 'positions' ie machines and tables whereas Rhino's application contemplated about 730.)

[14] On 20 April 1998 Exco was persuaded to concur in the grant of the sixth licence to Rhino. Silverstar applied to the Transvaal Provincial Division to review the decisions of the Board and Exco. On 11 March 1999 Swart J dismissed the application against the former but set aside the decision of Exco on the ground that it had failed to furnish a rational explanation of its support for Rhino's application.

[15] When Exco reconsidered the matter it reverted to its preference for Silverstar and declined to concur with the Board's decision to grant a licence to

Rhino. Rhino, in its turn, sought to review Exco's refusal.

[16] On 22 October 1999, however, Rhino's application for environmental approval for its site in the Kromdraai valley was rejected by the responsible Minister of State. The area was awarded World Heritage status, eliminating any prospect that Rhino might be able to proceed with its development at its proposed location.

[17] In June 2000 Rhino and Silverstar made common cause in a proposal which served the interests of both. On 1 December 2000 Rhino applied to the Board for the amendment of its application making provision for the grant of a licence to a newly-created company, Rhino Resort Ltd, in which both parties would be shareholders.

[18] The features of the combined application which are of moment in the present context are these:

1. The casino was to be established on the site previously earmarked by Silverstar, located less than 1 km from the perimeter of the buffer zone of the World Heritage site.
2. Whereas Silverstar had originally applied for permission to operate about 1200 slot machines and 75 tables in its permanent casino, the combined application set the limits at 700 and 30 respectively, the numbers previously applied for by Rhino. The Board was requested to consider an automatic increase of at least 30% in the number of gaming positions after the expiry of three years from the granting of the licence.

3. The shareholders of Silverstar were to become 100% holders of the shares in the casino owning company on payment of a nominal price.
4. Rhino agreed to issue 5% of the share capital for the benefit of empowerment groups and individuals from historically-disadvantaged communities within the Sterkfontein, Kromdraai and Swartkop area. (Silverstar had already proposed that more than 51% of the casino-owning company would be owned by communities and individuals from previously-disadvantaged communities.)
5. Silverstar's proposed casino management company, Century Casinos West Rand (Pty) Ltd, would be appointed manager of the joint project, while Rhino's nominee, Kairo SA Management (Pty) Ltd, would act as market consultants.
6. A temporary casino would be located at an existing premises in the Hillfox area accommodating 700 machines and 30 tables while the site was being developed.
7. The project funding was to be about R580 million financed largely by third party debt (as the original Silverstar application had proposed) and very much more dependent on cash flow generation than Rhino had initially postulated.

[19] After a process of notice, objections and a public hearing the Board announced on 15 November 2001 that it had resolved to allow the amendments and to grant the amended application subject to the concurrence of Exco, save that

the temporary casino was to be located at the site of the future permanent development and the application for the future increase in the number of gaming positions was not approved.

[20] In November 2001 Exco resolved to concur in the Board's decision. During February 2002 the sole objector to the combined application, Tsogo Sun Holdings (Pty) Ltd, took the decisions on review. Roux J set aside the Board's decision (and Exco's concurrence in it) as an impermissible substitution of one application for another.

[21] On 5 November 2002 Silverstar requested the Board to grant its original application for a casino licence. Rhino supported the request. Silverstar informed the Board that

'. . . the imposition, for example, of those conditions which attached to the licence as awarded to Rhino Resort Ltd would be acceptable to Silverstar.'

[22] The Board considered Silverstar's request on 4 December 2002 and resolved that

'The Board remains of the view Silverstar Development Limited is not the preferred applicant for the casino licence in the West Rand area.

There are two possibilities with regard to the sixth casino licence namely,

- not to issue a sixth licence
- re-invite applications for the sixth casino licence.'

[23] The Board informed Silverstar of its decision on 6 December 2002. Silverstar requested reasons. The Board replied on 24 January 2003 that its

'reasons for not awarding a casino licence to (Silverstar) are contained in the memorandum the

Board made available during April 1998', ie the memorandum referred to in para [8].

On 18 February 2003 the Board reiterated that it

'still holds the view that Silverstar is not the preferred applicant for an award of a casino licence in the West Rand area and the Board's reasons are fully set out in its memorandum issued during 1998'.

[24] Silverstar thereupon instituted the application which gave rise to this appeal, seeking the review and setting aside of the Board's refusal to award it the licence and an order directing the Board and Exco to issue a licence to it. Only the Board opposed the application. It took up the attitude that, in preferring Rhino as the licensee, it had necessarily and finally refused Silverstar's application. Mynhardt J disagreed. He found that the Board was mistaken in believing that the corollary of its decision to support the grant of a licence to Rhino was a refusal of Silverstar's application. He therefore set aside the Board's purported refusal. Although the Board appealed against that order its counsel now concede that the learned Judge was correct in that respect because it was incumbent upon the Board to reconsider the application 'in the light of the fact that Rhino's application had fallen by the wayside'.

[25] But Mynhardt J also directed the Board and Exco to award and issue a casino licence to Silverstar. It is this order which remains under attack in the present appeal.

[26] The learned Judge, applying *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission and Others*; *Transnet*

Ltd (Autonet Division) v Chairman, National Transport Commission and Others 1999 (4) SA 1 (SCA) at 7A-8D and 10I-11E, held that the Silverstar's application for a licence was already pending before the Board when the Gauteng Gambling Amendment Act, 6 of 2001 (read with Proclamation 18 of 2002 dated 4 December 2002) was passed. (The amendment which s 12 of that Act effected removed the concurrence of Exco as a necessary concomitant to the grant of a licence by the Board.) His conclusion that Silverstar's application for a licence therefore fell to be decided in terms of s 31 of the Act as it read before amendment was not disputed before us. In so far as Exco had an interest in any relief which the court *a quo* might grant, it chose to abide the decision of the court. Since Exco had at all material times supported Silverstar's application it was unnecessary for the court *a quo* to make its order subject to the approval of Exco.

[27] The learned Judge motivated his decision to order the Board and Exco to grant the licence as follows:

'In my view no purpose would be served by remitting the matter to the Board. Silverstar is presently the only applicant for a casino licence for the West Rand Area. It is common cause on the papers that it had complied with the minimum requirements that had been set out in the invitation to apply for licences that were issued by the Board. It was found by the Board during the evaluation process of the applicants for licences that Silverstar's proposed project was a viable one and also a sustainable one. As far back as 9 June 1999 Exco already concluded that Silverstar's application was to be preferred to that of Rhino. Exco's reasons for its conclusions are convincing. [The MEC and the Premier] abide the judgment of the court. Swart J also said that if the matter before him had been an appeal, he would have been inclined in favour of

Silverstar. In the present matter an affidavit has been filed wherein [a director of Rhino and of its subsidiary created for purposes of the failed joint proposal] says that the two companies support the allocation of a casino licence to Silverstar. It appears from the resolution passed by Rhino . . . that it has withdrawn its application for a casino licence in "Western Gauteng".

Under these circumstances I am of the view that this court should now bring finality to the whole saga.'

The legal principles

[28] The power of a court on review to substitute or vary administrative action or correct a defect arising from such action depends upon a determination that a case is 'exceptional': s 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000. Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair. Hefer AP said in *Commissioner, Competition Commission v General Council of the Bar of South Africa and Others* 2002 (6) SA 606 (SCA):

'[14] . . . the remark in *Johannesburg City Council v Administrator, Transvaal, and Another* 1969 (2) SA 72 (T) at 76D-E that "the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary" does not tell the whole story. For, in order to give full effect to the right which everyone has to lawful, reasonable and procedurally fair

administrative action, considerations of fairness also enter the picture. There will accordingly be no remittal to the administrative authority in cases where such a step will operate procedurally unfairly to both parties. As Holmes JA observed in *Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A) at 349G

". . . the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and . . . although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides." See also *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council (Johannesburg Administration) and Another* 1999 (1) SA 104 (SCA) at 109F-G.

[15] I do not accept a submission for the respondents to the effect that the Court *a quo* was in as good a position as the Commission to grant or refuse exemption and that, for this reason alone, the matter was rightly not remitted. Admittedly Baxter, *Administrative Law* at 682-4, lists a case where the Court is in as good a position to make the decision as the administrator among those in which it will be justified in correcting the decision by substituting its own. However, the author also says (at 684):

"The mere fact that a court considers itself as qualified to take the decision as the administrator does not of itself justify usurping that administrator's powers . . .; sometimes, however, fairness to the applicant may demand that the Court should take such a view."

This, in my view, states the position accurately. All that can be said is that considerations of fairness may in a given case require the court to make the decision itself provided it is able to do so.'

[29] An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none

of these advantages and is required to recognize its own limitations. See *Minister of Environmental Affairs & Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs & Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) at paras [47] to [50], and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at paras [46] to [49]. That is why remittal is almost always the prudent and proper course.

The appellant's attack on the discretion exercised by the court *a quo*

[30] The appellant's counsel raised three matters which they characterized as absolute bars to the court arrogating the discretion to itself.

[31] First, they submitted, the Board had never considered whether Silverstar should be granted the licence and it would be wholly inappropriate for the Court to assume that function without first affording the Board sufficient opportunity to do so. The submission, as I understand it, is that because the Board chose Rhino as its preferred candidate and maintained that stance until, at least, the hearing in the Court *a quo* and believed, wrongly, that such preference amounted to a refusal of Silverstar's application, it never became necessary for the Board to consider what the proper course should be in the event of Rhino falling by the way.

[32] Second, counsel submitted, the Board has neither decided nor created a legitimate expectation that all six available licences would be granted. With Rhino's departure that discretion was still open to the Board and was one which could not properly be exercised by the court since the Board was vested by statute with such exercise.

[33] Third, the six available licences were not by legislation or the Board's decision allocated to a particular area (in this case, the West Rand). Rhino secured the Board's approval because of its particular merits in the broader context of the best interests of the province and not because it was necessary to locate a casino on the West Rand. The Board might, in consequence, upon reconsideration, allocate the vacant licence to the only remaining West Rand candidate ie Silverstar or to any of the unsuccessful applicants or to any other applicant who might emerge on re-advertisement of the licence opportunity.

[34] Although all of these submissions bear a veneer of plausibility none, in my view, is reconcilable with the proven facts. Nor does any derive support from the evidence, ie the factual averments in the affidavits.

[35] The initial comprehensive exercise which the Board undertook was an assessment of each applicant according to the criteria laid down by the Act. The object was to ascertain the strong and weak points of each in the context of the possible grant of the licence to that applicant. Fatal flaws and winning features were both of high relevance. Then the Board compared candidates (within geographical limits which it set). That required the Board once again to ask itself which would be the better candidate and why, a task which could only be carried out by assuming that each was the successful party. In the exercise of its discretion the Board decided that Rhino held advantages over Silverstar. It did not expressly find or suggest that Silverstar was as a whole or in any decisive respect unsuitable; it merely stated a preference for Rhino and spelled out its reasons. Later when

required to persuade Exco (which thought Silverstar the better candidate) the Board was again required to address the question of which applicant would contribute more to the benefit of the province. Once again this involved an evaluation of both Rhino and Silverstar as if each was successful in its application. Once again the Board did not expressly reject Silverstar; it considered Rhino the better applicant. It subsequently adhered to that attitude at all material times. So the Board has both considered Silverstar as a potential licensee and set out its grounds for not selecting it – apart from the stubborn adherence to Rhino even after it was no longer a viable candidate, the Board has stated on more than one occasion that its reasons for *rejecting* Silverstar are to be found in its memorandum of April 1998. The attitude of the Board has at all stages amounted to a *de facto* refusal of its application albeit that it may not have had an equivalent effect in law. Why the Board needs to bring its mind to bear on the issue again is not rationally explained.

[36] Counsel is correct in submitting that the Board was under no statutory compulsion to grant six licences. But after careful consideration it recommended six applicants to Exco which, perhaps hoping to avoid dissension, then expressly requested the Board to defend its decision to award a sixth licence. Spokesmen for the Board explained that all applicants knew that six licences were available, all had been requested to prepare and justify their applications on the assumption that six licences would be awarded and in the circumstances possessed a 'legitimate expectation' that the assumption would be realised. Exco was persuaded. The five

licensees who were immediately successful must have conducted their affairs in the belief that a sixth operator would emerge sooner rather than later. Neither the Board nor Exco questioned the need for and desirability of a sixth licence when Rhino and Silverstar submitted the combined application. The Board did not in its answering affidavit in the present litigation set out any facts which might support a decision to withhold a sixth licence now. In the circumstances it appears to me that even making the suggestion approaches the level of frivolousness. It should be emphasized that the Board accepted from the time of its initial evaluation that the proposed operations of Rhino and Silverstar would have no adverse effect on any other licensee. The reference to a 'legitimate expectation' in counsel's submission on this aspect (and also in the context of Silverstar's entitlement to a licence) calls for a reminder that in the present state of the law's development, such an expectation does not found a claim for substantive relief but merely protects procedural fairness: *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) at paras 25 to 28. For a contrary view cf Campbell, *Legitimate Expectations: The Potential and Limits of Substantive Protection in South Africa* (2003) 120 SALJ 292.

[37] The West Rand area entered into the licence equation in the circumstances I have described in paragraph [5] as a result of the Board's considered appraisal that that area formed a natural catchment of gaming demand and spend which could satisfactorily be served by one licencee and for which there were two possible applicants. Nobody appears to have faulted that judgment then or subsequently. All subsequent cluster evaluations, identifications and the grant of five licences as

well as the litigation in respect of the sixth were conducted with the West Rand as a given (and appropriate) location for the sixth licence. The applicant's replying affidavit informs us that all five initial licences were granted subject to a condition that no competing licence was to be granted for 20 years; that surely leaves only the West Rand as the potential home of a further casino in Gauteng. This objection is also entirely without substance.

The inevitability of the outcome

[38] For the reasons which follow I am satisfied that despite the manifest advantages which the Board holds (by comparison with a court) as a decision-maker, the particular facts of the present case are such as to remove it from the limitations imposed by the general principles outlined in paragraph [31].

1. Applications, like trials, depend on evidence not conjecture. The Board, despite ample opportunity, has laid no basis in fact or expert opinion, to suggest that a reasonable possibility exists that, upon balanced reconsideration, it will make a finding adverse to Silverstar.
2. The Board brought to bear the information and expertise at its disposal in its evaluation of the applications in 1997 and in respect of the combined application in 2001. The court *a quo* had and this Court on appeal has the benefit of all that input in the contemporaneous reports prepared by the Board.
3. The combined application was, in substance if not in form, an application by Silverstar on Silverstar's terms, a reality which the Board has either not

appreciated or has chosen to ignore.

4. The Board approved the combined application. In doing so the Board

(a) approved the Silverstar site;

(b) approved the management and control of the operation including the real possibility of an acquisition by Silverstar of all Rhino's shares in the casino operator;

(c) abandoned the two major grounds of preference for the Rhino application, ie location in an underdeveloped rural area and the provision of benefits to a disadvantaged community;

(d) accepted that social benefits offered by the Rhino application (but not by Silverstar), such as employee housing and a clinic, would become unnecessary because of the proximity of such facilities to the new site;

(e) accepted without apparent qualm aspects of the Silverstar application at which the Board had baulked in 1998, such as the high gearing of the project.

5. Counsel was unable to refer us to any apparently material distinction between the combined application as approved by the Board and the original Silverstar application save for the aspect of the number of gaming positions, a problem which was overcome by Silverstar's tender of acceptance of the conditions which the Board had imposed in approving the combined application.

6. There is no suggestion that re-advertisement of the application will draw any other interested applicant or produce a proposal superior to that of Silverstar. The relative merits and demerits of Silverstar's application have received exhaustive ventilation by the Board and Exco and during the court proceedings. There is no unresolved issue.

[39] Taking all the matters which I have referred to in the preceding paragraph into account no objection of substance enunciated in the 1998 memorandum remains unanswered. No countervailing or additional objections have been raised by the Board. The result is that the court *a quo* was not merely in as good a position as the Board to reach a decision but was faced with the inevitability of a particular outcome if the Board were once again to be called upon fairly to decide the matter.

Fairness

[40] That nothing is to be gained by remittal is also relevant to the issue of fairness. The Board both in its answering affidavit and through counsel emphasized its role as a guardian of the public interest in the control and regulation of gambling interests. It sought, in the vaguest terms, to suggest that reconsideration of the licence would carry with it the benefits of greater insight into social conditions and economic facts as they affect and are affected by gambling than the Board could have possessed in the earlier stages of the application process. No facts or circumstances were relied on to support such an inference. On the papers which were before the court *a quo* lack of fairness to the

Board or the reasonable possibility of prejudice to the public were not probable consequences of non-remittal. But there are equitable considerations which favour Silverstar: the delay which has reached substantial proportions (in some degree the responsibility of the Board, in persistently backing an application, in its changing forms, that was doomed to fail) and the unswerving opposition of the Board to Silverstar based on a motivation largely superseded by events and inconsistent with its own approach to the combined application together with the raising of obstacles (the 'absolute bars') which were obviously of dubious merit to shore up an insecure case. Silverstar has well-founded grounds for believing that the Board has lost its objectivity.

Conclusion

[41] I conclude that this is an exceptional case and that the court *a quo* did not err when it decided against remittal to the Board.

[42] I would therefore dismiss the appeal. The learned Judge simply ordered the Board to grant the licence. He made no reference to the tender by Silverstar to submit its application to relevant conditions imposed by the Board in the combined application, a tender which counsel repeated before us. It will be appropriate to amend the order of the court *a quo* to take account of that situation.

[43] The following order is made:

1. The appeal is dismissed with costs including the costs consequent upon the employment of two counsel.
2. Para 2 of the order of the court *a quo* is deleted and replaced by the

following:

‘The First and Third Respondents are ordered to award and issue a casino licence for the West Rand area to the Applicant in terms of the Gauteng Gambling Act, 4 of 1995 on the terms set out in its 1997 application but subject *mutatis mutandis* to the conditions contained in paragraphs 30, 31 and 34 of the Memorandum of the First Respondent entitled “Application for Amendment of Casino Licence Application by Rhino Resort Limited” dated 14 November 2001.’

J A HEHER
JUDGE OF APPEAL

HOWIE P)Concur
FARLAM JA)
CLOETE JA)
MAYA AJA)