THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 89/2021

In the matter between:

TSOGO SUN CALEDON (PTY) LTD **FIRST APPELLANT**

WEST COAST LEISURE (PTY) LTD **SECOND APPELLANT**

GARDEN ROUTE CASINO (PTY) LTD **THIRD APPELLANT**

VUKANI GAMING WESTERN CAPE (PTY) LTD **FOURTH APPELLANT**

and

WESTERN CAPE GAMBLING AND RACING BOARD **FIRST RESPONDENT**

CHAIRPERSON OF THE WESTERN CAPE

GAMBLING AND RACING BOARD SECOND RESPONDENT

Neutral citation: *Tsogo Sun Caledon (Pty) Ltd and Others v Western Cape Gambling and Racing Board and Another* (Case no 89/2021) [2022] ZASCA 102 (24 June 2022)

Coram: PETSE DP and ZONDI, GORVEN and MABINDLA-BOQWANA JJA and MUSI AJA

Heard: 24 May 2022

Delivered: 24 June 2022

Summary: Administrative law – review – principle of legality – imposition of conditions of licences – condition that licensee must maintain a level 4 broad-based black economic empowerment certification – jurisdictional facts giving rise to power to impose such condition not satisfied – absent jurisdictional facts Board not empowered to impose impugned conditions – decision set aside on review.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town, Martin AJ sitting as court of first instance:

1 The appeal is upheld with costs, including the costs consequent on the employment of two counsel where so employed, such costs to be paid jointly and severally by the respondents, the one paying, the other to be absolved.

2 The order of the court a quo is set aside and substituted with the following:

‘1 It is declared that the following decisions of the first respondent are unlawful and invalid:

1.1 the decision to impose the licence condition contained in paragraph 6.2 of its letter dated 13 July 2017 on the first applicant’s Casino Operator Licence;

1.2 the decision to impose the licence condition contained in paragraph 6.2 of its letter dated 13 July 2017 on the second applicant’s Casino Operator Licence;

1.3 the decision to impose the licence condition contained in paragraph 6.2 of its letter dated 13 July 2017 on the third applicant’s Casino Operator Licence;

1.4 the decision to impose the licence condition contained in paragraph 6.2 of its letter dated 13 July 2017 on the fourth applicant’s Route Operator Licence.

2 The decisions of the first respondent referred to in paragraphs 1.1 to 1.4 hereof are reviewed and set aside.

3 The costs of the application are to be paid by the respondents, including the costs consequent on the employment of two counsel where so employed, such costs to be paid jointly and severally by the respondents, the one paying, the other to be absolved.'

3 The Registrar of this Court is directed to send a copy of this judgment to the Judge President of the Gauteng Division of the High Court, Pretoria, for him to take the steps contemplated in paragraph 26 of this judgment.

JUDGMENT

Gorven JA (Petse DP and Zondi and Mabindla-Boqwana JJA and Musi AJA concurring)

[1] At all relevant times, the first to third appellants held casino licences authorising them to operate casinos in the Western Cape. The fourth appellant held a route operator licence by which it was authorised to operate a limited payout machine business in that province. I shall refer to them collectively as the appellants since all parties agreed that the facts and law apply equally to them. All of the licences were subject to conditions imposed by the Western Cape Gambling and Racing Board (the Board) under the applicable Broad-Based Black Economic Empowerment (B-BBEE) framework.[1] The licences are renewable annually. On 13 July 2017, the Board wrote to the appellants indicating that it had decided to impose new conditions in respect of those licences. In short, the conditions

[1] This refers to the Broad-Based Black Economic Empowerment Codes promulgated under the Broad-Based Black Economic Empowerment Act 53 of 2003 (the B-BBEE Act).

required the appellants to 'achieve an overall rating of Level 4 in terms of the Tourism Scorecard' and to submit documentation related to this to the Board (the conditions). It is common cause that this requires the appellants to achieve and maintain a Level 4 status under the B-BBEE framework.

[2] The imposition of the conditions was an amendment to the conditions subject to which the appellants had previously held their licences. It is as well to set out in full the conditions imposed:

'6.1 In respect of the promotion of Broad-Based Black Economic Empowerment ("BBBEE") the licence holder shall, within the context of its licensed operations, comply with such requirements and/or implement such measures as may be required, stipulated or approved by the Board from time to time pertaining to –

(i) the submission of quarterly reports to the relevant Committee of the Board, in such format and at such intervals as it may specify or require, in connection with its corporate profile, initiatives implemented, commitments proposed or made and/or its compliance with legislation or the conditions imposed by the Board;

(ii) the attendance of such meetings of the relevant Committee(s) of the Board at such times or intervals determined by the said committee;

(iii) the conduct of such scheduled and/or ad hoc audits as the relevant Committee or the Board may require in relation to any aspect of the BBBEE in relation to its licensed operations; and

(iv) generally ensuring compliance with the elements and objectives of the Codes of Good Practice on BBBEE and the BBBEE Act, 2003, as amended from time to time and such further conditions as the Board may, in consultation with the licence holder, impose.

6.2 The licence holder shall achieve an overall rating of Level 4 in terms of the Tourism Scorecard, and shall in this regard:

(i) Submit to the Board, 3 calendar months before the expiry date of its licence, a BBBEE rating verification certificate which is not older than 12 months, from an accredited institution, along with its renewal application of the relevant licence.

(ii) Should the licence holder fail to achieve the Compliance Level prescribed above, it shall submit to the Office of the Board within 3 calendar months before the expiry date of its licence, a plan setting out how the required the BBBEE compliance level will be achieved.

(iii) In the event that the licence holder achieved the required BBBEE compliance level, it shall submit to the Office of the Board within 3 calendar months before the expiry date of its licence, a plan setting out its objectives to improve its current BBBEE level and status.

6.3 The licence holder shall ensure that CSI projects have emphasis on local delivery, with specific focus on local job creation (direct or indirect) and/or entrepreneurial local endeavours. This will be monitored through the relevant Committee of the Board.

6.4 The licence holder shall endeavour to focus on local (Western Cape) procurement and such procurement will be monitored by the relevant Committee of the Board.

6.5 The Board will annually review the BBBEE conditions and compliance therewith in terms of section 53 of the NGA.'[2]

[3] The appellants regarded sub-paragraph 6.2 of the Board's decision as unlawful for four reasons:

(a) The Board was not empowered in terms of the National Gambling Act 7 of 2004 (the National Act) or the Western Cape Gambling and Racing Act 4 of 1996 (the Western Cape Act) to impose those conditions.

(b) Even if the Board was so empowered, the jurisdictional facts for the exercise of that power were not satisfied and the power accordingly did not arise.

(c) The Board's decision to impose the Level 4 conditions involved an unlawful 'one size fits all' industry-wide condition, without regard to the specific circumstances of the appellants. As a result, the discretion of the Board had been fettered by rigidity.

(d) The Board's decision was unreasonable.

[2] Emphasis in the original.

[4] The appellants accordingly approached the Western Cape Division of the High Court, Cape Town (the high court) by way of application. They sought to review and set aside the decision of the Board to impose the condition in paragraph 6.2 (the impugned decision) on those four bases. The high court, per Martin AJ, dismissed the application with costs but granted the appellants leave to appeal to this Court.

[5] The Tsogo Sun group of companies, of which the appellants are part, has been commended by the Board for its voluntary commitment to the B-BBEE framework. The first three appellants improved their status to a level 1 status between 2010 and 2018. The fourth appellant improved from level 3 to level 2 in 2017. During this period, the codes governing the scoring of casinos were twice made more stringent. The levels run from level 1 to level 8. It should be noted that level 4 is a less exacting compliance level than levels 1, 2 or 3. In other words, prior to the impugned decision, the appellants had voluntarily far exceeded the level which the Board sought to impose in the conditions. This much is uncontested. In addition, by the time the replying affidavit was delivered, all four of the appellants had achieved a level 1 status. The achievement of this status was not in any way motivated by, or a result of, the imposition of the conditions. The appellants asserted, without contradiction, that they supported the necessity for empowerment pursuant to the B-BBEE Act. What is clear from the above is that this assertion was amply confirmed by their actions.

[6] Some feature of the licences and submissions leading to the impugned decision forms a necessary backdrop to the issues in this appeal.

(a) According to s 40 of the Western Cape Act, licences are valid for a period of 12 months and issued annually. A licensee must apply annually for the renewal of the licence, 90 days before it expires.

(b) The B-BBEE Act was not in force when the licences were first issued. The initial conditions contained a requirement that various percentages of previously disadvantaged persons be employed in certain positions.

(c) After the B-BBEE Act came into effect, Codes of Good Practice were adopted, first in 2007 and then in 2013.

(d) In 2009, the Board, along with Boards in other provinces, sought to impose new conditions concerning levels of compliance with the B-BBEE framework. The appellants challenged these in various provinces, including the Western Cape. This has no bearing on the outcome of the present matter but will be adverted to later.

[7] In 2015, the 2013 Codes of Good Practice came into effect. As a result, the Board indicated to all licence holders that it intended to impose new licence conditions relating to the maintenance of a particular B-BBEE status. The first three appellants made representations concerning this in September 2016. They contended that to impose an industry-wide condition would be unlawful and that the B-BBEE status of each licensee should be separately evaluated. They proposed an alternative condition in the following terms:

'In order to enable the Board to monitor the progress of [the appellants] in relation to broad based black economic empowerment (BBBEE) each of the three casinos shall submit annually to the Board:

(a) A report on its performance in relation to BBBEE for the preceding year; and

(b) Its plan in relation to BBBEE for the forthcoming year.'

This, they submitted, would enable the Board to monitor the performance of the appellants and address any shortcomings. There is nothing in the record showing

that the Board considered these proposals. On 13 October 2016, an ad-hoc committee of the Board recommended that licensees be given the opportunity to be rated on an individual basis. This was followed up by the Board CEO suggesting that, instead of the proposed level 4 condition, 'the imposition of an appropriate level' should be arrived at after consultation with each licence holder. The Board adopted these two suggestions. Despite this, on 29 May 2017, the CEO of the Board suggested that, since all casinos and route operators had achieved at least a level 4 rating, that requirement could be 'maintained for the final licence condition'. This about turn led to the impugned decision by the Board to impose the conditions.

[8] The same conditions were imposed on the fourth appellant, but with a rating against a 'generic scorecard' applicable to route operators. The Board has justified this approach on the basis that it 'ensures uniformity in approach and also allows for a coherent and sustainable position' and because a level 4 condition is a mid-level status which, it says, can be maintained by all licensees.

[9] There is no dispute that decisions of the Board amount to administrative action under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). This means that such decisions are susceptible of review under both PAJA and the principle of legality. As to the latter, it is trite that the Board, being a statutory body, is limited to the powers accorded to it in legislation. If an entity exceeds the powers accorded it in making a decision, the decision is unlawful. It has no power to make the decision and such decision would be *ultra vires* (beyond its powers).

The underlying principle was explained in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*:[3]

'It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.'

[10] There is likewise no dispute that the Board is the statutory provincial licensing authority for the Western Cape. As such, any powers to impose conditions derive from either or both of the National Act and the Western Cape Act. The appellants indicated at the hearing that they no longer persisted in challenging the power of the Board to impose conditions at all. This concession is well made. The first basis on which they submitted that the impugned decision was unlawful therefore falls away. The nub of the argument on the legality of the impugned decision was whether the requirements for the exercise of the power to impose the conditions on the appellants arose in the present matter. This brings into focus the second basis for the review mentioned above.

[11] The parties agreed that the power to impose the conditions arises from s 53(2) of the National Act, which provides:

'(1) When considering an application for a licence, other than an employment licence, or when considering an application for the transfer of a licence, a provincial licensing authority-

(a) must consider the commitments, if any, made by the applicant or proposed transferee in relation to-

(i) black economic empowerment; or

(ii) combating the incidence of addictive and compulsive gambling;

(b) must consider the potential socio-economic impact on the community of the proposed licence; and

[3] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) para 58.

(c) may impose reasonable and justifiable conditions on the licence to the extent necessary to address the matters referred to in paragraphs *(a)* and *(b)*.

(2) At least once every year after the issuance of a licence other than an employment licence, the provincial licensing authority that issued that licence-

(a) must review the commitments considered in terms of subsection (1)*(a)* and the achievements of the licensee in relation to those commitments; and

(b) may impose further or different reasonable and justifiable conditions on the licence to the extent necessary to address the matters referred to in subsection (1)*(a)* and *(b)*.'

[12] In order to determine whether the Board acted within the powers accorded to it by s 53(2), it is necessary to construe that section. The approach to do so is now well established:

'The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'[4]

Put another way, but to similar effect:

'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise".'[5]

[13] Section 53(2)*(b)* empowers the Board to 'impose further or different reasonable and justifiable conditions . . . to the extent necessary to address the matters referred to in subsection (1)*(a)* and *(b)*'. This means that the Board is

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[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA); [2012] 2 All SA 262 (SCA) para 18.

[5] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA) para 12.

empowered only to impose conditions 'to the extent necessary to address the matters referred to in subsection (1)*(a)* and *(b)*'. Prior to doing so, the Board must consider the commitments previously made by the appellants relating to black economic empowerment. It must then 'review the . . . achievements of the licensee in relation to those commitments'.

[14] On construction, there is a four-stage process which must take place in imposing further or different conditions arises under s 53(2):

(a) It must first consider the previous commitments of the licensee regarding black economic empowerment;[6]

(b) It must then review the achievements of the licensee in relation to those commitments;

(c) A discretion then arises whether, in the light of these two factors, further or different conditions should be imposed on the licensee;

(d) If so, the power to impose such conditions is limited in that:

(i) The further or different conditions must be reasonable and justifiable; and

(ii) The further or different reasonable and justifiable conditions must be imposed only to the extent that is necessary to address the matters set out in s 53(1)*(a)* and *(b)* of the National Act.

[15] This is clearly a focused exercise geared to each individual licensee. It requires each licensee to be evaluated separately. It cannot be said that the commitments and achievements of a licensee have been evaluated if the conditions are blanket ones imposed on all licensees. Only if an individual evaluation has

[6] I deal only with the question of black economic empowerment since the conditions address only this and not the other issues referred to in ss 53(1)*(a)* and *(b)*.

been undertaken, can it be said that the power to impose further or different conditions arises. Even if so, the conditions must be reasonable and justifiable and tailored to each licensee to address any shortcomings and only to the extent necessary to do so. What is glaringly obvious from this interpretation is that it is insufficient for the Board to impose further or different conditions on all the licensees without undertaking an evaluation of each licence holder. The required exercise differs entirely from that appropriate to the adoption of a general policy.

[16] In *Kemp NO and Others v Dr J J H van Wyk and Others*,[7] this Court set out the approach a decision maker should take to the application of a policy to specific cases. Here, the Director of Animal Health was given the discretion to grant or refuse permits to import certain animals to South Africa. The appellants applied for such a permit in conditions where, about a year before applying, an embargo on the importation of such animals had been imposed in order to control the spread of foot-and-mouth disease. The appellants motivated their application on the basis that they would take sufficient steps to prevent any such spread. Their application was refused and they sought to review this refusal. They contended that the Director had failed to exercise a discretion at all and had simply applied the embargo. This Court held:

'[The Director] was entitled to evaluate the application in the light of the directorate's existing policy and, provided that he was independently satisfied that the policy was appropriate to the particular case, and did not consider it to be a rule to which he was bound, I do not think it can be said that he failed to exercise his discretion.'[8]

Applying these principles to the facts, the conclusion was:

'In the present case it cannot be said that the first respondent considered himself bound to refuse the permit because of the existence of the embargo. His evidence establishes sufficiently that he

[7] *Kemp NO and Others v Dr J J H van Wyk and Others* [2005] ZASCA 77; [2008] 1 All SA 17 (SCA).
[8] Ibid para 10.

indeed evaluated the application and concluded independently that the embargo was appropriate to the particular case.'[9]

[17] This establishes the principle that, where an entity is given a discretion, it may validly develop a policy relating to that discretion. If such a policy exists, the decision maker must nevertheless evaluate whether it is appropriate to apply the policy in the circumstances of individual cases. If this is not done, no discretion is exercised and the decision would be susceptible of review. In the present matter, it may well be, for example, that the Board was entitled to adopt a policy that all licensees should achieve a level 4 status. When applying this policy, however, s 53(2) requires a separate evaluation of each licensee as set out above. If the commitments and achievements of a particular licensee do not require further or different conditions to be imposed, the power to do so does not arise. An example might be where a licensee has consistently exceeded the policy minimum and met its own commitments. Since an annual report must be submitted by all licensees, the risk of the policy not being implemented or effective in such a case would be negligible and, if the licensee does not measure up, this could be addressed in the review under s 53(2) which the Board must undertake at least annually.

[18] What is meant by the criterion of necessity was clarified in *Minister of Finance v Afribusiness NPC*.[10] Here the Constitutional Court considered the power to promulgate regulations under the Preferential Procurement Policy Framework Act 5 of 2000. Section 5 of that Act empowered the Minister to 'make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of the Act'. The majority judgment held that:

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[9] Ibid 11.

[10] *Minister of Finance v Afribusiness NPC* [2022] ZACC 4.

'What the first judgment identifies as the "only restriction" on the Minister's power has the effect of attaching no or little meaning to "necessary or expedient". This inverts the provisions of the section because the two words – "necessary" and "expedient" – are, in fact, the limiting factor, not what the first judgment identifies as the "only restriction". A regulation that does not meet the threshold of necessity or expedience is invalid for being *ultra vires* the empowering section.'[11]

In the present matter, the power of the Board is limited to imposing conditions only 'to the extent necessary to address the matters referred to in subsection (1)*(a)* and *(b)*'.

[19] The reasons given by the Board for arriving at the impugned decision must now be considered. This Court has set out why this is important:

'The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable. In England the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards — even if they show that the original decision may have been justified. For in truth the later reasons are not the true reasons for the decision, but rather an *ex post facto* rationalisation of a bad decision. Whether or not our law also demands the same approach as the English courts do is not a matter I need strictly decide.'[12]

The Constitutional Court later commented on the question left open in this passage:

'It is true that reasons formulated after a decision has been made cannot be relied upon to render a decision rational, reasonable and lawful. However, a report by an expert will not necessarily constitute *ex post facto* (after the fact) reasons; it may merely explain the rationale of the reasons that were provided prior to the making of the decision.'[13]

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[11] Ibid para 108.

[12] *National Lotteries Board and Others v South African Education and Environment Project* [2011] ZASCA 154 2012 (4) SA 504 (SCA) para 27 (references omitted).

[13] *National Energy Regulator of South Africa and Another v PG Group (Pty) Ltd and Others* [2019] ZACC 28; 2020 (1) SA 450 (CC) para 39 (references omitted).

What is clear from this passage is that *ex post facto* reasons must be excluded from consideration. These are reasons which did not form the basis for the decision at the time but are subsequently formulated to meet the attack of a reviewing applicant. Of course, it is not always easy to distinguish the two. It is safe to say, however, that reasons which motivated the decision at the time must form the basis for the evaluation by a court.

[20] In the present matter, no such difficulty arises. This is simply because none of the reasons given in any way take account of the specific commitments or performance of the appellants as regards their approach to B-BBEE. This much was conceded in argument. The reasons in both the letter responding to the initial challenge to the impugned decision and in the answering affidavit address industry- wide considerations only. In other words, they are more suited to the adoption of a policy rather than to the application of a policy to the specific circumstances or performance of the individual appellants as envisaged by s 53(2).

[21] Some examples will suffice. In the initial reasons, the Board set out its 'engagements with the industry'. These included letters to 'all licence holders' at various points in the process, 'industry consultation on proposed licence conditions', the adoption by the Board of 'the new draft licence conditions' and opportunities for licence holders to make representations concerning 'the proposed conditions of licence' at special Committee meetings. After giving licence holders a deadline to submit 'BBBEE verification certificates', the Board made the impugned decision on 21 June 2017 'to approve the final new BBBEE licence conditions to be imposed on licence holders'. It was accepted in argument that the same conditions were imposed on every licence holder. There is not one mention of any licence holder having been individually evaluated. Nor is there any mention

of a consideration of whether requiring a level 4 status necessitated further or different conditions to be imposed on the respective appellants.

[22] The approach taken to the impugned decision was then followed by paragraph 6 setting out the reasons for the decision. It is worth quoting parts of this paragraph:

'6.1 Since inception of the initial conditions imposed since 2009, compliance with the BBBEE conditions is monitored by the different Committees of the Board.

6.2 With the adoption of the 2013 Codes of Good Practice, the then operative 2007 Codes were replaced by the 2013 Codes, which took effect on 1 May 2015.

6.3 Therefore, at the March 2015 Board meeting, the Board resolved that it will commence a consultation process with the industry and recommend a draft level 3 in terms of the 2013 Codes. The intention at the time was for the new conditions to take effect one year after the adoption of the Revised Codes . . .

6.4 In determining the final conditions to be imposed on the industry, the Board considered all written and oral submissions of licence holders.'

One further paragraph of the reasons is worth quoting:

'6.15 The Board is fully cognisant of and appreciates the fact that the Revised Codes and particularly the Tourism Codes are more stringent compared to the initial Codes of Good Practice. Hence, the Board will be adopting a progressive approach, taking into account the current BBBEE compliance level of each licence holder, their unique, individual business plans and circumstances in arriving at reasonable and justifiable conditions that will be imposed as deemed necessary and appropriate.'

This latter sub-paragraph shows that the approach set out under s 53(2) did not take place prior to the impugned decision but was one which would only be employed by the Board thereafter. Had this been done at the time, the conduct of the Board may well have complied with s 53(2). Throughout the reasons given, however, there is no indication that account was taken of the 'compliance level of each

licence holder, the unique, individual business plans and circumstances' of specific licensees in arriving at the impugned decision.

[23] In the answering affidavit, seven reasons were given to counter the assertion by the appellants that, given their achievements in respect of B-BBEE the imposition of the conditions was neither necessary nor expedient. Again, it will be helpful to quote these in full:

'59.1 First, irrespective of an entity's achievements in relation to B-BBEE, it lacks any relevance to the granting of a licence or the renewal thereof unless it is imposed as a condition for the granting of a licence.

59.2 Second, imposing such a condition is a key feature to enforcing transformation to the gambling industry. By imposing conditions relating to compliance with certain B-BBEE requirements, the objective is to shift the significance thereof from a "*nice to have*" to a directly enforceable obligation aimed at transforming the industry and holding licence holders to account in respect thereof.

59.3 Third, unless imposed as a condition the Board has little recourse in the event that entities regress in respect of the empowerment credentials. The condition accordingly allows for a means of controlling and evaluating the process.

59.4 Fourth, the gambling industry, as with many other sectors in South Africa still has a long way to go in order to achieve proper transformation. This justifies the necessity of the condition.

59.5 Fifth, the condition as imposed will advance the economy of the Western Cape.

59.6 Sixth, it is precisely in order to cater for a change of circumstances that Condition 6.1. provides for a regular reporting obligation.

59.7 Seventh, the condition allows for an objective determination by an external agency; this facilitates the fairness of the process.'[14]

Once again, none of the reasons advanced targets any of the specific appellants. All relate to the industry as a whole.

[14] Emphases in the original.

[24] All of these reasons would be valid if they were focused on developing policy. As has been mentioned above, the development of policy is unobjectionable. What is problematic is when the policy is applied in a blanket fashion and no evaluation takes place as to whether it should be applied to individual licence holders in the light of their commitments and achievements. In *Kemp NO v Van Wyk*,[15] Nugent JA explained of a decision-maker:

'A public official who is vested with a discretion must exercise it with an open mind but not necessarily a mind that is untrammelled by existing principles or policy. In some cases, the enabling statute may require that to be done, either expressly or by implication from the nature of the particular discretion, but generally, there can be no objection to an official exercising a discretion in accordance with an existing policy if he or she is independently satisfied that the policy is appropriate to the circumstances of the particular case. What is required is only that he or she does not elevate principles or policies into rules that are considered to be binding with the result that no discretion is exercised at all. Those principles emerge from the decision of this Court in *Britten and Others v Pope* 1916 AD 150 and remain applicable today.'

Sadly, the Board appears to have elevated what is really a policy into an immutable rule which it applied indiscriminately to all licence holders regardless of their circumstances.

[25] As has been shown above, that approach is impermissible as a basis for imposing further or different conditions under s 53(2). The Board nowhere showed that it undertook any of the stages of the four-stage process mentioned above which gives effect to the provisions of s 53(2). It is clear that, even if it could be said that a discretion arose, none was exercised at all. As such, it is clear that the power of the Board to impose further or different conditions on the appellants did not arise. For the same reason, the Board could also not show that the conditions were reasonable and justifiable or had been imposed only to the extent necessary to

[15] Footnote 7 para 1.

address the commitments and achievements of the appellants, since these were not considered. Accordingly, the jurisdictional facts which give rise to the power of the Board to impose the conditions were clearly not satisfied. The imposition of the conditions was therefore unlawful. It follows that it is unnecessary to consider the other two bases relied upon by the appellants in attacking the impugned decision. The conditions fall to be reviewed and set aside.

[26] It remains to mention a singularly unpleasant matter. As mentioned above, in 2009, the Board and other provincial licensing authorities had also sought to amend existing conditions. The decision of the Mpumalanga Board was taken on review by the appellants in the Gauteng Division of the High Court, Pretoria. That taken by the first respondent herein was challenged but it was agreed that the challenge would be held in abeyance pending the outcome of the application in the Gauteng Division. We were informed by counsel on both sides that the application was heard in 2016 and judgment reserved. The judgment remains outstanding. Taking counsel at their word, as we must, absent any indications to the contrary, this is a state of affairs to be strongly deprecated. In the milieu of service delivery, the service required of courts by the Constitution is to hear matters, decide them and render reasoned judgments for the decision, and to do all of this within a reasonable period of time. One can hardly conceive that this service has been rendered in the review arising from the 2009 conditions. It is directed that this matter be brought to the attention of the Judge President of the relevant division with a view to reporting it to the Judicial Conduct Committee of the Judicial Service Commission for consideration of the conduct of the judicial officer or officers responsible for this lamentable state of affairs in that matter.

[27] The present matter involved some degree of complexity. Although the appellants employed three, and the respondents two, counsel lead counsel for the appellants readily accepted that costs of three counsel would not be warranted. Thus, the costs of two counsel should be allowed on appeal.

[28] In the result:

1 The appeal is upheld with costs, including the costs consequent on the employment of two counsel where so employed, such costs to be paid jointly and severally by the respondents, the one paying, the other to be absolved.

2 The order of the court a quo is set aside and substituted with the following:

‘1 It is declared that the following decisions of the first respondent are unlawful and invalid:

1.1 the decision to impose the licence condition contained in paragraph 6.2 of its letter dated 13 July 2017 on the first applicant’s Casino Operator Licence;

1.2 the decision to impose the licence condition contained in paragraph 6.2 of its letter dated 13 July 2017 on the second applicant’s Casino Operator Licence;

1.3 the decision to impose the licence condition contained in paragraph 6.2 of its letter dated 13 July 2017 on the third applicant’s Casino Operator Licence;

1.4 the decision to impose the licence condition contained in paragraph 6.2 of its letter dated 13 July 2017 on the fourth applicant’s Route Operator Licence.

2 The decisions of the first respondent referred to in paragraphs 1.1 to 1.4 hereof are reviewed and set aside.

3 The costs of the application are to be paid by the respondents, including the costs consequent on the employment of two counsel where so employed, such costs to be paid jointly and severally by the respondents, the one paying, the other to be absolved.'

3 The Registrar of this Court is directed to send a copy of this judgment to the Judge President of the Gauteng Division of the High Court, Pretoria, for him to take the steps contemplated in paragraph 26 of this judgment.

T R GORVEN
JUDGE OF APPEAL

Appearances

For appellants:	S Budlender SC (with him L Kelly and M Mokhoaetsi)
Instructed by:	Edward Nathan Sonnenbergs Incorporated, Cape Town
	Lovius Block Incorporated, Bloemfontein
For respondents:	K Pillay SC (with her T Sarkas)
Instructed by:	Abrahams Kiewitz Incorporated, Cape Town
	Webbers Attorneys, Bloemfontein