



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 17 December 2021

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Golden Palace Site 3 (Pty) Ltd & others v Vukani Gaming Eastern Cape (Pty) Ltd & others (1338/2019); K2017440277 (South Africa) (Pty) Ltd & others v Vukani Gaming Eastern Cape (Pty) Ltd & others (1366/2019); The Chairperson, Eastern Cape Gambling and Betting Board and another v Vukani Gaming Eastern Cape (Pty) Ltd and others (119/2020) [2021] ZASCA 180 (17 December 2021)

Today the Supreme Court of Appeal (SCA) granted the applicants special leave to appeal and upheld their appeal with costs, including the costs of two counsel, where employed. The SCA set aside and replaced the order of the full court as follows: ‘The appeal is dismissed with costs, including the costs of two counsel, where employed’.

Three applications for special leave to appeal against the judgment and order of the full court of the Eastern Cape Division of the High Court, Grahamstown were referred to the SCA for oral argument. Vukani Gaming Eastern Cape (Pty) Ltd (Vukani) was one of two licensed route operators of limited pay out machines (LPMs) in the Eastern Cape province. Each of these operators had been allocated 1000 LPMs under their licence. LPMs are akin to slot machines, but they are played for lower stakes. They are not licensed for use in casinos. They are to be found in restaurants, bars and clubs.

The Eastern Cape Gambling and Betting Board (the Board) issued a request for proposals (RFP) calling for applications for 10 independent site operator licences. The Golden Palace companies and the Spin and Win companies were successful. Vukani brought a review in which it challenged the legality of the RFP on the basis that the RFP failed to comply with regulation 59(3)(a) of the regulations promulgated under s 80 of the Eastern Cape Gambling and Betting Act 5 of 1997. This regulation required the Eastern Cape Gambling and Betting Board (the Board), before issuing additional licences for LPMs, to be satisfied that the additional licences will not lead to an over-saturation of LPMs in the province. Vukani’s review was dismissed in the high court, but found favour in the full court. The Golden Palace applicants, the Spin and Win applicants and the Board sought special leave to appeal, and their applications were referred to the SCA for oral argument.

There was disagreement as to the interpretation of what it meant for the Board to be satisfied as required by regulation 59(3)(a). The Board had emphasised what it submitted to be the predominantly subjective nature of the regulatory provision and the importance of showing deference to the Board in its assessment of over-saturation. Vukani submitted that whether the Board was satisfied, as required by regulation 59(3)(a), must be objectively tested.

The SCA observed that the use of the descriptors subjective and objective was not always helpful. Further, to hold a subjective opinion or to be satisfied subjectively was often said to require nothing more than that a person held

the relevant opinion or said that they were satisfied. The SCA held that conjuring the idea of deference, whether as demon or saviour in public law, could also be apt to mislead. The court's duty was simply to give effect to its best understanding of what it had found the power to be.

The SCA was of the view that for the Board to issue or allow incremental licences and comply with regulation 59(3)(a), it must be able to come to the over-saturation conclusion and in fact reach that conclusion. Those reasons do not require the concurrence of a reviewing court. The SCA held that they were simply reasons that could permit a decision-maker, in the position of the Board, to reach the saturation conclusion that it had – in other words, it must have a rational basis for its conclusion.

Vukani challenged the RFP on the basis that the study on which it was based had found over-saturation of LPMs in at least two municipalities and this precluded the Board from being satisfied that the additional machines would not lead to over-saturation in the province. As to what is meant by over-saturation 'in the Province', the SCA drew a distinction between aggregative and distributive judgments. Over-saturation in the province is an aggregative judgment. The province may be under-saturated, even if particular areas within the province were not. Hence, there was no inconsistency in the Board being satisfied that the additional LPMs it proposed to license would not lead to over-saturation of LPMs in the province, even if a number of areas within the province were over-saturated. The distinct question as to where in the province the additional licences should be enjoyed was an allocative or distributive issue. This issue was not implicated by regulation 59(3)(a). Accordingly, Vukani's review on this ground could not succeed.

Vukani also challenged the RFP on the basis that it was based on a study that was so flawed as to render the RFP irrational. Vukani procured the services of an expert whose report pointed to many errors in the study that the Board relied upon in issuing the RFP. The SCA held that a review, framed on this basis, cannot prevail simply because the study made numerous errors. What was required was a showing that the central conclusions of the study were supported by no evidence or reasoning, and hence the study was irrational. Vukani's review did not make such a showing, and it was consequently dismissed.

The SCA found that the Board, the Golden Palace applicants and the Spin and Win applicants had made out their case for special leave to appeal. Further, it was held that their applications enjoyed strong prospects of success and raised a substantial question of law as to how regulation 59(3)(a) was to be interpreted. As to the merits of the appeal, the SCA found that the appeal must be upheld and Vukani's review of the RFP and the issue of licences to which it gave rise must be dismissed. The costs followed the result, including the costs of two counsel, where so employed.

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