

SOUTH AFRICA / JUDGMENT

Elite Bingo (UTH) Proprietary Limited v Zwane N.O. and Others (CA354/2016) [2017] ZAECHGHC 53; [2017] 3 All SA 236 (ECG) (11 May 2017)

[2017] ZAECHGHC 53

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M Makaula, S M Mbenenge, P Mageza

CASE / FILE NUMBER

CA354/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE

NO: CA 354/2016

Date Heard: 13

February 2017

Delivered On: 11

May 2017

In

the matter between:

ELITE

BINGO (UTH) PROPRIETARY LIMITED

Appellant

and

MABUTHO

ZWANE N.O.

First Respondent

EASTERN

CAPE GAMBLING AND BETTING BOARD

Second

Respondent

GALAXY

GAMING EASTERN CAPE 2 PROPRIETARY LTD

Third Respondent

EC

GAMING UITENHAGE PROPRIETARY LTD

Fourth
Respondent
GOLDRUSH
BINGO EASTERN CAPE NO 1
t/a
KERLIGENEX
Fifth Respondent
GOLDRUSH
BINGO EASTERN CAPE NO 2
t/a
KERLIGLO
Sixth Respondent

JUDGMENT

MAKAULA J:

A.

Background:

- [1] The appellant and third to sixth respondents, responded to a tender issued by the Eastern Cape Gambling and Betting Board (the Board) dated 11 February 2014 for Request for Proposals (RFP) to operate Bingo Halls in the Eastern Cape Province.
- [2] The appellant and the fourth respondent were both applicants in respect of a licence to operate a Bingo Hall in Uitenhage (a town forming part of Nelson Mandela Bay Municipality) (the NMBM). The fourth respondent was successful with the appellant having been disqualified on 22 October 2014 by the second respondent (the Board). The appellant brought an application to review the decision of the Board. The review application served before Sandi J on 4 and 5 June 2015, whereafter judgment was reserved.
- [3] Before judgment was delivered the fifth and sixth respondents sought leave to intervene and the matter served before Pickering J as an opposed application on 31 March 2016. However, the parties, having taken into account that if the application to intervene was to be heard before Sandi J, further delays would be occasioned, agreed that the intervening applicants be granted leave to intervene as fifth and sixth respondents and that the entire application be argued de novo.
- [4] The application was subsequently heard before Pickering J on 12 and 13 May 2016 and judgment was delivered on 24 May 2016.

Pickering J dismissed the review application and ordered the appellant to pay the costs of the first, second, third and fourth

respondents, including the costs of the application for an interdict and of the hearing on 4 and 5 June 2015 before Sandi J and those of two counsel. Furthermore, it was ordered that the fifth and sixth respondents jointly and severally the one paying the other to be absolved, pay such costs as were occasioned by their application to intervene and by their subsequent intervention in the main application, including the costs of two counsel where applicable.

- [5] On 10 August 2016, the appellant was granted leave to appeal to this court by the court a quo against that part of the judgment and order dismissing the application of the appellant and declaring that the fifth and sixth

respondents pay the costs of the hearing before Sandi J on 4 and 5 June 2015.

B. The terms of the tender:

- [6] The RFP contained the terms and conditions of the tender. The clauses of the RFP pertinent to this appeal are clauses 5.7; 7.4 and 7.5 which deal with Essential Minimum Requirements (EMRs) contained in the RFP and briefing notes sent out by the Board in terms of the EMRs. The relevant provisions of the EMRs, RFP and Briefing notes read:

“5.7 Non-compliance and rejection

“Any failure on the part of an Applicant to comply with the terms of this RFP, read together with all the Briefing Notes, will result in its Proposal being treated as non-compliant.

Any proposal received without all information or data requested in terms of this RFP, or with insufficient information for substantive evaluation thereof, will be marked as incomplete and non-compliant.

The Board reserves the right to reject any or all incomplete and/or non-compliant Proposals in its sole and absolute discretion and to waive any immaterial defect, or lack of compliance with any formality in any proposal.

The aforesaid discretion will not apply to the submission of a Proposal after the Closing Date, the submission of the guarantee and the zoning certificates after the date and time stipulated in the Briefing Notes referred to in 7.2 and 7.4 respectively below or to a failure to comply with any of the EMRs in 7.5 below. In any such event the Applicant shall be automatically disqualified and its Proposal rejected.

A non-compliant Applicant may not, after the Closing Date, submit additional documents or apply to the Board in terms of the Regulations to amend its Proposal to cure the objective infirmities of its Application.

Any person and/or Applicant who fails to meet the probity requirements and/or commits any of the prohibitive practices contemplated in the RFP may be disqualified. (Emphasis added).

7.4 Zoning

The site must be zoned for a Bingo Hall and the other land uses envisaged in the Application. In the event that the Site is not zoned for the aforesaid land uses by the Closing Date, a copy of the application for the re-zoning of the Site for such uses, together with proof of submission from the local authority, must be submitted on the Closing Date (as required in 7.5 below). The zoning certificate shall be provided by the Applicant concerned at least seven (7) days prior to the date of the public hearings of the application. A Briefing Note setting out the date and time of submission of the zoning certificate, where applicable, will be sent by e-mail to the Registrant or the Lead Applicant. (Emphasis added).

7.5 Essential Minimum Requirements

The Table below covers the EMRs in each of the evaluation areas which must be satisfied.

Applicants must submit a Proposal which meets the EMRs listed below and, which responds to all information requested by the RFP. Applicants shall satisfy the Board that they complied with the EMRs, setting out relevant information in support of this.

Evaluation area Essential Minimum Requirements

...

...

Legal

The Applicant must provide, as a minimum response [in its Proposal], the following:

o ...

o Proof from the local authority that the Site is zoned for a Bingo Hall and the other land uses envisaged in the Application, alternatively a copy of the application for the re-zoning of the Site for the aforesaid land uses together with proof of submission from the local authority;

o ...”

...”

[7] Briefing notes are defined in the definition section of the RFP as ‘an amendment, addition to, or clarification of the RFP issued by the Board.’

[8] Various briefing notes referred to in clauses 5.7 and 7.4 were furnished to the bidders in terms of clause 5.5 of the RFP. The relevant briefing notes are 2 and 6. Briefing note 2 issued on 25 April 2014 reads:

“1. We refer to the various written requests for clarification on the

final Bingo RFP submitted to the Board.

2. Various Registrants have submitted written submissions requesting clarification and dispensation in terms of paragraph 5.5 (“Clarification of the RFP”) and 7 (Information Required) of the Final Bingo RFP issued by the Eastern Cape Gambling and Betting Board (“the Board”).

...

15. “we are not aware of any Zoning scheme that includes Zoning for a Bingo Hall so this will not be seen on Zoning Certificate. However, a zoning certificate may include a “a place of entertainment” or “a Place of amusement” in this case we request the local authority to confirm in writing that a Bingo hall falls within these land use rights so is therefore permitted on the particular ERF. The Majority of times it is not re-zoning that is required, but merely a special consent use from the local authority. To clarify is a consent letter for the operation of a Bingo hall on the particular ERF or at the application stage proof of submission for consent use acceptable to the Board.” (Sic) (Emphasis added)
16. The RFP requires that the zoning certificate (consent use) must be in place and provided to the Board at least seven days prior to the public hearings. Should an applicant not be able to obtain the required zoning, notwithstanding that it complied with the other requirements of clause 7.4, it will have to apply for dispensation on good cause shown.
17. Applicants are not without remedies where local authorities fail to deal with applications, you are referred to the provisions of the Promotion of Administrative Justice Act 3 of 2000 in this regard.”
- [9] On 15 September 2015, briefing note 6 headed ‘Submission of Zoning for the Bingo Licence Applications’ was issued. The note reads as follows:
“1. Paragraph 7.4 of the Bingo RFP in respect of the Bingo Licensing process requires that all Applicants submit zoning certificates at least seven (7) days prior to the date of the public hearing of the application.”
2. The Board has recently issued a notification for change of the date for public hearing on 02 September 2014.
3. In light of the above, the Applicants are now required to submit their respective zoning certificates on Tuesday, 16 September 2014 at 15H00.”

C. The Tender process:

- [10] The closing date for the submission of the bids was 14 May 2014. The appellant submitted its bid on the closing date. Included in its bid were the zoning certificates for the Uitenhage properties and proof of its application for the grant of special consent to the NMBMM. The appellant’s bid identified erven 3454 and 8946 as the properties where the bingo hall would be operated from. Both erven were certified by the NMBMM as zoned ‘business 1’ in terms of the Uitenhage zoning scheme (the zoning scheme).

[11] The NMBMM acknowledged receipt of the appellant's letter for special consent on 25 April 2014 advising the appellant ' . . .that until such time as Councils' Special Consent is granted you may not commence with the use of the subject property . . . '

[12] On 2 September 2014 the Board informed the appellant and other bidders that the date scheduled for public hearings had been

rescheduled and provided revised dates. Prior to the public hearings and in briefing note 6 referred to, the Board required the appellant to provide zoning certificates by not later than noon of 16 November 2014. On 1 and 2 October 2014 public hearings were held. At that time, the appellant had not submitted proof of the granting of the special consent for the Uitenhage properties.

[13] During the deliberations at the public hearings, the third respondent requested a public inspection of the appellant's detailed proposal but they were not available at the time. On 9 October 2014, the Board sent a letter to the appellant requesting it to respond to questions which were posed during the public hearings. Also included in the letter was an enquiry about the status of the application for special consent in relation to the Uitenhage properties. On 13 October 2014 by email, the appellant asked for an extension of time as it had not received the letter dated 9 October 2014, and that the deadline had passed. On the same day, the Board sent another letter to the appellant referring to its letter dated 9 October 2014, stating that the written questions asked at the public hearings were not answered by the appellant. The information, so the letter goes, was requested in order to prepare Board packs due to be dispatched on 14 October 2014.

[14] The appellant responded under cover of an email sent at 12h32 on 14 October 2014 as follows:

"10. The applicant is requested to explain to the Board the status of its application for consent use (zoning) in respect of Uitenhage application.

10.1 We note that the proposed site in Uitenhage is zoned "Business 1" in terms of the Uitenhage business scheme. This zoning allows us to perform all the activities of a Bingo Hall, accommodation, restaurant and bar facilities. We believe that the proposed site is therefore adequately zoned per section 7.4 of the RFP, and the certificate submitted with the application." (Emphasis added)

[15] On 16 October 2014, the Board sent a reminder to the appellant requesting a response to its letter dated 9 October 2014 and asking it to 'provide a status update'. The appellant referred to its letter of 14 October 2014. On 17 October 2014, the Board emailed a letter to the appellant stating that:

"... the municipality does require a special consent for a bingo... Proof such submission of special consent is key..." (Sic)

- [16] The appellant responded by attaching proof of an application for special consent sent to the municipality and not the special consent required. On the same day, the appellant sent another email advising the Board as follows:

“further from our discussions, see attached correspondence from the NMBM dated 10 July 2014 notifying us of the objections to the consent application.”

- [17] On 22 and 23 October 2014, the Board deliberated on the applications received and took a decision. By letter dated 24 October 2014 the Board communicated its decision to the appellant. The Board resolved amongst others that (a) the appellant’s failure to furnish the Board with the special consent/zoning certificate for a bingo hall is a material non-compliance with the EMRs of the RFP and (b) the appellant had failed to demonstrate that they were in a position to operate a bingo hall in the sites earmarked for that purpose as contemplated in clause 7.5 of the RFP. The letter concluded by saying that ‘the applications in respect of Uitenhage and . . . have been disqualified.’

- [18] The appellant then brought an application for the review of the decision which, as I alluded above, to was dismissed by the court a quo.

D. Grounds of Appeal:

- [19] The appeal as I understand it is primarily premised on the fact that (a) the ‘Business zoning’ of the properties was sufficient to permit an operation of a bingo hall and (b) its application for special consent should have been disregarded by the Board as unnecessary. By failing to have regard to these factors, so argued the appellant, the Board committed a reviewable irregularity.

F. The appellant’s argument:

- [20] From the onset, I agree with the submission by Mr Ford, for the appellant, that even though the letter of disqualification by the Board states as a reason non-compliance with the 7.5, the deliberations of the Board reveal that the disqualification is based on non-compliance with Clause 7.4 as reflected in the deliberations thus:

“The Board in relation to the Uitenhage application by Elite Bingo resolves that there is a non-compliance with the provisions of 7.4 of the RFP and the Board is constrained to find the applicant disqualified and its being rejected.” (Sic)

- [21] Mr Ford submitted that the court a quo committed an error in failing to find that the Board failed to adopt a procedure which was procedurally fair notwithstanding its finding that the Board at its deliberation ‘. . . did not pertinently address the issue of whether the first applicant’s business use zone certificate sufficed. . .’

- [22] Mr Ford developed his argument in this regard by submitting that the primary purpose for which buildings may be erected and used in a business use zone includes ‘places of amusement’. In amplification of his argument, he referred to the Uitenhage zoning scheme regulations (the zoning scheme).
- [23] It was further argued that the literal meaning of the words used is clear and on an objective and reasonable interpretation would include a bingo hall because the definition does not purport to be all inclusive nor does it purport to list all the specific types of amusement contemplated. The drafters of the scheme intended to incorporate a use covering places of amusement generally and sought to give certain examples and any other approach would have been unworkable and not cater for the changing interests, changes in technology and demands of society, so he submitted.
- [24] Mr Ford, further submitted that the approach taken by the court a quo is subjective in that it focused on what the court a quo regarded as reasonable, sensible and businesslike and failed to have regard to the actual words used.
- [25] The attack by the appellant on the judgment of the court a quo is further premised on the use by the court a quo of the definitions in the Eastern Cape Gambling and Betting Act 5 of 1997 (the Gambling Act) which predates the zoning scheme, as and when interpreting the zoning scheme. Intertwined with that is the criticism of the court a quo’s finding that the definition of ‘special building’ was relevant. The submission by the appellant is that, if that were the position, it is tantamount to ‘putting the cart before the horse’, because ‘special building’ has been included to cater for something which does not fall under the definition provided for. In amplification of this

submission, the appellant referred to various special consents granted by the Nelson Mandela Bay Municipality (NMBM), of which the zoning scheme falls under and other municipalities where ‘special building’ is not mentioned as a condition.[1] In so submitting, the appellant relied on a letter dated 5 November 2014 by the Director: Human Settlements to the Executive Mayor, wherein it appears that the Uitenhage property, to be used by the appellant, had existing use rights by virtue of being zoned business. The relevant portion reads:

“... it is clear that the property has extensive existing rights which will enable the property to be developed for a variety of uses which will not require any land use application or require any of the said parking requirements. ‘Gambling facilities’ are accommodated with the above definition therefore to apply (sic) uniformly across the municipal jurisdiction it can be argued that a development of this nature is acceptable to satisfy the existing use rights.”

- [26] Mr Ford, based on this excerpt, argued that it could not have been more clearer that the gambling facilities were accommodated within these existing use rights. Furthermore, so he submitted, even the Gambling Act's objectives are, besides the introduction of legal gambling, to provide 'the provisions of entertainment facilities to members of the public ...;' which by proper interpretation and logic incorporates a place of entertainment like the bingo hall.
- [27] The appellant contended that the court a quo erred in finding that the belief harboured by it in its letter dated 9 October 2014 was an afterthought. The appellant referred to various correspondence between it, the NMBM officials and the Board as proof thereof.

E.

Analysis:

- [28] The interpretation by Mr Ford that the language used in the zoning scheme spells out that the operation of a bingo hall does not require special consent, cannot be correct. The wording, context and established practice of NMBMM militate against that interpretation.
- [29] In *Natal Joint Municipality Pension Fund v Endumeni Municipality*[2] Wallis JA said the following about the interpretation of documents, statutes and statutory instruments:

"[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School. The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.[3] The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. 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."

[30] The zoning scheme under Reservations of Lands; Erection and use of Buildings states in Clause 5(1) that the purpose for which buildings may be erected and used only with the special consent of Council, in each of the Use Zones specified in Table “B” are shown in columns

(2) and (3) of the Table. Any use not reflected in columns (2) and (3) may not be permitted in the relative zone. Table “B” reads:

“TABLE ‘B’

Column 1

Column 2

Column 3

A. Business

Business premises, shops,

Public garages, open-air car marts, places of

licensed hotels, flats above the instruction, residential buildings above the ground

ground floor, social halls and floor, warehouses, special buildings, Putting

places of amusement, dry

Courses, Drive-in Restuarants.”

cleanettes and launderettes

(Emphasis added).

[31] Under the zoning scheme, a ‘place of amusement’ referred to under column 2 is defined as inter alia:

“a building designed for use as a public hall, theatre, cinema, music hall, concert hall, billiard salon, sports arena, skating rink, or dance hall, or for the purpose of exhibitions of trade and industry.”

[32] In turn, a ‘social hall’ under column 2 in the zoning scheme means ‘a building designed for social meetings, gatherings and recreation and includes a masonic temple and a non-residential clubs, but does not include a ‘place of amusement’ or any form of use for the personal gain of any person or persons’. A ‘special building’ under column 3 is defined ‘as a building designed to be used for any use other than one of the uses for which buildings herein before are designed’.

[33] The appellant submitted that in interpreting a ‘place of amusement’ one has to have regard to the fact that the drafters of the zoning scheme intended to incorporate a use covering places of amusement

generally and sought to give certain examples. This interpretation is not entirely correct because the definition is that

the buildings (as place of amusement) are designed for cultural activities, sports or for exhibitions for trade and industry. The words used do not include a gambling

establishment or venue where legal gambling or betting places may take place, let alone a bingo. As shall be shown below, a bingo is not a sport or cultural activity but a gambling game in terms of the Gambling Act.

[34] What is apparent is that there is a difference between an ‘amusement game’ and a ‘gambling game’ as shall be shown in paragraphs 40 to 43. Gambling cannot be played anywhere^[4] and anyhow and that is informed by the manner in which NMBM and Uitenhage in particular worded its special consent, for example the special consent of the third respondent is worded:

“the application for Councils special consent to permit Erf 25332 Uitehnage to be used for Gambling purposes – Bingo Hall is hereby granted subject to the standard conditions pertaining to such use and . . .” (My underlining)

[35] This wording spells out the purpose for which the property should be used and the type of gambling to be operated thus confirming that a gambling game cannot be played anywhere and whenever.

[36] The appellant disagrees with the court a quo that the definition of ‘special building’ is relevant and argues that it would only become relevant if the usage was not covered by a definition already included. I disagree with this submission. The definition of ‘place of amusement’, ‘social hall’, etc deals with how the buildings covering such activities are designed for and does not refer to ‘special buildings’. A ‘special building’ is given a definition in the zoning scheme which means a building designed to be used for any use other than one of the uses for which buildings herein before defined are designed. Such buildings include, ‘place of amusement’, ‘social halls’, etc.

[37] As found by the court a quo and submitted by Mr Buchanan, with which I agree, ‘special building’ is a catch all definition covering all the uses of buildings other than those already covered by the other definitions (in the zoning scheme) and is therefore an indication that the other definitions should be expanded beyond what they primarily or necessarily include hence special consent is required.

[38] It is correct that at the time the zoning scheme regulations were promulgated both the National Gambling Act^[5] and the Gambling Act were not in existence. Gambling was unlawful. It could therefore not have been in the mind of the drafters of the zoning scheme regulations. It cannot be doubted that ‘Bingo’ is a form of gambling which has been legalised in terms of the Gambling Act. It is inconceivable that the drafters of the zoning scheme would have contemplated that a ‘place of amusement’ would encompass a Bingo hall or any hall that may involve gambling as it was illegal at the time. To expand the definition to

include such, would, in my view, be taking the definition too far to include activities which could not have been contemplated by the drafters of the zoning scheme. That puts credence to the submission by Mr Buchanan, that ‘the new and unanticipated use should instead be considered to fall within the catch-all category (special buildings) which was included to cater for building uses not otherwise described.’

[39] A bingo, being a form of gambling in terms of the Gambling Act and in the context of this appeal, necessitates that regard be heard to the Gambling Act when interpreting the zoning scheme regulations. A bingo is practiced within the zoning regulations. In the absence of any regulation covering a bingo hall, one has to have regard to the Gambling Act and the established practice of the municipality concerned in order to establish its interpretation. In casu, there is established practice developed by the NMBMM.

[40] ‘Bingo’ is defined in both the National Gambling Act and the Gambling Act as follows:

“The gambling game known as Bingo and any similar gambling game which is played with cards (including electronic screens) on which appears sets of numbers or symbols and in the course of which each player attempts to match for money, property, cheques or anything of value, all or a specified set of numbers or symbols on his or her cards to calls made by the operator and includes any similar gambling games operated whole or in part by electronic means.” (My underlining)

[41] A ‘gambling game’ is not an ‘amusement game’, as contended for by the appellant. Section 1 of the Gambling Act defines an ‘amusement game’ as follows:

“An amusement game referred to in section 4(3) which is played or activated by the insertion or payment of a coin, token, credit,

electronic credit, debit, bill of exchange, or other value instrument whereby the player may win a prize which is not in the form of cash, tokens, cheques, credit, debits, bill of exchange or other value instruments but is limited to –

I. One of more non-cash prizes with a combined retail monetary value not exceeding the limits set by the Board;

II. More than one opportunity to play a further game, provided that no more than ten such opportunities may be won in respect of a single game; or

III. In the case of games which involve a substantial element of skill, one or more tickets which cumulatively entitle or enable the player to receive a non-cash prize on the premises concerned and which are not transferrable to any other person...” (Emphasis added)

[42] The finding by the court a quo is correct, that Section 1 is instructive and an ‘amusement game’ is a game that precludes the winning of, inter alia, money but which is played for amusement.

[43] A ‘gambling game’ on the other hand is defined in the Gambling Act as meaning:

“any game with or by means of cards, or dice or any mechanical, electronic device, component or machine, any computer hardware or software or any gambling device, which upon payment of money, a token, electronic credit, credit, debit or electronic clip or similar object, or upon payment, whether directly or indirectly, by a player of any consideration whatsoever ... may entitle or deliver to the person playing the game money, merchandise, profit of cheques, credit, electronic credit, debits, . . . whether the payoff is made automatically or in any other manner whatsoever and includes without derogating from the generality of the foregoing, . . . bingo . . . blackjack . . . and excludes any sports pool and, in so far as it is otherwise regulated in terms of the Act, any amusement game.” (My underlining).

- [44] I am not with Mr Ford, in his argument that the Gambling Act should not be taken into account when interpreting a ‘place of amusement’. The opposite is correct, because the Gambling Act deals specifically with a Bingo amongst other gambling games. As alluded to, the drafters of the zoning scheme would have excluded a bingo hall as a form of a place of amusement because it was an unlawful activity.
- [45] It cannot be correct therefore that the zoning certificate submitted by the appellant sufficed to satisfy the requirements of Clause 7.4 of the RFP and in particular, that it did not require special consent. The RFP specifically required that applicants should obtain a special consent from the various municipalities. The NMBM required that in order to operate a bingo hall one has to obtain a special consent. This is evident from the other applicants who contested with the appellant for the operation of a bingo hall in Uitenhage. They applied for council’s special consent. For example, on 18 June 2014, the third respondent was granted special consent to operate a bingo hall in Uitenhage. The appellant, albeit, later than the required date in terms of RFP and EMRs, was granted special consent to operate a bingo hall on the properties on 4 December 2014 by NMBMM. NMBMM in its letter referred to in paragraph 12 above instructed the appellant ‘not to commence with the use of the properties until such time as the special consent was granted’.
- [46] Pickering J in his judgment had regard to the terms upon which NMBM granted in ‘council’s special consent’ to permit the respective properties of the fourth and fifth respondents in that the properties are ‘to be used for gambling purpose-bingo hall... subject to the standard conditions pertaining to such use’. The other conditions imposed by NMBM apart from the standard conditions were articulated as follows:

“(i) Trading hours being restricted as set out in terms of the Council’s

Liquor Outlet Policy;

(iii) The “Bingo Hall” activities, including the serving and consumption of foods, drinks and beverages, being restricted or confined to the interior of the buildings;

(iv) The applicant not causing or permitting the playing of live music (i.e. live or recorded music) that is audible outside the building, or music which is played inside the building and is audible outside

the building to the extent that it causes any type of common law nuisance;

(v) The amenity of the surrounding area shall not be adversely affected

by the gambling activities. This means that the neighbours must not be adversely affected by any activities beyond those which flow from operating in compliance with all conditions imposed on the business;

(vii) Compliance with the requirements of the Liquor Act (Act 10 of 2003) as amended or replaced.”

[47] Pickering J concluded that these conditions go beyond the standard conditions, thus agreeing with the submission by Mr Motau that the conditions ‘illustrate precisely why the interpretation of a ‘place of amusement’ as encompassing a use permitting the operation of a bingo hall cannot not be correct’. Correctly in my view, Pickering J correctly concluded that ‘[t]he type of activities conducted in the course of bingo hall operations, as envisaged in the terms of the special consent, take the use of the properties out of the ambit of the standard conditions pertaining to business use and accordingly require, inter alia, that property owners in the neighbouring areas be afforded an opportunity to lodge objections to the granting of licenses and that such activities, including the consumption of liquor, be properly regulated by way of conditions included in the special consent.’ Even, in this instance, the neighbours of the properties lodged objections to the operation of a bingo hall.

[48] The correspondence between the Board and the appellant and other bidders, the consistent application and interpretation/application of the zoning scheme[6] puts paid to the argument that the zoning certificate sufficed. The correspondence between the Board and the bidders, the briefing notes and EMRs of the RFP including clause 7.5 of the RFP are clear that special consent was required. As succinctly put by the court a quo:

“Clause 7.5 of the RFP provides that an applicant ‘shall satisfy’ the Board that it has complied with the EMRs and requires,

furthermore, that an applicant must provide, as a minimum response, the following:

- Proof from the applicant that the site is zoned for a Bingo Hall and the other land uses envisaged in the application.”

[49] Mr Ford argued that the belief that the special consent was not required was not an afterthought but was raised earlier than its letter dated 14 October 2014.

[50] In fortifying this argument, Mr Ford referred to the applicant’s founding affidavit where the following appears in paragraph 23.5.1:

“the Uitenhage properties only needed to be zoned for Business 1 purposes and the consent of the NMBM to operate the Bingo Halls was not required as its permitted use included places of amusement; and ...”

[51] Mr Ford asked this to be read together with the next paragraph where the appellant stated:

“ ... [t]he First Applicant included in its bid a zoning certificate for the Uitenhage property and the Second Applicant provided proof of its special consent to use the KWT property as a place of entertainment (bingo hall) to the BCM. The applicants had therefore complied with the Requirement.”

[52] Mr Ford linked the above with the records of the Board officials when considering and reviewing the applicant's compliance with the requirements of the bid that required proof of the correct land use for the operation of bingo hall. In amplification thereof, Mr Ford, pointed out that the Board's officials noted under legal that the appellant had provided 'proof from the local authority that the site is zoned for a bingo hall and the other land uses envisaged in the application, alternatively a copy of the application for the re-zoning of the site for the aforesaid land uses together with proof of submission from the local authority.' The argument further goes that the zoning certificate states unequivocally that the use rights are for business purposes.

[53] The appellant therefore argued that the correspondence prior to the letter of 14 October 2014 which I have referred to in the preceding paragraphs establishes that it is not an afterthought. Of importance to the argument, are the contents of the letter dated 14 October 2014 by the appellant to the Board, that is, paragraphs 10.1 thereof referred to in paragraph 14 above.

[54] I am convinced that the argument, that the belief is not an afterthought, is not correct. I say so because the belief came about after the Board sent the letter of 9 October 2014 asking about the issues raised at the public hearings held on 1 and 2 October

2014. The response came back on 14 October 2014 which was 8 days before the Board's deliberations on 22 and 23 October 2014.

[55] Even the belief expressed, as Mr Motau argued is far from being unequivocal. The word 'believe' means to 'think or suppose'. It connotes that one is 'not certain about something' or 'to accept something without proof'. Even its synonyms are to think, imagine, feel, assume etc. That postulates that the appellant was not sure whether he was required to submit the special consent or not. That is in spite of the fact that the Board had consistently made it clear to the appellant that it was necessary for it to submit the special consent or proof that the properties were zoned for bingo hall. As submitted by Mr Motau, it is also important to note that the belief was not raised (a) in May 2014 when the appellant submitted the Bid proposals, (b) when the appellant applied for a special consent from the Municipality, (c) during the public hearings. I am, therefore, of the view that the Board acted within the prescripts of the EMRs and the Briefing Notes in terms of the RFP.

[56] The contention by the appellant is that the Board was misled by its CEO during the deliberations. The appellant argued that the CEO was aware before the deliberations of the Board that the appellant considered the zoning certificate and the fact that the properties fell under business 1, to be sufficient to operate a bingo hall but withheld that information

from the Board. In so doing, the CEO deprived the Board of an opportunity to consider the contention by the appellant that no special consent was required, so submitted the appellant. The court a quo erred in finding that there was no dispute before the Board as to whether or not a special consent to operate a bingo hall was required.

[57] In his introduction, the CEO informed the Board that four issues were due to be deliberated. One of the issues related to whether the properties were zoned for a bingo hall under general business and that in some municipalities, special consent was a requirement for the operation of a bingo hall. The record further reveals that clauses 7.4, 7.5 and the briefing notes were discussed and the import they had to the applicant's bidding processes. In particular the Board deliberated about the significance and the requirement to submit a special consent to operate a bingo hall by the applicants, in particular the appellant. The Board took into account that the appellant's special consent was still pending before the NMBMM. The Board considered that the competitors of the appellant applied for and obtained the NMBMM's special consent to operate a bingo hall in Uitenhage. The Board further deliberated on the zoning certificates but concluded that that did not prove that the site is zoned for a bingo hall.

[58] I am, therefore, convinced that the Board did take into account relevant considerations in disqualifying the appellant's bid.

[59] Having had regard to all the factors raised before us, I cannot find that the court a quo erred in dismissing the appellant's application.

F. Costs:

[60] The court a quo amply dealt with the circumstances which led to an order granting the fifth and sixth respondents leave to intervene. It is apposite for me to refer to the circumstances leading to the grant of the order.

[61] Aggrieved by the order of the Board, the appellant brought an application for review which was argued before the late Sandi J on 4 and 5 June 2015 whereafter judgment was reserved. Sandi J took ill before judgment was delivered. During March 2016 the fifth and sixth respondents brought an application to intervene as respondents in the review application already argued before Sandi J. The application to intervene came before Pickering J as an opposed application. A long delay was anticipated by the parties, if the application to intervene was to be heard before Sandi J as intimated by Pickering J. Influenced by that, the parties agreed that the fifth and sixth respondents be granted leave to intervene and that the whole review application be argued de novo. That culminated in the application for review starting de novo before Pickering J.

[62] In the court a quo and in this court the appellant argued that the fifth and sixth respondents be ordered to pay the costs of the hearing of the matter on 4 and 5 June 2015 because of their late intervention. In considering this argument, the court a quo reasoned as follows:

“90. . . . [w]hilst there may be some merit in this submission the fact is that on 31 March 2016 it was agreed by all the parties, for the sake of expedience, that fifth and sixth respondents should be granted leave to intervene and that the matter accordingly be re-argued. Had the application for leave to appeal been opposed and dealt with as a discrete issue before Sandi J, the re-argument of the matter would not have been necessary. In my view therefore the costs of 4 and 5 June 2014 should be regarded as being costs in the cause.

91. In my view there is no reason why costs should not follow the result and why the applicants should not therefore be ordered to pay the costs of first to fourth respondents including the costs of 4 and 5 June 2014...”

- [63] Mr Ford argued that the court a quo misdirected itself in spite of it finding that the intervention by the fifth and sixth respondents achieved nothing. He referred to the order taken by agreement on 31 March 2016 which granted the intervention of the fifth and sixth respondents and that the matter be started de novo. The first paragraph thereof reads:

“without conceding that the first and second intervening Applicants have a legal interest to intervene in the review application ...”

- [64] In terms of that order, a record of proceedings before the Board had to be served on the fifth and sixth respondents and within ten (10) days thereafter the fifth and sixth respondents were to file any answering affidavits and the appellant and other parties would do likewise if necessary. No papers were filed by the fifth and sixth respondents. The appellant argued therefore that the court should have taken these factors into consideration when determining the costs.

- [65] The fifth and sixth respondents opposed the appeal against costs on the ground that the appellant failed to establish any of the grounds a party should rely on in an appeal of this nature. Furthermore, the fifth and sixth respondents argued that there is no merit in the argument by the appellant that but for the intervention there would have been no need for the re-hearing of the review application.

- [66] The test applicable on appeal is the same in respect of the merits and costs on any matter. In *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs*[7] Ackerman J noted the test to be that:

“[11] A Court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the Court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.”

[67] There is merit in Mr Ford's argument. The court a quo though conscious of the fact that the intervention or joinder of the fifth and sixth respondents achieved nothing did not have regard to the fact that the re-hearing of the matter would not have occurred but for the ill-conceived intervention of the fifth and sixth respondents. The outcome of the review application would have waited for the judgment of Sandi J. As stated above, the agreement in paragraph precludes by stating that:

"... without conceding that the First and Second Applicants have a legal interest to intervene..."

[68] The agreement in my view, should not detract from the fact that the ill-conceived application to intervene by the fifth and sixth respondents led to the starting of the application for review afresh.

[69] If the application for review was not started de novo, the costs incurred on 4 and 5 June 2015 would not have been wasted. I say so mindful of the fact that the fifth and sixth respondents were not parties to the proceedings at that stage. In my mind, the court a quo did not have regard to these facts and the fact that the appellant did not concede that the intervention had merit.

Consequently, I make the following order:

1. The appeal on the merits is dismissed.
2. The appellant shall pay the first, second, third and fourth respondents' costs of the appeal.
3. The appeal against the cost order of the court a quo in so far as it relates to the fifth and sixth respondents succeeds.
4. The fifth and sixth respondents shall pay the costs occasioned by the appeal against the costs order of the court a quo.

M MAKAULA

JUDGE OF THE HIGH COURT

I agree and it is so ordered:

S M MBENENGE

ACTING DEPUTY JUDGE PRESIDENT

I agree:

P MAGEZA

ACTING JUDGE OF THE HIGH COURT

Appearances:

Appellant:

Advocate Ford instructed by

Rushmere Noach Inc

c/o Netteltons Attorneys

118A High Street

GRAHAMSTOWN

1st & 2nd Respondents: Advocate Motau and Advocate Kutumela instructed by

Messrs Neveille Borman & Botha Attorneys

22 Hill Street

3rd & 4th Respondents: Advocate Buchanan SC & Adv Farlam SC instructed by

Edward Nathan Sonnenburg (ENS Africa)

c/o Whitesides Attorneys

53 African Street

5th & 6th Respondents: Advocate Smit instructed by

Cliffe Dekker Hofmeyer Inc

c/o Nolte Smit Inc

115 High Street

[1] Examples of special consents by Mnquma District Municipality (Lusikisiki, NMBMM special consent granted in Warmer to a sister company of the appellant etc).

[2] 2012 (4) SA 593 (SCA at para 18)

[4] Gamble J said the following about the social impact of legal gambling: “[45] From the foregoing it is clear that the gambling industry in general and the LPM form of gaming, in particular, is heavily

regulated: and for good reason. Having been constitutionally sanctioned, organized gambling has shrugged off the mantle of moral opprobrium which it once bore in South Africa and the somewhat schizophrenic state of the “casino republics” has been addressed. But this legitimization of the once illegitimate comes with in-built safeguards to protect the vulnerable users of a past time that can quickly turn the wealthy to paupers and reduce the poor to penury.”

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[5] 33 of 1996

[6] As also borne out by the bingo licences issued to the sister company of the appellant and other bidders

[7] 2000 (2) SA 1 CC at para 11

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