

SOUTH AFRICA / JUDGMENT

Elite Bingo (UTH) (Pty) Ltd and Another v Zwane N.O and Others (4406/2014) [2016] ZAECHGC 34 (24 May 2016) [2016] ZAECHGC 34

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Pickering

CASE / FILE NUMBER

4406/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

Case

no: 4406/2014

DATE:

24 MAY 2016

NOT

REPORTABLE

In

the matter between

ELITE

BINGO (UTH) (PTY)

LTD.....First

Applicant

ELITE

BINGO (KWT) (PTY)

LTD.....Second

Applicant

Vs

MABUTHO

ZWANE N.O.

(As

the Chief Executive Officer of the

Eastern

Cape Gambling and Betting

Board).....First

Respondent

EASTERN CAPE GAMBLING AND BETTING BOARD.....	Second
Respondent GALAXY GAMING EASTERN CAPE 2 (PTY) LTD.....	Third
Respondent EAST CAPE GAMING UITENHAGE (PTY) LTD.....	Fourth
Respondent GOLDRUSH BINGO EASTERN CAPE NO1 t/a KERLIGENEX.....	Fifth
Respondent NO 2 t/a KERLIGLO.....	Sixth
Respondent	

JUDGMENT

Date heard: 12 & 13 May 2016

Date delivered: 24 May 2016

PICKERING J:

- [1] On 11 February 2014 the Eastern Cape Gambling and Betting Board (“the Board”) issued a Request for Proposals (“RFP”) to operate Bingo Halls in the Eastern Cape Province. For the purpose of specifying permissible locations in the province, five areas were determined by the MEC for Economic Development, Environmental Affairs and Tourism. These areas were referred to as “Zones”. Certain licences were thereafter issued by the Board. In respect of the Zones with which this matter is concerned the Board resolved to issue two licences in each of Zones 1 and 2. Zone 1 covers, inter alia, the magisterial district of Uitenhage and Zone 2, inter alia, the magisterial district of King William’s Town. Four bids were received for the operation of Bingo Halls in Uitenhage and three for the operation of Bingo Halls in King William’s Town. Bids which had been submitted by the two applicants herein, namely Elite Bingo (UTH) (Pty) Ltd and Elite Bingo (KWT) (Pty) Ltd in respect of Uitenhage and King William’s Town respectively, were disqualified. I will return to the basis of the disqualification hereunder.

- [2] Aggrieved thereby the first and second applicants launched an urgent application during November 2014 citing as first respondent, Mr. Mabutho Zwane, in his capacity as Chief Executive Officer of the Board, which in turn was cited as second respondent. The two successful bidders, namely Galaxy Gaming Eastern Cape 2 (Pty) Ltd in respect of the King William's Town licence and East Cape Gaming Uitenhage (Pty) Ltd in respect of the Uitenhage licence were cited as third and fourth respondent respectively.
- [3] In the urgent application the applicants sought an order, inter alia, interdicting the first respondent from causing bingo licences to be issued in accordance with section 34 of the Eastern Cape Gambling and Betting Act no 5 of 1997 ("the Gambling Act") to third respondent in respect of the King William's Town licence and to fourth respondent in terms of the Uitenhage licence, pending the outcome of an application to be instituted by the applicants for a review of the decision by second respondent to disqualify the respective bids of the applicants.
- [4] On 28 November 2014 this application was postponed by agreement between the various parties, with agreement having been reached with regard to the further conduct of the proceedings including an undertaking by the third and fourth respondents not to exercise any rights under any bingo licence issued by first and second respondents in respect of the third and fourth respondents' premises in King William's Town and Uitenhage respectively. It was further agreed that the proceedings be converted to the review application and that the wasted costs occasioned by the postponement be costs in the cause.
- [5] The review application was in due course argued before Sandi J on 4 and 5 June 2015, whereafter judgment was reserved.

Unfortunately, before delivering judgment, the learned Judge became ill and is presently still on sick leave. Thereafter, during March 2016, events took an unexpected turn when two other unsuccessful bidders in respect of both licences, namely Goldrush

Bingo Eastern Cape No 1 t/a Kerligenex in respect of Uitenhage and Goldrush Bingo Eastern Cape No 2 t/a Kerliglo in respect of King William's Town, belatedly filed an application for leave to intervene in the review application which had already been argued before Sandi J. The matter came before me as an opposed application on 31 March 2016. I expressed the firm view to counsel that the applications for intervention should be heard by Sandi J who was seized with the matter. In these circumstances

a date for the hearing of the intervention applications would in all probability only have become available at some time during the course of the third term when, hopefully, Sandi J would have returned to duty, resulting in a further delay in the finalisation of the matter. Counsel expressed concern about the delay and the matter stood down whilst the parties deliberated on the way forward.

- [6] I was then advised by counsel that in the light of developments the parties had agreed that the intervening applicants be granted leave to intervene as fifth and sixth respondents respectively and that, because of this, the entire review application should be argued de novo before another Judge as soon as possible. The matter was thereafter postponed to the opposed motion roll on 12 May 2016. Although I was not on duty on that day I was in due course requested by the Judge President to deal with the matter as I had read the voluminous papers in preparation for the hearing on 31 March.
- [7] A further obstacle to the final determination of these protracted proceedings arose when, at the outset of the hearing on 12 May, Mr. Smit, who appeared for the fifth and sixth respondents, applied, not only for a postponement of the main application in order for these respondents to be furnished with certain documentation allegedly essential to the proper presentation of their case, but also for a postponement of the postponement application itself so that a further affidavit in support of the postponement application could be filed. Having heard argument I was satisfied that there was no merit in the submissions advanced by Mr. Smit and I dismissed both applications and ordered fifth and sixth respondents to pay the wasted costs occasioned thereby.
- [8] It is common cause that, in the event of the review application succeeding, applicants do not seek an order that the Court substitute

its decision for that of the second respondents and award the licences to them but, rather, that applicants' applications for the respective licences be referred back to second respondent for re-adjudication thereof.

- [9] The second respondent was established in terms of section 3 of the Gambling Act and is a public entity listed in Schedule 3 of the Public Finance Management Act 1 of 1999. Its procurement practices are accordingly governed by the provisions of the Preferential Procurement Policy Framework Act 5 of 2000. As defined in section 1 thereof an "acceptable tender" is a tender that "in all respects complies with the specifications and conditions of tender as set out in the tender documents."
- [10] It is uncontested that although the Gambling Act confers wide discretionary powers on second respondent, second respondent remains an organ of state and must therefore not only function in a transparent and open manner as required by section 16 of the Act but must also act in an administratively fair manner. See: *National Gambling Board v Premier Kwa-Zulu Natal*
- [2001] ZACC 8; 2002 (2) SA 715 (CC) at paragraph [19].
- [11] If the second respondent's decision to award or not to award a licence is unlawful, unreasonable or procedurally flawed it may be set aside. See *Gauteng Gambling Board v Silverstar Development Ltd and Others* 2005 (4) SA 67 (SCA); *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA).

- [12] Lying at the heart of the applications by first and second applicants is the disqualification by second respondent of their bids. By letter dated 24 October 2014 second respondent advised the applicants as follows:

“The Board came to the conclusion that as at the date of deliberations, the applicants had failed to demonstrate that they were in a position to operate a Bingo Hall in that the Sites, they had earmarked for this purpose are not zoned for a Bingo Hall as contemplated in clause 7.5 of the RFP.” (sic)

- [13] Although there is a considerable amount of overlapping of the issues relating to the Uitenhage and King William’s Town applications it will be convenient to deal with them separately.

THE UITENHAGE APPLICATION BY FIRST APPLICANT

- [14] According to the record of the second respondent’s deliberations the second respondent decided as follows in respect of first applicant:

“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 been rejected.” (sic)

- [15] Clause 7.4 of the RFP provides:

“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 email to the Registrant or the Lead Applicant.”

- [16] Clause 7.5 sets out certain “essential minimum requirements” (“EMR”). The clause provides that:

“Applicants must submit a Proposal which meets the EMRs listed below ... Applicants shall satisfy the Board that they comply with the EMRs, setting out the relevant information in support of this. (My emphasis.)

- [17] Of immediate relevance hereto is the following EMR under the heading “Legal”, namely:

“The applicant must provide, as a minimum response, the following:

- 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.”

- [18] Clause 5.5, which is headed “Clarification of the RFP”, provides, inter alia, that in the event of an applicant identifying any ambiguities, errors or inconsistencies between the various portions of the RFP the applicant undertakes to notify the Board in writing accordingly and the first respondent undertakes to provide clarification as to the intended position to all applicants by way of a Briefing Note. It provides further that the Briefing Notes will be sequentially numbered and will indicate whether they supplement, vary or amend any portion of the RFP.
- [19] In clause 1 of the RFP “Briefing Notes” are defined as meaning “an amendment, addition to or clarification of the RFP issued by the Board.”
- [20] Clause 5.7 provides, inter alia:
- “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.”*
- [21] The clause provides further that in the event of an applicant submitting the “zoning certificates after the date and time stipulated in the Briefing Notes,” referred to in clause 7.4, “the applicant shall be automatically disqualified and its Proposal rejected.”
- [22] The land use rights in Uitenhage are regulated by zoning scheme regulations promulgated under the Land Use Planning Ordinance of
1985. In terms of the relevant Zoning Scheme Regulations of the Nelson Mandela Bay Municipality (“NMBM”), which are applicable to Uitenhage, the primary purpose for which buildings may be erected and used in a Business Use Zone includes “places of amusement.”
- [23] First applicant contends, briefly put, that a Bingo Hall falls within the ambit of the definition of “place of amusement” contained in the Uitenhage Scheme and that no more was therefore required than that it furnish its business use zoning certificate which it timeously did and that in the circumstances its bid was fully compliant with the requirements of the RFP.
- [24] With reference to the fact that the other competing bidders had obtained the special consent of NMBM for the operation of a Bingo Hall on their Uitenhage properties first applicant averred that although it was of the view that the special consent of the municipality was not required in respect of the Uitenhage application it had, ex abundante cautela, submitted an application for a special consent to NMBM on 24 March
2014. In this regard reference is made to a letter dated 14 October 2014 addressed by first applicant to first and second respondents in which the following is stated:
- “We would like to bring it to the Board’s attention that the premises ... in Uitenhage are also zoned as ‘business 1’. Although we believe the zoning to be correct we have submitted a special consent application. All the requirements for the consent use application have been submitted and await approval from the Human Settlements Committee...”*

[25] This was the first occasion on which first applicant had advised the Board that it did not believe that special consent was required to operate a Bingo Hall on its erven. Be that as it may, on 25 April 2014 the Executive Director: Human Settlements, of NMBM acknowledged receipt of first applicant's application of 24 March 2014 and advised first applicant that the application was being circulated to property owners in the immediate vicinity and that the requisite advertisements would appear in the local press. First applicant was further advised as follows:

"You are hereby kindly advised that until such time as council's special consent is granted you may not commence with the use of the subject property." (My emphasis)

[26] The closing date for the submission of bids in terms of clause 5.2 of the RFP was stipulated as being 14 May 2014 and various Briefing Notes were in due course furnished to the prospective bidders.

[27] In Briefing Note 2, issued on 25 April 2014, the following was, inter alia, stated:

"We refer to the various written requests for clarification on the final Bingo RFP submitted to the Board. Various registrants have submitted written submissions requesting clarification and dispensation in terms of paragraph 5.5 ('clarification of the RFP') and 7 (the information required) of the final Bingo RFP issued by the Board.

...

THE REGISTRANT REQUEST FOR CLARIFICATION:

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 'place of entertainment' or '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 rezoning 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.

THE BOARD RESPONSE:

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."

[28] First applicant's proposal was duly submitted on 14 May 2014 to the second respondent together with Business Use Zoning certificates for its two Uitenhage erven issued by NMBM and a copy of the letter addressed to it by the Executive Director: Human Settlements of NMBM on 25 April 2014 acknowledging receipt of first applicant's Special Consent application and advising it that it could not commence with the use of the subject property until such time as the Council's Special Consent was granted.

[29] Thereafter Briefing Note 6 dated 15 September 2014 was issued wherein the Board stated as follows:

"SUBMISSION OF ZONING FOR THE BINGO LICENCE APPLICATIONS

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."

[30] In response to Briefing Note 6 requiring first applicant to provide the zoning certificate for the site of its proposed Bingo Hall, first applicant furnished further copies of the zoning certificates together with the application for special consent to second respondent on 16 September 2014.

[31] The public hearing in respect of first applicant's licence application was duly held on 1 October 2014. It is common cause that by that date first applicant had not provided proof of the granting of special consent for the Uitenhage premises, nor, had it applied for "dispensation on good cause shown for its failure to comply therewith as envisaged in Briefing Note 2."

[32] On 9 October 2014 first respondent addressed a letter to first applicant requesting it to respond to certain questions which had been posed by second respondent at the public hearings held on 1 October 2014 and, in particular, to explain to the Board by 13 October 2016 the status of its application for consent use. The relevant part of the letter reads as follows:

"We refer to the public hearings held for ... Elite Bingo UTH (Pty) Ltd on Wednesday 1 October 2014 for a site in Uitenhage.

(1) ... (11)

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

application.” (sic)

[33] It is common cause that although this letter called for a response by no later than noon on 13 October it was inexplicably only sent to first applicant at 16h39 on 13 October. In the light of this first applicant, at 16h56 on 13 October, requested an extension of time within which to respond thereto. On the same day, however, first respondent replied, pointing out that the questions referred to in its letter had been asked at the public hearing on 1 October and that first applicant had been advised then to prepare written submissions in that regard. In its reply first respondent stated that “management is required to update the investigation reports for inclusion in a Board pack to be despatched on 14 October 2014.

[34] First applicant accordingly responded thereto by email at 12h32 on 14 October 2014. It advised the second respondent that in its view the Business zoning of the proposed sites in Uitenhage allowed it to perform all the activities of a Bingo Hall and that the proposed site was therefore adequately zoned as per clause 7.4 of the RFP. The first applicant proceeded to state as follows:

“Although we believe the zoning to be correct, we have submitted a special consent application. All the requirements for the consent use

application have been submitted and await approval of the Human Settlements Committee, which was scheduled for 8 October 2014 but ... [which was postponed] We understand that the meeting will take place on Wednesday 29 October 2014 where the special consent will be approved.” (My emphasis)

[35] On 16 October 2014 first respondent addressed a further communication to first applicant requesting it to “provide a status update” in respect of its application for special consent. First applicant, represented by Mr. Charlton Kerridge, a chartered accountant employed as Group Finance Officer by the African Pioneer Group which includes both applicants, responded by email on 17 October advising that it had already responded to this request. It further stated that it would “provide all outstanding information and responses requested by noon on Monday, 20 October 2014.”

[36] By email at 09h21 on 17 October 2014 one Bonga Jaxa, representing second respondent, wrote as follows to Kerridge:

“Thanks for the feedback ... You will also appreciate that the municipality does require special consent for Bingo and have taken note that it may be that the delay is circumstances beyond your control. Proof such submission of special consent is key in this regard.” (sic)

[37] In reply hereto, at 09h32, Mr. Kerridge attached “the proof of special consent application” and, at 10h59 sent a further email stating that “further from our discussions, see attached correspondence from the NMBM dated 10 July 2014 notifying us of the objections to the consent application.”

[38] Second respondent considered first applicant's application at its meeting of 22 and 23 October 2014. On 24 October 2014 second respondent advised first applicant, inter alia, as follows:

"3.4 That the applicants' failure to furnish the Board with the special consent/zoning certificate for a Bingo Hall, in respect of both Uitenhage and King William's Town is a material non-compliance with the Essential Minimum Requirements of the RFP and as such the applicants applications are disqualified on this basis.

3.5 With above said, the applicant is referred to the contents of the Essential Minimum Requirements in clause 7.5 of the RFP, wherein it is provided, inter alia, that an applicant must furnish 'proof from the local authority that the site is zoned for a Bingo Hall and the land uses envisaged in the application, alternatively a copy of the application for the re-zoning of Site for the aforesaid land uses together with proof of submission from the local authority'.

3.6 The applicants are also referred to clause 7.4 of the RFP which provides, inter alia, that the 'site must be zoned for a Bingo Hall and the other land uses envisaged in the application.'

In light of the above came to the conclusion that as at the date of deliberations, the applicant had failed to demonstrate that they were in a position to operate a Bingo Hall in that the sites, they earmarked for this purpose are not zoned for a Bingo Hall as contemplated in clause 7.5 of the RFP. Accordingly, kindly be advised that both the applicants applications in respect of Uitenhage and King William's Town have been disqualified."

[39] Eventually, on 4 December 2014, first applicant was advised by NMBM that its application for special consent had been approved on 14 November 2014. That consent was couched in the same terms as the consent granted to the other Uitenhage applicants and contained conditions therein over and above the standard conditions "pertaining to the Business use zone as contained in the Uitenhage Zoning Scheme applying."

[40] It is relevant that, in the interim, on 29 October 2014, Mr. Dondolo, a director of both first and second applicants and Chairman of their respective Boards, laid the blame for the disqualification of first applicant squarely at the door of NMBM. He was quoted in a newspaper article as saying:

"The deadline was last Friday and it was refused and rejected by the Gambling Board. My heart is broken, it is bleeding. I can't believe that the council did not sit to approve the application. All these meeting postponements have destroyed

me."

[41] Mr. Ford's submissions, as I understood them, were largely premised on two main issues. Firstly, so he contended, it was clear upon "any sensible" interpretation that the definition of "place of amusement" would include a Bingo Hall and that in the circumstances first applicant had complied with the requirements of the RFP by timeously furnishing to the second respondent its Business use zoning certificate. The corollary of this submission is

that the Special Consent of the NMBM was not required for the operation of a Bingo Hall and that first applicant's application to the NMBM for such consent had merely been made ex abundante cautela.

- [42] Second, so the argument went, the Board, despite being fully apprised of first applicant's contentions that the Business use zoning certificate sufficed, disregarded this entirely in its deliberations and failed in the circumstances to investigate and consider whether in fact special consent was required. Its failure to do so led it to place an incorrect interpretation on the relevant provisions of the RFP. It could therefore not reasonably or lawfully have come to the decision to disqualify first applicant's bid. See: *Ekuphumleni Resort (Pty) Ltd & Another v Eastern Cape Gambling and Betting Board & Others* (402/2007) [2010] ZAECGHC 5 (18 February 2010) at paras [76] to [78], *Makana Municipality & Others v Ruck* (Full Bench Judgment on Appeal of the Eastern Cape High Court Grahamstown) Case no 22/2011 at para [7].
- [43] It will be convenient to deal firstly with the submissions relating to the definition of "place of amusement"
- [44] "Place of amusement" is defined in the Scheme Regulations as including, inter alia:
- "A building designed for use as a public hall, theatre, cinema, music hall, billiards saloon, sport arena, skating ring, or dance hall or for the purpose of exhibitions of trade or industry."*
- [45] Mr. Ford submitted that on "any sensible" interpretation the definition of "places of amusement" would include a Bingo Hall. He submitted that the definition did not purport to be all inclusive nor did it purport to list all of the specific types of amusement contemplated.
- [46] At the risk of being thought irrational or unrealistic as opposed to sensible, I am of the view that Mr. Ford's contentions with regard to the correct interpretation of "places of amusement" cannot be upheld.
- [47] I agree with Mr. Buchanan S.C., who, with Mr. Farlam S.C. appeared for the third and fourth respondents, that the definition of "special building" in the Zoning Scheme Regulations is also relevant in this regard. "Special building" is defined as meaning "a building designed to be used for any use other than one of the uses for which buildings herein before defined are designed". As submitted by Mr. Buchanan the term "special building" is a catch-all definition covering all the uses of buildings other than those already covered by the other definitions and is therefore an indication that the other definitions should not be expanded beyond what they plainly or necessarily include.
- [48] In my view it is clear that a Bingo Hall is not a "place of amusement" within the meaning of the definition thereof. "Amuse" is defined in the Concise Oxford English Dictionary as meaning "to make someone laugh or smile, entertain." "Amusement" is defined as "the state or experience of finding something funny; the provision or enjoyment of entertainment; a game machine or other mechanical device for providing entertainment." "Entertainment" is in turn defined as "the action of providing or being provided with amusement or

enjoyment.” The definition of “amusement game” as defined in section 1 of the Gambling Act is instructive. It is defined as meaning:

“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...”

[49] It is a game, therefore, that precludes the winning of, inter alia, money but which is played for amusement.

[50] “Gambling game” on the other hand is defined as meaning any game which, inter alia, “may entitle or deliver to the person playing the game money, merchandise, property, cheques ... and includes roulette .. bingo ... blackjack ... and excludes ... any amusement game.”

[51] “Bingo” is defined as meaning:

“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.”

[52] It is clear from these definitions that the game of Bingo with which this case is concerned is a gambling game and not an “amusement game” as contemplated by the Gambling Act. The type of activities contemplated by the definition of “place of amusement” are all related to cultural or sporting activities and do not include a single activity related to gambling. Bingo, on the other hand, is clearly not a cultural or sporting activity. It is a gambling game of chance in which money may be won, something different from an “amusement game” in which no monetary prizes may be won. A Bingo Hall, in my view, has very little in common with the type of activities referred to in the definition of “place of amusement”.

[53] I agree also with the submission by Mr. Buchanan that another factor strongly militating against the applicant’s interpretation is that the Uitenhage Zoning Scheme pre-dates the legalisation of gambling in South Africa, which occurred pursuant to the promulgation

of the National Gambling Act 33 of 1996. The scheme would therefore not have contemplated a building designed to accommodate any form of gambling. As submitted by Mr. Buchanan the definition of “place of amusement” should accordingly not be stretched beyond what it was intended to include and the kind of activities that it was envisaged to regulate, in order to include a form of gambling.

[54] It is also instructive to have regard to the terms upon which NMBM granted “council’s special consent” to permit the respective properties of fourth and fifth respondents “to be used for Gambling Purpose – Bingo Hall ... subject to the standard conditions pertaining to such use.” Apart from the standard conditions, NMBM imposed certain other conditions. Of particular relevance are the following

conditions, namely:

“(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.”

It was also recorded that “the remaining conditions pertaining to the business use zone as contained in the Uitenhage zoning scheme” would continue to apply.

[55] It is clear, in my view, that the above conditions set out in the Special Consent are conditions going beyond the standard conditions pertaining to business use and which NMBM considered necessary for the operation of a Bingo Hall on the said properties. As was submitted by Mr. Motau S.C., who with Mr. Kutumela appeared for first and second respondents, these conditions illustrate precisely why the interpretation of a “place of amusement” as encompassing a use permitting the operation of a Bingo Hall cannot be correct. The 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 licences and that such activities, including the consumption of liquor, be properly regulated by way of conditions included in a special consent.

- [56] Mr. Ford submitted, forcefully, that the fact that Bingo was a gambling game was irrelevant and that what was relevant was that the persons who partook therein amused themselves by playing it. In my view, however, whether persons who played the game derived amusement therefrom is irrelevant to the determination of the meaning of “place of amusement” in the regulations. I imagine many gamblers attending a casino derive amusement from their activities but it could never be suggested that a casino would fall within the ambit of the definition. No doubt in Roman times the populace flocked to the Colosseum in order to derive amusement from the sight of Christians being torn apart by lions or gladiators fighting to the death but that would not render the Colosseum a “place of amusement” having regard to the type of activities set out in the Scheme Regulations.
- [57] In my view therefore the primary use indicated in first applicant’s zoning certificate did not encompass a use permitting the operation of a Bingo Hall.
- [58] As was held in Ekuphumleni Resort supra at para 78 it was incumbent upon the Board to accord to the phrase “place of amusement” the meaning which as a matter of law it bore. If it adopted an interpretation that was wrong in law and disqualified first applicant on the strength thereof then, clearly, it acted unlawfully. Whilst it may be so that the Board did not pertinently address the issue of whether first applicant’s business use zone certificate sufficed, the fact is that its ultimate decision to the effect that special consent was required in order to operate a Bingo Hall was, in my view, correct in law. In the circumstances the Board did not commit an error of law as contended for by Mr. Ford.
- [59] In any event I am of the view that there is merit in the submission by Mr. Buchanan that there was in fact no genuine dispute before the Board as to whether or not the zoning scheme required special consent for the operation of a Bingo Hall. This was an issue that was only raised with the Board for the first time on 14 October when first applicant, opportunistically in my view, stated to second respondent that “we believe the zoning to be correct.” Mr. Ford submitted that this letter had made it clear in unequivocal terms that the business use zoning certificate complied with the requirements of clause 7.4 of the RFP, thereby obliging the Board to enquire into the matter. I do not agree. As was stressed by both Mr. Motau and Mr. Buchanan this “belief”, far from being unequivocal, was only raised tentatively for the first time after the public hearings had been concluded and a mere three business days prior to the Board’s deliberations. The expression of the “belief” contained in the letter is far removed from a categorical assertion of the correctness thereof. “To believe” is defined in the Concise Oxford English Dictionary as, inter alia, meaning “to think or suppose”.
- [60] 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...”

- [61] In my view Mr. Buchanan is correct in his submission that the onus in this regard clearly rested on the first applicant and not, as Mr. Ford sought to argue, on the Board. It was for the first applicant to satisfy the Board within the requisite time frames that the site was in fact properly zoned for the operation of a Bingo Hall as opposed to a mere statement of “belief” belatedly expressed in an email to the effect that the site was properly zoned. In this endeavour it was bound to fail for the reasons I have given above.
- [62] Apart from this expression of first applicant’s belief the Board also had before it the special consents which had been granted to all the other bidders for the Uitenhage licence by NMBM as well as the letter addressed by the Executive Director: Human Settlements, in the NMBM to first applicant on 25 April 2014 in which first applicant was advised that “until such time as council’s special consent is granted you may not commence with the use of the subject property.” At no time did first applicant take issue with the municipality as regards the aforementioned prohibition, nor did it ever seek clarification from NMBM in this regard, but remained supinely silent whilst NMBM engaged in what first applicant now avers was the entirely irrelevant process of determining whether the special consent application should be granted, despite objections thereto having been received and despite NMBM expending considerable administrative and other resources in dealing with the application.

Furthermore, first applicant did not contend before the Board that the said prohibition was of no force and effect, that it did not preclude the Board from granting the licence to it, and it should be disregarded.

- [63] In this regard Mr. Ford submitted that this letter was no more than “an almost automatically generated standard letter” from some unknown municipal official which, according to first applicant, was made before any consideration by NMBM of the application serving before it. In my view, this submission overlooks firstly the fact that the letter was not addressed to first applicant by some faceless minion in the employ of NMBM but from the Executive Director: Human Settlements, as indeed were all subsequent communications concerning the special consent issue. The submission overlooks too that at that time NMBM had already dealt with and granted fifth respondent’s application for special consent in precisely the same circumstances, as it also later did in respect of fourth respondent’s application for special consent.
- [64] In my view in these circumstances it would have appeared to the Board that first applicant had reconciled itself to the fact that special consent was necessary. There was, in my view, therefore no need for the Board to engage in a legal analysis as to whether the business use zoning certificate sufficed.
- [65] I am accordingly satisfied that second respondent acted in an administratively fair manner and that its decision to disqualify

first applicant’s bid was lawful, reasonable and rational in all the circumstances.

THE KING WILLIAM’S TOWN APPLICATION OF SECOND APPLICANT

[66] As set out above, by letter dated 24 October 2014, second applicant was advised that it had failed to demonstrate that it was in a position to operate a Bingo Hall in that the site earmarked by it for this purpose was not zoned for a Bingo Hall as contemplated in clause 7.5 of the RFP.

[67] In respect of the application of the second applicant the record reflects the following:

“The Board has resolved in relation to the application by Elite Bingo for a licence in King William’s Town that they did not comply with the terms of the RFP the Board does not have discretion to condone the non-compliance.” (sic)

[68] In terms of the applicable Zoning Scheme Regulations of the Buffalo City Municipality (“BCM”) applicable to King William’s Town, the primary purpose for which a building may be erected and used in a Business Use Zone includes “place of entertainment.” It was common cause, however, that in order to operate a Bingo Hall the special consent of the BCM was required.

[69] As with the Uitenhage application, second applicant was obliged in terms of Briefing Note 6 to have provided its zoning certificate,

including the Special Consent, in respect of its King William’s Town property by 16 September 2014. It is common cause that second applicant included in its proposal proof of its application for special consent to the BCM. By the date of second

respondent’s deliberations on 22 October 2014, however, the application for Special Consent had not yet been granted. Mr. Ford, however, relied on Briefing Note 2 referred to above. For ease of reference I will repeat the terms of Briefing Note 2 which provided as follows:

“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 hearing. Should 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.”

[70] Mr. Ford submitted that Briefing Note 2 constituted an amendment to the provisions of clause 5.7 of the RFP which expressly precluded any discretion on the part of the Board with regard to the submission of zoning certificates after the dates stipulated. He submitted that any other interpretation of the Briefing Note would render it meaningless.

[71] Mr. Buchanan submitted to the contrary that Briefing Note 2 did not constitute an amendment to the provisions of the RFP in that it proceeded from the mistaken assumption that second respondent had a discretion to depart from the provisions of the RFP when it clearly did not, having regard to the provisions of clause 5 itself. He submitted further in any event that it was apparent from the provisions of clause 5.5 that Briefing Notes were primarily intended to clarify the RFP and that to the extent that they were intended to vary the terms thereof this was only to correct “any ambiguity, errors or inconsistencies.”

[72] Mr. Buchanan pointed further to the fact that Briefing Notes were required in terms of clause 5.5 to “indicate whether they supplement, vary or amend any portion of the RFP”. In this regard he referred to instances where Briefing Notes specifically indicated when they were merely providing clarification

and when they were amending the RFP. Briefing Notes also specifically recorded when a dispensation was being granted.

[73] In my view Mr. Ford’s submission that Briefing Note 2 constitutes an amendment of clause 5.7 is correct. Clause 5.7 provides, inter alia:

“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 ... or a failure to comply with any of the EMR’s in 7.5 below.

In any such event the applicant shall be automatically disqualified and its Proposal rejected.”

[74] Despite the express exclusion in clause 5.7 of any discretion to condone the failure to submit zoning certificates timeously, Briefing Note 2 purports to confer just such a discretion on second respondent, provided that good cause for such failure is shown.

Furthermore, it is clear, in my view, from the conduct of second respondent and its officials that as far as they were concerned

clause 5.7 had been amended. If they did not consider that it had been so amended then, as at 16 September 2014, when the

certificate had to be filed, second applicant’s Proposal would have been “automatically disqualified and its Proposal rejected.”

[75] That did not happen. Instead, second respondent’s officials entered into certain correspondence with second applicant

which makes it clear that even at that late stage after 16 September second respondent was prepared to entertain second applicant’s

Proposal.

[76] Of relevance in this regard are the following emails:

(a) On 17 September the aforementioned Kerridge wrote to an employee of BCM as follows:

‘The Gaming Board have indicated that they may require some sort of indication that the King William’s Town special consent is in progress and an indication that it will be approved. Can you please speak to Ashleigh about this. We would need this by the end of next week.’

It is common cause that Ashleigh is Mr. Arjun, a City Planning Technician, Land Use Management, in the employ of BCM.

(b) On the same day Mr. Arjun replied to Kerridge:

"I confirm that the application for the Bingo Hall on Erf 8889, King William's Town, is currently undergoing the formalities of the municipal procedure for a Special Consent. I am awaiting feedback from four municipal departments. Some departments may consent stating that, they are in support of the application on condition ... Therefore, it is imperative that I acquire these

comments before drafting the consent so the condition is included within the consent issued to yourself."

(c) On 20 October 2014 at 10h50 Mr. Bonga Jaxa wrote to Mr. Kerridge as follows:

"Please advise if you have also dealt with the KWT application in respect of Special Consent?"

(d) Mr. Kerridge replied thereto at 13h35 on 20 October 2014 stating:

"We have been made aware that the consent has been approved. I have requested confirmation thereof from the BCM. I will confirm in due course."

(e) Mr. Kerridge then received the following email from Mr. Arjun at 16:08 on 20 October 2014:

"Kindly be advised that the consent document is awaiting endorsement by our Acting Director. Once the document is returned I shall notify you accordingly."

Mr. Arjun's email was forwarded by Mr. Kerridge to Mr. Jaxa on 21 October 2014 with the comment:

"There is also the mail from Mr. Arjun dated 17 September 2014 below as evidence of the application being submitted."

(f) Mr. Jaxa replied hereto at 16:44 on 21 October 2014:

"Re: KWT – Special Consent

No meant for approval, as indicated. (sic)

Submission date was noted."

(g) At 16:47 on 21 October 2014 Mr. Kerridge again emailed Mr. Jaxa stating:

"Nothing other than the two mails for now. We do however want to assure you that all the necessary documentation will be obtained within the next few weeks. Mr. Dondolo is personally going to see to it that we do."

(h) With reference to Mr. Arjun's last email Mr. Kerridge stated in an email to Mr. Dondolo:

"I discussed with Mr. Arjun earlier and he said that his Department has approved the application and it is now with the Director for endorsement. There are no problems expected." (My emphasis)

- [77] In my view this correspondence clearly reflects that, whether it had formally been requested or not, and whether second respondent was lawfully empowered to grant any dispensation or not, a dispensation had in fact been granted by second respondent in respect of second applicant's non-compliance with the strict provisions of clause 5.7. It is apparent from the emails that second respondent was prepared to accept late delivery of the Special Consent. Indeed, on 16 October 2014, first respondent requested the applicant to "provide a status update" on its Special Consent application. First respondent knew at that stage that the Special Consent had not yet been granted. Obviously if the applicants had already been automatically disqualified this would have been a pointless request.
- [78] In coming to the conclusion that clause 5.7 had been amended as aforesaid I have specifically refrained from deciding whether the second respondent was empowered to do so, more especially by way of a Briefing Note. Compare: *Steenkamp N.O. v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at para 60. It is not necessary to decide this issue because, in my view, even if clause 5.7 was validly amended this is of no avail to second applicant.
- [79] The reference in Briefing Note 2 to an application for "dispensation on good cause shown" must be read in its proper context, namely, together with the requirement of the RFP that "the zoning certificate (Consent Use) must be in place and provided to the Board at least seven days prior to the public hearing." It is the failure to have provided that Zoning Certificate (Consent Use) to the Board at least seven days before the public hearing which, according to the Briefing Note, could be condoned on good cause shown. This, in my view, is something very different to the granting of condonation for the failure to have provided the requisite Zoning Certificate by the time of the Board's deliberations. Briefing Note 2 makes no reference whatsoever to an application for dispensation in those circumstances nor can such be inferred from the clear wording thereof. At best for second applicant, therefore, is that the Board was prepared to condone the late delivery of proof of the Special Consent up to the time of its deliberations but not later.
- [80] Furthermore, at the Board's hearing, second applicant did not seek a postponement of the matter to enable it to obtain the Special Consent nor did it pertinently request condonation for its failure to have provided the Special Consent prior to the meeting of the Board.
- [81] Mr. Ford submitted, however, with reference to the correspondence from, inter alia, Mr. Arjun, which I have set out above, and to the record of the Board's deliberations, that had the Board not considered second applicant's application in what he criticised as being a perfunctory manner it would have appreciated that the application for special consent had in fact been approved by the BCM and that there had therefore been substantial compliance with the requirements of the RFP entitling the Board to exercise its discretion in favour of the second applicant.
- [82] In the course of the Board's hearing its legal representative, Mr. Mngomezulu, stated with reference to second applicant's

application to the BCM for Special Consent that “the discussion stands at the point where they [the BCM] acknowledge receipt of the application and that’s where it ends. It would have been different if there was an official communiqué from the Municipality that says we have approved your Special

Consent. However we are waiting for so-and-so’s signature. But now all we have is an acknowledgement of this

application and it ends there.”

[83] Mr. Ford submitted that Mr. Mngomezulu’s statement was incorrect and had caused the Board to approach the second applicant’s

proposal on the wrong basis. In this regard he relied strongly on the statements by Mr. Arjun that “the consent document is awaiting endorsement by our Acting Director.” He submitted that this could only have meant and plainly in fact did mean that the application had been approved and that only the Acting Director’s signature thereon was being awaited.

[84] I disagree. It is noteworthy in this regard that no affidavit has been put up by Mr. Arjun in explanation of his statement that the consent document was awaiting “endorsement” by the Acting Director, and as to whether such “endorsement” was a mere formality. In the circumstances regard must be had to the meaning of “endorsement.” “Endorse” is defined in the Shorter Oxford English Dictionary as meaning, inter alia, “to declare one’s public approval of”, “to confirm”. As was submitted by Mr. Buchanan, the Acting Director would on the face of it, in the absence of evidence to the contrary, have a discretion whether or not to confirm the granting of the Special Consent. There is no evidence to the effect that he was a mere rubber stamp. This was recognised by Mr. Kerridge himself who, after stating that the application was with the Acting Director for endorsement, added that “there are no problems expected.” In my view therefore Mr. Mngomezulu’s statement to the Board was entirely correct.

[85] In these circumstances, where the application for Special Consent had not been approved prior to the Board’s deliberations and where such approval was not a *fait accompli*, second applicant’s bid was, in my view, correctly disqualified by second respondent.

[86] There remains one further issue to be dealt with. The applicants allege in their founding affidavit that the manner in

which the Board dealt with the further round of representations, which was considered necessary after the public hearings, reflected

“manifest procedural unfairness” and raised a clear perception of bias such as to justify the setting aside of the decision disqualifying their bids. In the view that I take of the matter it is not necessary to deal in detail with this issue.

[87] Applicants had been obliged in terms of the RFP to submit their comprehensive public inspection documents prior to the public

hearing. They did not do so. Their failure in this regard was pointed out by fourth respondent at the public hearings on 2 October. These documents were then provided to fourth respondent on 8 October and fourth respondent was afforded thirty

days in terms of s 21(2)(b) of the Gambling Act to comment thereon. They, however, submitted their representations within seven business days thereafter, on Friday 17 October. These responses were forwarded to applicant by second respondent on Monday 20 October and applicants were requested to reply thereto by close of business on 21 October, in view of the fact that the deliberations were due to be held on 22 October, which they did. Applicants did not seek an extension of time within which to deal with the issue nor, tellingly, did they complain to the Board that they were prejudiced by the situation which had arisen because of their own default. Indeed, it does not appear that they did suffer any prejudice in consequence of the short time afforded to them by the Board to respond.

[88] In these circumstances there is, in my view, no merit in the submission that the Board's handling of the matter gives rise to a reasonable perception of bias. On the contrary, a reading of the correspondence leading up to the Board's deliberations reveals that the Board was scrupulously fair and indeed indulgent towards applicants as they endeavoured to obtain the requisite special consents.

[89] I turn then to deal with the issue of costs.

[90] In this regard Mr. Ford submitted that the renewed hearing of the matter on 12 and 13 May 2016 had been occasioned because of the belated intervention application of fifth and sixth respondents and that they were therefore the cause of the costs of the previous hearing on 4 and 5 June 2015 being wasted. Whilst 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 intervene 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 2015 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 2015. In my view also, the costs of the application for an interdict, which costs were in terms of the order of 28 November 2014 agreed to be costs in the cause, must on the same basis be borne by applicants.

[92] I am satisfied that the intervention of the fifth and sixth respondents achieved nothing nor, in my view, could it have achieved

anything. The main basis on which the application for intervention was originally brought by fifth and sixth respondents

was that first and second applicants were seeking an order that this Court substitute its own order for that of the Board. As set out above in paragraph [8] this was not the case and fifth and sixth respondents had clearly misconstrued the nature of the relief sought by the applicants. As the application proceeded, however, fifth and sixth respondents changed tack. They now sought, in the event of one or both of the applications succeeding, that the Court, in remitting the matter to the Board, should, acting in terms of s 8 of the Promotion of Administrative Justice Act 3 of 2000, make a just and equitable order setting aside the entire tender process and declaring that it should start de novo and be re-advertised or, at the very least, ordering the second respondent to reconsider all the competing tenders at the time the award was made.

[93] This approach overlooks entirely the fact that fifth and sixth respondents did not intervene as applicants but as respondents.

It was thus not open to the fifth and sixth respondents to seek relief which could only be claimed by the applicants as dominus litis in each application.

[94] There is no reason therefore why fifth and sixth respondents should not be ordered to pay such costs as were occasioned by their application to intervene and by their subsequent intervention.

[95] The following order will issue:

1. The applications of both first and second applicants are dismissed.
2. The applicants are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of first, second, third and fourth respondents, such costs to include the costs of the application for an interdict and the costs of the hearing on 4 and 5 June 2015 before Sandi J. Such costs are further to include the costs of two counsel, wheresoever employed.
3. The fifth and sixth respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay such costs as were occasioned by their applications to intervene and by their subsequent intervention in the main application, such costs to include the costs of two counsel where applicable.

J.D. PICKERING

JUDGE OF THE HIGH COURT

Appearing on behalf of Applicants: Adv. E.A.S. Ford S.C.

Instructed by: Rushmere Noach Inc c/o Netteltons Attorneys, Mr. Nettelton

Appearing on behalf of First and Second Respondents: Adv. T. Motau S.C. and Adv. L. Kutumela

Instructed by: Neville Borman & Botha, Ms. Bosman

Appearing on behalf of Third and Fourth Respondents: Adv. R.G. Buchanan S.C and Adv. P.B.J. Farlam S.C.

Instructed by: Edward Nathan Sonnenburg (ENS Africa) c/o Whitesides Attorneys, Mr Nunn.

Appearing on behalf of Fifth and Sixth Respondents: Adv. M. Smit

Instructed by: Cliff Dekker Hofmeyr Inc. c/o Nolte Smit Inc, Mr. Farrell

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