

SOUTH AFRICA / JUDGMENT

Vukani Gaming Eastern Cape v Chairperson, Eastern Cape Gambling and Betting Board and Others (226/18) [2018] ZAECHGHC 29 (19 April 2018)

[2018] ZAECHGHC 29

COURT

Eastern Cape High Court, Grahamstown

BEFORE

JE Smith

CASE / FILE NUMBER

226/18

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE NO: 226/18

In

the matter between:

VUKANI
GAMING EASTERN CAPE
APPLICANT
and
CHAIRPERSON,
EASTERN CAPE GAMBLING
1ST RESPONDENT
AND
BETTING BOARD
THE
EASTERN CAPE GAMBLING AND
2ND RESPONDENT
BETTING
BOARD
PIONEER
SLOTS (PTY) LTD
3RD
RESPONDENT
MARSHALLS
WORLD OF SPORTS

4TH RESPONDENT
EASTERN
CAPE (PTY) LTD
K201744277
(PTY) LTD
5TH
RESPONDENT
GOLDEN
PALACE SITE 3 (PTY) LTD
6TH
RESPONDENT
GSLOTS
ISO EC (PTY) LTD
7TH
RESPONDENT
GOLDENT
PALACE SITE 3 (PTY) LTD
8th
RESPONDENT
K201744277
(PTY) LTS
9th
RESPONDENT
SPIN
AND WIN ENTERTAINMENT MBIZANA 10th
RESPONDENT
(PTY)
LTD
GEC
GAMING (PTY) LTD
11th
RESPONDENT
K20140002030
(PTY) LTD
12th
RESPONDENT
GOLDEN
PALACE SITE 1 (PTY) LTD
13th RESPONDENT

JUDGMENT

SMITH J:

Introduction

- [1] The applicant seeks an order interdicting the Chairperson of the Eastern Cape Gambling and Betting Board and the Board, respectively, from granting and issuing independent site operator gambling licenses to the fourth to thirteenth respondents, pending the final determination of review proceedings.
- [2] The applicant is a duly incorporated company and the holder of a route operator license issued by the Board in terms of section 49 of the Eastern Cape Gambling and Betting Act, no 5 of 1997 (“the Eastern Cape Act”). The applicant is one of only two holders of route operator’s licenses in the province, the other license being held by the third respondent.
- [3] The Chairperson of the Eastern Cape Gambling and Betting Board and the Board have been cited as first and second respondents, respectively.
- [4] The fourth to thirteenth respondents submitted applications for independent site operator licenses pursuant to the publication of a Request for Proposals (“RFP”) during November and December 2017. The fifth, sixth, eighth, ninth, tenth, twelfth, and thirteenth respondents opposed the application and filed papers in defence of the Board’s decision. They were also represented by counsel at the hearing.
- [5] The applicant contends that it brings the application in its own interests, as a route operator’s license holder, and also in the public interest since the issuing of the additional licenses will have “severe negative effects for the people of the Eastern Cape by increasing the number of LPMs in the province in a situation where certain areas are already oversaturated and where the board has failed to rationally asses the demand for LPMs’. Limited Pay-out Machines (LPMs) are gambling machines that resemble the machines found in casinos but are placed in bars, taverns, restaurants and other similar sites, and their stakes and prices are circumscribed by Regulations made in terms of the National Gambling Act, 7 of 2004 (“the National Act”).
- [6] The Eastern Cape Act provides for two types of LPM licenses namely, licences issued to route operators for a certain number of LPMs. The route operators then contracts with holders of gambling machine site licenses (“site operators””) to operate the LPMs at the relevant sites. The other type is where site operators, not linked to a route operator, are licensed to own and operate not less than 21 and not more than 40 LPMs on a site.
- [7] Only licenses of the first type (for 2000 LPMs) have been granted in the Eastern Cape, namely 1000 LPMs each to the applicant and the third respondent.
- [8] The number of LPMs which may be licensed in the Eastern Cape is limited to 6000 by the Regulations issued in terms of the National Act. The Regulations also stipulate that the LPMs must be rolled out in two phases of 50% each.

- [9] The Eastern Cape Regulations provide for further restrictions on the number of LPMs that may be rolled out in the first phase. Regulation 52(2) provides that no more than 2000 LPMs shall be exposed for play in terms of route operator or independent site operators' licenses.
- [10] The applicant launched review proceedings on 15 November 2017 in which it challenges the decision taken by the board in terms of Regulation 17 of the National Regulations to issue the RFP inviting applications for additional independent site operator licenses.
- [11] In the review application the applicant contends that the Board failed to comply with the prescripts of Regulation 59(3) which permits it to grant or issue more than 2000 licenses only:
- (i) if the Board is satisfied that it will not lead to over-saturation of LPMs in the province and;
 - (ii) it has considered, inter alia, the economic, social, and environmental impact, as well as the impact on the gambling problem and other relevant information, and is of the opinion that it would be in the best interests of the Province to grant and issue the additional licenses.
- [12] The applicant furthermore contended in that application that the study commissioned by the Board ("the Study") - and on which it had based its decision to issue the RFP - is flawed in material respects, in that it does not provide a rational basis for determination whether certain areas of the province are over-saturated, neither does it provide meaningful information regarding the social and economic impact of allowing more than 2000 site operator licenses. And in the event, even if the Study were valid, the decision by the board to issue the RFP contradicts the findings and conclusions contained in the Study. Despite the fact that the Study had concluded that three municipalities, namely the Nelson Mandela Bay Metropolitan, Sarah Baartman and Buffalo City Municipalities were oversaturated, the Board nevertheless invited applications for independent site operator licenses in those municipalities.
- [13] The applicant contends that the issuing of those additional licenses will lead to over-stimulation of the demand for gambling in the Eastern Cape, which will constitute a serious social risk.
- [14] The applicant has also raised the following additional review grounds in its supplementary affidavit, namely that:
- (a) the Study was not included in the Rule 53 record, and could accordingly not be used to justify the Board's decision; and
 - (b) the Rule 53 record also failed to provide reasons for calling for applications in respect of areas that were found to be over-saturated.

The procedure adopted by the Board

- [15] On 18 March 2016 the Board published a document titled: “Re: Policy document on Limited Pay-out Machines (ECGBB)”, and invited all interested parties, including the applicant and the third respondent, to comment on the draft revised policy document. The document mentioned, inter alia, that:
- (a) the board had commissioned a study to investigate the desirability of licensing more than 2000 LPMs;
 - (b) the study was finalised during November 2015, and based on its findings and recommendations the study (in order to prevent an oligopoly), suggested a license model resulting an additional 1000 MPLs in the Province;
 - (c) the board has, however, approved the licensing of only 400 additional LPMs. The allocation model would be based on the on the target weight ratio of 70% Gross Domestic Product (“GDP”) distribution and 30% Population Based distribution; and
 - (d) the proposed allocation model indicated that two municipalities, namely the Sarah Baartman and Nelson Mandela Bay Municipalities are over-saturated, the former to the extent of 4.6% and the latter to the extent of 16.2%.
- [16] The applicant submitted representations wherein it questioned the applicability of GDP as a basis for determining whether there is over- or under-saturation of LPMs in a particular area.
- [17] The third respondent also made representation contending, inter alia, that:
- “The projected allocation of LPMs are far in excess of the realistic number of ISO sites which can reasonably be expected to be rolled out within the province.”*
- [18] During June 2017 the Board published for comment a draft RFP which indicated that no allocations had been made for the Nelson Mandela Bay Metropolitan and Sarah Baartman Municipalities “due to over-saturation of LPMs”.
- [19] The final RFP was published on 11 September 2017, inter alia, inviting applications for 10 independent site operators’ licenses in the following municipalities: Alfred Nzo - 2, Sarah Baartman
- 1, OR Tambo - 3, Nelson Mandela – 2; and Buffalo City - 2.
- [20] On 26 September 2017 the Board published a notice amending the allocation of licenses as follows: Alfred Nzo – 2; Chris Hani and Joe Gqabi District Municipalities (jointly) – 1; OR Tambo – 3; Nelson Mandela Metropolitan Municipality – 2; and Buffalo City and Amatola Municipalities (jointly) - 2.

The applicant’s criticisms of the Study

- [21] The applicant contends that despite the fact that the Study had found that three municipalities were over-saturated, the Board nevertheless decided to award two licenses to Nelson Mandela Bay Metropolitan Municipality and two to the Buffalo City and Amatola District Municipalities jointly. This decision contravenes the jurisdictional requirements mentioned in Regulation 59(3), in that roll-out of further licenses should not lead to over-saturation and must be in the best interests of the Province. The decision is accordingly unlawful, irrational and unreasonable.
- [22] The applicant further contends that, in any event, the Study is flawed since a report by its expert shows that the Study does not provide meaning or definition for the concept of over-saturation. Thus no objective measures to assess the rationality of its findings and conclusions have been provided.
- [23] The Study also used the general population figures instead of the limited segment of the population who were found to play LPMs, namely a specific income segment and persons over 18. The Study also improperly relied on average distribution of LPMs relative to population in a particular area, and ignored the fact that a particular area may have a below average distribution, but could still be over-saturated due to limited demand as a result of distribution of income.
- [24] In applying its Population Based Equitable Distribution model, the Study incorrectly compared the number of sites as opposed to the number of machines in a particular area, thus resulting in the incorrect distribution of LPMs in a particular area.
- [25] In addition, no consideration was given to the different types of licenses. The Study also ignores issues such as different income categories and distances between the various LPM sites, is based on incorrect assumptions regarding the number of LPMs, incorrect distribution of those machines across municipalities, and an incorrect understanding of the different LPM sites.

Applicant's contentions regarding irreparable harm, balance of convenience and alternative remedies

- [26] The applicant contends that it and the "public at large" will suffer irreparable harm if the interim relief is not granted since, even if it eventually succeeds with the review application, the reviewing court may nevertheless be encouraged by the respondents to use its residual discretion not to set aside the impugned decision. The respondents would be in a position to argue that rights had already accrued and steps that could not be undone had already been taken pursuant to the issuing of the licenses.
- [27] Furthermore, even if licenses are set aside in the review proceedings, it would not alter the harm the applicants would have suffered in the interim. The harm to the public would also be irreversible since the Board's own study had shown that allowing the additional 400 LPMs into the market would result in over-saturation, with resultant deleterious consequences for the public.

- [28] Since the applicant only seeks an order restraining the Board from issuing licenses, it can in the meantime continue to adjudicate and process applications received pursuant to the impugned RFP. There would therefore be no conceivable prejudice to the Board. The prejudice to the other respondents, if any, will be of limited duration and insignificant.
- [29] The applicant contends furthermore that it has no alternative remedies available. It has written to the Board on 29 November 2017, inviting it to provide an undertaking that it will not proceed with the adjudication and issuing of licences pending the finalization of the review. If the Board had agreed to provide that undertaking, the interim relief would have been rendered unnecessary, and the applicant would have withdrawn its application. In the absence of such an undertaking the applicant was constrained to proceed with the application for interim relief.

The Board's contentions

- [30] The Board asserted that the proposed licensing models were designed to use either the GDP or population figures as a basis. The Population Based model allocated licenses for the operation of LPMs based on one machine per 1000 persons in a local municipality. The theoretical allocation is then compared to the actual one to determine whether there is over- or under-saturation in a particular municipality. Using population data obtained from Statistics SA and populating it into the designed model, the Study concluded that Nelson Mandela Bay and Cacadu District municipalities were over-saturated, while Buffalo City was under-saturated.
- [31] The use of the GDP model indicated that the Nelson Mandela Bay and Cacadu Municipalities were relatively over-saturated with LPMs while Buffalo City was over-saturated by only 1.1%.
- [32] The study concluded that based on the GDP model Nelson Mandela Bay Metropolitan Municipality can still be awarded 60 additional LPMs, while Buffalo City can absorb 198 machines.
- [33] In deciding which model to adopt the Board had regard to the fact that the Study highlighted concentration of ownership in the LPM industry to two groups only, namely the applicant and Gold Rush Gaming. It also took into account that LPMs contribute to about 9.6% of gambling taxes, and that for every 100 LPMs 34 jobs are created. Thus if 6000 licenses were issued, a total number of 13 505 jobs would be created.
- [34] The Study recommended that the board roll out all 6000 licenses across the Province in order to open up the market and avoid an oligopoly. The study accordingly recommended that the Board choose between the equitable Population Distribution Model and the one based on GDP, alternatively a hybrid of the two. It also recommended that 4800 LPMs which is 80% of the allocations, could be awarded according to the GDP model and 1200 (20%) at the board's discretion.

[35] After having considered the findings and recommendations of the Study the Board decided to revise its policy document on LPMs in line with those recommendations. Interested parties were thereafter given an opportunity to comment on the proposed revised policy.

[36] The applicant's representations mainly centred on its own position and were aimed at protecting its interests. Seeking to defend oligopoly as not being necessarily undesirable, it stated that it was "justifiable and necessary for the wellbeing of the sector", and contended that from a commercial point of view an oligopoly is inevitable. It also asserted that the business interests of existing

license holders will be prejudiced by the issuing of new site operator licenses.

[37] The Board then considered all the representations and effected amendments to the draft policy, incorporating some of those representations. The amended draft policy was then again circulated to interested parties for comment.

[38] The further representations received were considered by the Board and the policy again amended. The amended policy was thereafter approved by the Board on 26 May

2017. The draft RFP was thereafter published and the Board invited written comments before the publication of the final RFP. It stated, inter alia, that the draft RFP may change substantially in format and content when it reaches the final RFP stage.

[39] Various representations were thereafter received and a Bidder's Conference was held on 3 August 2017 where the representations were discussed. The Board subsequently again received various representations including an objection to the exclusion of Sarah Baartman Municipality. After considering all the representations the Board approved the final RFP on 29 August 2017 and issued same on 7 September 2017.

[40] The final RFP specifically emphasised, inter alia, the following objectives:

- (a) to provide for participation and ownership of previously disadvantaged persons;
- (b) the promotion of tourism;
- (c) creation of sustainable employment opportunities;
- (d) stimulation of local economies;
- (e) development of skills;
- (f) provision of entertainment facilities to the members of the public;
- (g) to create new entrants to the market; and
- (h) the creation of opportunities for involvement of small and medium enterprises in the gambling industry.

- [41] The reasons for the amendment to the allocations contained in the final RFP were that available sites would be shared by different municipalities and the names of towns in each municipality had to be clarified to avoid misunderstanding.
- [42] The Board accordingly contends that the impugned decision was taken after a comprehensive consultative process aimed at achieving the objectives of the Act. The decision was accordingly procedurally and substantively sound.
- [43] The Board furthermore contends that the applicant's assertion that the reviewing court may be encouraged to exercise its residual discretion not to set aside the impugned decision, are speculative and ignores the fact that once it is found that the impugned decision was unlawful, there is no reason why the court should not set aside everything done pursuant thereto. This would include the issuing of the licenses and any steps taken by the successful respondents pursuant thereto. There is also no reason why the applicant will not be able to quantify and institute civil action to recover any damages it may suffer.
- [44] Regarding the balance of convenience, the Board contends that stopping the issuing of licenses would delay generation of much needed jobs in the Province. An interim interdict would consequently prejudice the Board and the public at large. In addition, the Board would be precluded from exercising its legislative and constitutional mandate. Regarding the issue of alternative relief, the Board contends that the applicant has an alternative remedy in the form of the review application which it has already pursued.

Undue delay

- [45] Mr Jamie SC, who appeared for the Board, submitted that the applicant has delayed unduly in bringing the application and that the proceedings should be dismissed for that reasons alone.
- [46] He submitted that the applicant has known since March 2016 that the Board had approved an additional 400 LPM licenses to site operators. When the Board issued its RFP on September 2017, it indicated that there would be an allocation of LPMs to the Nelson Mandela Bay Metropolitan and Sarah Baartman Municipalities.
- [47] The applicant's attorneys wrote to the Board on 16 October 2017 asking for the RFP to be withdrawn. The Board responded on 24 October 2017 stating that it will not withdraw the RFP. The review application was thereafter launched on 15 November 2017 without any prayer for interim relief.
- [48] The applicant's attorneys had subsequently requested the Board to give an undertaking that the licenses would not be issued, but by 15 December 2017 had known that the Board intended to decide on the applications by 23 February 2018 and would issue the licenses by 23 March 2018. Despite those categorical declarations of the Board's intentions, the applicant delayed in bringing the application and only launched proceedings on 31 January 2018.

- [49] The result of the applicant's undue delay is that it is no longer possible to interdict the granting of the licenses since that horse has since bolted. Furthermore, the issuing of the licenses is an administrative function which is not performed by the Board but by its functionaries. The applicant has not made out a case to interdict those functionaries from performing their administrative functions, or so the argument went.
- [50] I am of the view that it would be unreasonably technical to dismiss the application on this basis alone. On 23 November, Mbenenge JP issued a directive for the matter to be heard by Lowe J on 6 March 2018 regarding the question of urgency only. After hearing argument, Lowe J ordered, inter alia, that the matter must be set down for hearing on the merits as a matter of urgency. A finding that the applicant has delayed unduly in bringing the application for interim relief would, in my view, be incompatible with Lowe J's findings regarding urgency.
- [51] More importantly though, it is trite that a court will only non-suit an applicant who delayed unduly in instituting legal proceedings if the respondent would be prejudiced. The prejudice should typically relate to: the compromised ability of the respondent to properly present its case as a consequence of the passage of time; the unavailability of witnesses and documentary evidence; or the deleterious consequences which would flow from setting aside of the impugned decision.
- [52] In my view none of those circumstances is present in this matter. At best for the Board there has been a delay of just over one month, and it has not made out a case that it has been prejudiced in the presentation of its defence.

Prima Facie right

- [53] A pending review does not in itself establish a prima facie right, but such a right may be established by showing prospects of success in the review application. (South African Informal Traders Forum and Others v City of Johannesburg and Others 2014 (4) SA 371 (CC), at paragraph 25.)
- [54] Mr Paterson SC, who appeared for the applicant, submitted that the applicant has established strong prospects of success in the review application since it has shown that:
- (a) the Study on which the decision was based was patently flawed;
 - (b) the RFP contradicted the Study without any rational basis; and
 - (c) the record filed by the Board demonstrates that its decision was irrational.
- [55] I have already set out the factual bases on which these contentions are predicated and will not repeat them. Suffice it to say that the essence of the applicant's argument in this regard is that, on its own version, the Board has failed to establish the jurisdictional facts mentioned in Regulation 59(3)(b).

- [56] Mr Paterson argued further that the court is not required to interfere with executive policy making since the review will not involve a polycentric assessment of how to issue licenses. He submitted that the issue which will fall for decision is whether or not the Board has complied with the jurisdictional requirements set out in Regulation 59(3).
- [57] Mr Jamie criticised the applicant's assertion that the Board's decision was based only on the Study. He submitted that the Study was merely the first step in a long drawn out consultative process that resulted in the issuing of the final RFP. Not only did the Board invite and consider representations from various interested parties, including the applicant, but it also arranged a Bidder's Conference where it had interacted with stakeholders.
- [58] He argued further that the applicant misconstrued the provisions of Regulation 59(3), since it requires the Board to only issue or allow route operator's licenses or LPM site licenses which will allow more than 2000 LPMs to be operated in the Province if it is satisfied that this will not lead to an over-saturation of LPMs "in the province". The Regulation accordingly does proscribe over-saturation of LPMs in particular sites, but rather in the Province as a whole.
- [59] Mr Jamie further argued that since the applicant seeks an interdict prohibiting the Board from exercising a statutory power it must demonstrate a strong case in the clearest of terms.
- [60] In the ordinary course an applicant for interim relief is required to establish a prima facie case "though open to some doubt". (*Johannesburg Municipal Pension Fund v City of Johannesburg* 2006 SA 273 (WLD) at 280F. When, however, the interim interdict is aimed at restraining the exercise of statutory powers, different and more exacting requirements apply. (*Gool v Minister of Justice* 1995 (2) SA 682C at 688F.)
- [61] This principle was confirmed in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) ("OUTA") and *International Trade Administration Commission v SCAW South Africa and Others (Pty) Ltd* 2012 (4) SA 618 (CC) ("SCAW"), where the Constitutional Court held that courts will not readily grant interdicts to stop an organ of state from exercising a statutory power, except when a strong case has been made out for the relief, and even so, only in the clearest of cases.
- [62] In SCAW the Constitutional Court emphasised the importance of the separation of powers doctrine and held that:
- "The primary responsibility of a court is not to make decision reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the constitution. This would especially be so where the decision in issue is policy laden as well as polycentric."* (at para. 95)

[63] And in OUTA the Constitutional Court cautioned that courts:

“...must also be alive to and carefully consider whether the temporary restraining order would unduly trespass upon the sole terrain of other branches of government even before the final determination of the review grounds. A court must be astute not to stop dead and exercise of executive or legislative power before the exercise has been successfully and finally impugned on review. This approach accords well with the comity the court owe to other branches of government, provided they act lawfully.” (at para. 26)

[64] The Court in OUTA also emphasised the need for courts to consider the:

“probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought.” (at para. 46)

[65] And regarding the issue of the balance of convenience the Court held as follows:

“The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers’ harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimants’ case may be granted only in the clearest of case and after a careful consideration of separation of powers’ harm”. (OUTA at para. 47)

An important consideration in this regard would be whether the apprehended harm would amount to a breach of one or more of the applicant’s fundamental rights.

[66] Mr Paterson has sought to distinguish those cases on the basis that (in his submission) the review of the impugned decision does not require a polycentric assessment of how many licenses should be issued in the respective municipalities, or how the various competing interests should be balanced. He argued that the court hearing the review application will be called upon to consider whether the Board has conducted a proper study in order to satisfy the jurisdictional facts set out in regulation 59(3). He submitted that the court will thus not be required to interfere in the area of executive policy making, but merely to pronounce upon the legality of the impugned decision and to uphold basic principles of the Rule of Law.

[67] I do not agree with this submission. The granting and issuing of gambling licences are some of the Board’s most important statutory obligations. The decisions regarding the number of licences that should be made available and LPMs to be rolled out are by their very nature policy-laden issues which require the Board to balance various socio-economic and commercial considerations, and in the light thereof determine whether the decision would be in the best interests of the Province. The relief sought by the applicant will thus inevitably have the effect of preventing the Board from exercising its statutory powers. This factor does, however, in itself not mean that the state is immunised against judicial review. In OUTA Moseneke DCJ, as he then was, emphasised that “[t]he exercise of all public power is subject to constitutional control. In an appropriate case an interdict may be

granted against it...” Such cases must, however, be considered on the basis of the exacting requirements enunciated in OUTA and SCAW.

[68] Regarding the additional review grounds, I am of the view that the fact that the Study may not have been included in the Rule 53 record is inconsequential at this stage of the proceedings. It would of perhaps have been different if the Board relied solely on the findings and recommendations contained in the Study. It is, however, manifest that this was not the case. The Board has embarked on an extensive process of consultation after the results of the Study had been published and comments thereon invited. Not only has the Board received and considered such further representations from various role-players, but before issuing the RFP

it also organised a Bidder’s Conference where further representations were entertained before the impugned final RFP was

issued.

[69] The Board has provided extensive reasons for its decision, relating, inter alia, to the impact of further licenses on job creation, empowerment of previously disadvantaged individuals and entities, creation of opportunities for small and medium enterprises, and other socio-economic considerations. The Board’s decision was consequently taken after an extensive multi-stage consultative process during which it had regard to representations from various stakeholders and was based on relevant and rational considerations.

[70] I am accordingly not satisfied that the applicant has established a prima facie right, either on the lesser test of a prima facie right “though open to some doubt”, or on the more exacting standards enunciated in SCAW and OUTA.

[71] Having found that the applicant has failed to establish a prima facie right, it is of course not necessary for me to consider the other requirements for interim relief. Suffice it to say, however, that I am in any event not convinced that the applicant has established that it will suffer irreparable harm if the interim interdict is not granted. The applicant’s main contention in this regard is that, if the interdict is not granted and it is ultimately successful in the review application, “the applicant may nonetheless be denied effective relief at that stage because the court hearing the review application may be encouraged by the respondents to exercise its residual discretion not to set aside the decision.

[72] I am of the view that this speculative contention cannot qualify as a reasonable apprehension of irreparable harm.

[73] I am also of the view that the applicant has failed to establish that the balance of convenience is in its favour. After the review application had been launched the Board has awarded licences to some of the respondents. If the Board were stopped from issuing those licenses, it will result in considerable prejudice to the successful licensees.

[74] In the event, any conceivable harm that the applicant may suffer (including reduction of its profits) will be of a limited nature and of short duration. I have, at the hearing of the matter, indicated that I intend to direct the Registrar to submit the review application to the Judge President for case flow management and further directives regarding the set down and hearing of the matter. The purpose of this directive is to facilitate an expedited hearing of the matter and, if necessary, to designate a particular judge to deal with the matter instead of it being set down on a saturated opposed motion court roll.

[75] In the premises I am of the view that the applicant did not make out a case for the urgent interim relief, and the following order accordingly issues:

- (a) The application is dismissed.
- (b) The applicant is ordered to pay the costs of those respondents who opposed the matter, including the costs of two counsel where so employed.
- (c) The Registrar is directed to submit the review application to the Judge President for case flow management, with a view of facilitating an expedited hearing.

JE SMITH

JUDGE OF THE HIGH COURT

Appearances:

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Assisted by

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12th Respondents

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Attorneys for the 5th, 9th, 10th : Strauss Dally Inc.

and 12th Respondents

C/O Cloete and Company

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Matter heard on

: 27 March 2018

Judgment

delivered on : 19 April 2018

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Prepared on 12 October 2026 · Esheria