



## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

### MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**From:** The Registrar, Supreme Court of Appeal

**Date:** 6 October 2021

**Status:** Immediate

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

*Vukani Gaming Free State (Pty) Ltd v Pillay & Others (577/2020) [2021] ZASCA 137  
(6 October 2021)*

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Today the Supreme Court of Appeal (SCA) handed down judgment upholding, with costs including the costs of two counsel, an appeal against the decision of the Free State Division of the High Court, Bloemfontein (the high court)

The appeal concerned a review application brought by the appellant, Vukani Gaming Free State (Pty) Ltd (Vukani) concerning the validity of the decision taken by the third respondent, the Free State Gambling, Liquor and Tourism Authority (Authority) to grant the route operator licence to the fourth respondent, Restivox (Pty) Ltd (Restivox) in terms of s 72 of the Free State Gambling, Liquor and Tourism Act 6 of 2010 (the Act).

In February 2011, the predecessor to the Authority, the Free State Gambling and Racing Board, issued a Request for Proposals, inviting applications for a second operator licence in the Free State Province. Restivox submitted an application in response to the Authority's invitation. At the public hearings held on 7 February 2013, Vukani queried, among others, the inclusion of two black women, Anna Makhetha (Makhetha) and Thato Lion (Lion) who were Free State residents, in the Restivox's shareholding structure, as they were allegedly public servants. Vukani also questioned

the shareholding of another Free State resident, Sophia Swartz (Swartz) who was included as an indirect shareholder of Restivox through Atretone (Pty) Ltd, when she was not. Restivox's response was that the two women had taken up employment as public servants after it had submitted its application and that it had wrongly believed that Swartz had accepted an offer of shares from one Quentin Eister. It subsequently corrected this error. The Board of the Authority (Board) rejected Restivox's application.

This was followed by a series of review applications by Restivox, and Vukani at different times, following reconsidered decisions of the Board. In the process, the Board referred the issues raised by the parties for forensic investigation by appointing Gobodo Forensic and Investigative Accounting (Pty) Ltd (Gobodo) to conduct such investigation. On 31 May 2017 it awarded the route operator licence to Restivox.

Aggrieved by that decision, on 20 November 2017, Vukani lodged the review application, which was the subject of the appeal. The Authority failed to file a complete Rule 53 record as required. No transcripts of the proceedings of the meeting of 31 May 2017 was provided as part of this record. The chairperson of the Board, Mr D Pillay (Pillay) and the Chief Executive Officer (CEO), Mr K A Dichabe (Dichabe), who were first and second respondents respectively indicated on affidavit that the meeting of 31 May 2021 was not recorded and therefore a transcript of the meeting was not available. Mr Pillay, in his opposing affidavit, however, indicated that shorthand notes had been taken. He also indicated that the Authority had received a report from Gobodo on 16 May 2017 and this was the report that served before the Authority at its 31 May meeting, during which a presentation was given by Alberto Torres (Torres) of Gobodo. This appeared to be borne out by the notes, which state that the Gobodo report presented to the Board was erroneously dated 10 May 2017, instead of 15 May 2017. Vukani questioned the authenticity of the alleged handwritten notes.

Pillay's version as to the Gobodo reports that served before the Board differed from Torres' who mentioned in his confirmatory affidavit that the Board and/or management of the Authority had been presented with four reports, namely, a draft investigation dated 13 January 2013, a supplementary report dated 17 May 2017, a supplementary report dated 31 May 2017, which was presented to the Board at the meeting of 31 May 2017 and a final report dated 7 June 2017. The glaring omission from his affidavit was any reference to a report dated 10 May 2017.

Vukani's argument on appeal was that the similarities between the reports of 10 May 2017 and 7 June 2017 coupled with the fact that the report of 31 May 2017 was incomplete led to an inescapable conclusion that the Authority backdated the report of 7 June 2017, which was the final supplementary report. This was done in order to indicate that the Board had the final Gobodo report well before 31 May 2017, when it awarded the licence to Restivox. The Authority and Restivox *contended, inter alia*, that the Gobodo reports made no difference as the issues before the Board (relating to Vukani's objections) had been resolved by the Restivox and the Board and they raised nothing new.

The SCA found that on close analysis, of the reports of 31 May and 7 June 2017, the latter was a cleaning up of the former. It could not be possible that the report dated 10 May 2017 (which was identical to the report of 7 June 2017) could contain the exact updated information as the report of 7 June. It also made no sense that it was necessary to obtain reports dated 17 and 31 May (which were incomplete) if the report dated 10 May 2017 was a final report. The Authority failed to provide answers to these questions. The SCA held that the high court erred by not scrutinising the version offered by the Authority. It further found the reasons given by the Authority for the decision to award Restivox the licence, to be wholly inadequate. In the result, the SCA substituted the high court's decision with an order reviewing and setting aside the Board's decision and remitting the matter to the Authority for reconsideration.