THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 577/2020

In the matter between:

VUKANI GAMING FREE STATE (PTY) LTD **APPELLANT**

and

MR D PILLAY, THE CHAIRPERSON, FREE STATE GAMBLING, LIQUOR AND TOURISM AUTHORITY **FIRST RESPONDENT**

MR KA DICHABE, THE CHIEF EXECUTIVE OFFICER, FREE STATE GAMBLING, LIQUOR AND TOURISM AUTHORITY **SECOND RESPONDENT**

FREE STATE GAMBLING, LIQUOR AND TOURISM AUTHORITY **THIRD RESPONDENT**

RESTIVOX (PTY) LTD **FOURTH RESPONDENT**

THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF ECONOMIC, SMALL BUSINESS DEVELOPMENT, TOURISM & ENVIRONMENTAL AFFAIRS, FREE STATE PROVINCE **FIFTH RESPONDENT**

THE ENTITIES LISTED IN ANNEXURE "A" TO THE NOTICE OF MOTION **SIXTH RESPONDENT**

Neutral citation: *Vukani Gaming Free State (Pty) Ltd v Pillay & Others* (Case no 577/20) [2021] ZASCA 137 (6 October 2021)

Coram: WALLIS, SALDULKER, MBATHA and MABINDLA-BOQWANA JJA and UNTERHALTER AJA

Heard: 30 August 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 9h45 on 6 October 2021.

Summary: Administrative law – Review of administrative decision taken by the Free State Gambling, Liquor & Tourism Authority to grant a limited gambling machine route operator licence – investigation report backdated – reasons for decision inadequate – appeal upheld.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Jordaan and Naidoo JJ, sitting as a court of first instance):

1 The appeal is upheld with costs including the costs of two counsel.

2 Paragraphs 5 and 6 of the order of the Free State Division of the High Court, Bloemfontein are set aside and replaced with the following order:

'5. The review application succeeds with costs.

6. The matter is remitted to the third respondent for reconsideration and the decision is to be made within 90 calendar days of the date of this order.

7. The operation of this order is suspended pending the decision of the third respondent in terms of paragraph 6 above.'

JUDGMENT

Mabindla-Boqwana JA (Wallis, Saldulker and Mbatha JJA and Unterhalter AJA concurring):

Introduction

[1] The appellant, Vukani Gaming Free State (Pty) Ltd (Vukani), is part of a national group of businesses involved in the gaming industry in the Free State province and is a holder of a route operator licence issued for that purpose. The fourth respondent, Restivox (Pty) Ltd (Restivox), is part of a similar group. The two are in competition. On 31 May 2017, the third respondent, the Free State Gambling, Liquor & Tourism Authority (the Authority), granted a similar licence to Restivox in terms of s 72 of the Free State Gambling, Liquor and Tourism Act 6 of 2010 (the Act). This appeal follows the dismissal by the Free State Division

of the High Court, Bloemfontein (high court) of Vukani's review of that decision. It serves before us with the leave of this Court.

[2] By way of explanation, a route operator licence is a licence granted in terms of s 64(1)[1] of the Act to operate limited pay-out gambling machines (LGMs). These LGMs are installed in places like restaurants and pubs. They are similar to slot machines in casinos (but with pay-outs that are for limited amounts). Site operators are issued with site operator licences in order to operate lawfully.

Factual background

[3] The matter before us has a long-drawn-out history dating back to February 2011 when 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. Until then Vukani had been the only holder of a route operator licence in the province.

[4] On 6 May 2011 Restivox submitted an application to the Authority in response to the invitation. Public hearings in respect of this application were held on 7 February 2013. At the public hearings Vukani queried the shareholding structure of Restivox. In particular, it raised a concern about the inclusion of two black women who were Free State residents, Anna Makhetha (Makhetha) and Thato Lion (Lion) as direct shareholders of Restivox, as they were public servants. Sophia Swartz (Swartz), another Free State resident, who was in attendance at the public hearings, also questioned her inclusion as an indirect shareholder of Restivox through Atretone (Pty) Ltd (Atretone), when she was not.

[1] Section 64(1) of the Free State Gambling, Liquor and Tourism Act (the Act) provides that '[t]he Authority may, subject to the provisions of this Act, grant the following licences in respect of gambling, namely –
(a). . .
(*b*) limited gambling machine operator licences;
(*c*) limited gambling machine site licences.'

[5] Restivox's response to these complaints was that Makhetha and Lion were not civil servants at the time its application was submitted. They took up employment after the submission of Restivox's licence application. As regards the position of Swartz, the explanation was that one Quentin Eister, who held shares in Atretone, had offered shares to Swartz. Restivox wrongly believed that Swartz had accepted the shares when she had not. According to Restivox, that issue was subsequently corrected.

[6] Restivox raised a further issue that Kennedy Khoza (Khoza)'s shareholding was shown as having increased from 3 percent to 4 percent, which was not the case. According to Vukani, Khoza, who had initially denied any knowledge of this increase to Vukani's attorney, later 'changed his tune in support of Restivox's position'. On the whole, Vukani's complaint was that Restivox's application was deficient and contained misrepresentations. Its objection regarding these shareholding issues was that Restivox was engaged in the practice of 'fronting' in order to burnish its image with the Authority as a transformed business.

[7] On 19 December 2013, the Board of the Authority (the Board) refused Restivox's application. Restivox took the Board's refusal on review before the high court. At the hearing of the review application, on 2 February 2015, the parties settled the matter on the basis that the Board would reconsider Restivox's application. That agreement was made an order of court. The matter went back to the Board. On 11 June 2015 it reconsidered the application, effectively accepting Restivox's explanation as regards the shareholding complaints made by Vukani, and granted the route operator licence to Restivox.

[8] Aggrieved by this decision, Vukani, launched its own application in October 2015, to review and set aside the Board's decision. In that application it

contended that when granting the licence application to Restivox, the Board was unaware that five directors had resigned from Restivox, leaving only two directors, Sundri Padayachee (Padayachee) and her son Mergan Naidoo (Naidoo), who were both Gauteng based. The court reviewed and set aside the Board's decision on 8 December 2016 (per Molitsoane AJ and Hancke J concurring). It found, inter alia, that the Board 'acted unlawfully and irrationally when it allowed crucial amendments to the Restivox application and failed to subject the process to a further public participation'. It referred the matter back for reconsideration and ordered that an appropriate public hearing process be followed as prescribed. An application for leave to appeal the court's decision was dismissed by the high court on 3 March 2017.

[9] As a consequence of that judgment, Restivox sent a letter dated 4 March 2017 to the Board, addressing the issues raised by Vukani in its review application and, in particular those relating to changes in directorships. Vukani again objected to Restivox's amended licence application on the basis that deliberate false misrepresentations were, inter alia, made by Restivox in the original application regarding shareholding and directorships and that Padayachee and Naidoo were as a result not fit and proper persons as required by the provisions of the Act. Vukani also complained that Restivox was not entitled to amend its application without the approval of the Board. The Board responded to Vukani's objection in a letter dated 13 April 2017 and held public hearings on 20 April 2017.

[10] The Board decided to refer the issues raised by both parties for forensic investigation conducted by Gobodo Forensic and Investigative Accounting (Pty) Ltd (Gobodo). Gobodo provided the Board and/or management of the Authority with a number of reports, which were the subject of the dispute before us. In January 2013, it had undertaken a similar investigation covering some of the same

issues and it revived this in May 2017, shortly before the Board made the impugned decision to grant the licence to Restivox on 31 May 2017. There is a dispute as to how many reports served before the Board and which of the reports was taken into account when the Board made its decision on 31 May 2017, as there were various versions of updated supplementary reports.

[11] Vukani alleges that it discovered that the Board had awarded the licence to Restivox when applications for site operator licences were advertised by Restivox on 4 July 2017. As can be seen from the papers, Restivox entered into agreements with various entities some of which are cited as respondents, as site operators or applicants for site operator licences.

[12] Having discovered the Board's decision, Vukani requested access to information in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA) on 5 July 2017. The Authority failed to provide the necessary information, so Vukani launched an application in the high court for an order directing the Authority to furnish it with a response to its PAIA request. This matter was settled by way of an agreed court order.

[13] On 20 November 2017, Vukani lodged its review application before the high court. The Authority failed to file a complete Rule 53 record as required. No transcript of the proceedings at the meeting of 31 May 2017 was provided as part of this record. At Vukani's request, the Authority furnished two affidavits signed by the first respondent, (Pillay) and the second respondent (Dichabe), stating that the meeting of 31 May 2017 was not recorded and therefore a transcript of that meeting was not available. This turned out not to be entirely accurate. In his opposing affidavit, Pillay said that while the meeting had not been recorded shorthand notes had been taken. He attached a document purporting to be a typed version of the notes. A copy of the handwritten notes was only made available

pursuant to an interlocutory application brought by Vukani in terms of Rule 35(12). These notes were not in shorthand, but written in a somewhat illegible handwriting with no signature or name of the author.

[14] These notes assumed significance in the light of Pillay's explanation of what was before the Authority at its meeting on 31 May 2017, when the decision to award the licence to Restivox was taken. He said that the Authority had received a report from Gobodo on 16 May and this was the report before the Authority at the 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 recorded that Torres made a presentation at the outset in which he said that the report in question was supposed to be dated 15 May, but due to an error in their offices it was dated 10 May. A report bearing that date formed part of the record.

[15] This version of events began to unravel when Torres filed a confirmatory affidavit. In it, he said that Gobodo had provided the Authority with the following reports:

'A draft investigation report dated 30 January 2013;

A supplementary report for discussion purposes dated 17 May 2017;

A supplementary report dated 31 May 2017, which was presented to the FSGLA Board meeting held on 31 May 2017; and

A final supplementary report dated 7 June 2017, which was issued to the management of the Authority.'

The glaring omission from this affidavit was any reference to a report dated 10 May 2017.

[16] After Torres filed his affidavit, Pillay deposed to a further affidavit saying that he had not been aware of the further report of 7 June 2017. Pursuant to Torres' averment, he enquired about the report and was advised by Torres that it

had been requested by the management of the Authority for audit purposes. This report, according to him, was never tabled at any Board meeting. In any event, on the date of the said report, so he alleged, the Board had already made a decision to award the licence to Restivox and the report could have in no way been considered for purposes of awarding the licence.

[17] When the Rule 53 record was delivered, Vukani complained that the Gobodo reports dated 17 May 2017, 31 May 2017 and 7 June 2017, as well as the draft investigation report dated 30 January 2013, had not been included as part of the record. This prompted Vukani to seek disclosure of these three versions of the report along with a copy of the short-hand notes, under Rule 35(12). The Authority initially refused to disclose the Gobodo reports, forcing Vukani to bring an interlocutory application to compel which was settled by way of an agreed order on 16 May 2019.

[18] Vukani questioned the authenticity of the handwritten notes, in particular, that they were neither signed nor certified. It also pointed to the strangeness of these notes surfacing in the Authority's answering affidavit, whereas Pillay and Dichabe had earlier indicated on oath that no recording of the Board discussions of the meeting of 31 May 2017 existed. Vukani also pointed out various anomalies concerning the Gobodo reports, including the differences between Pillay's and Torres' versions as to which report served before the Board on 31 May 2017. According to Vukani, it was not likely that the Board would have had a complete report before it, as the report dated 31 May 2017 (as per Torres' affidavit) appeared incomplete and was described by him as a supplementary report.

[19] The review application served before Jordaan and Naidoo JJ in the high court. On 5 December 2019, the high court dismissed the application with costs

including those occasioned by the employment of two counsel, where so employed. The court also granted, in Vukani's favour, costs of the PAIA application that had stood over. The findings of the high court in regard to the review application were, inter alia, the following:

'… From the notes of the proceedings of the board on 31 May 2017 it appears that the report then considered was the report dated 10 May.

…In the notes it is recorded that Mr Torres who presented and explained the report indicated that the report was mistakenly dated 10 May. To include such an insignificant remark in the recordal of the meeting as a fabricated afterthought is highly improbable. The inclusion of that gives credence to the notes and negates the suspicion of it being tailored to suit the Board. Whether the notes are compatible to a rendition of shorthand notes is unknown and speculative.

…The fact that the notes are not certified and signed may be contrary to statutory prescripts but that fact does not necessarily preclude the court from having regard to it. According to its contents, it refers to various issues that were investigated and the results of the investigations, most of which were directed at the complaints raised by Vukani. The content of the notes gives some reassurance as to its reliability and credibility. It therefore has to be accepted that it was the report dated 10 May 2017 that was discussed and dealt with at the meeting of 31 May 2017. Since that report is identical to the report of 7 June 2017, there can be no mention of relevant considerations flowing from the 7 June report not having been taken into account. What is more, the slight differences in the reports as pointed out by Vukani are not material at all. All the reports come to the same conclusion in respect of all the aspects investigated.'

It is the appeal from this decision of the high court which is before us.

Issues on appeal

[20] The main grounds for review raised by Vukani were that: (a) the Authority was biased in favour of Restivox, was reasonably suspected of bias or acted in bad faith; (b) the Authority failed to take into account relevant factors and to apply its mind properly to the matter, including by taking its decision on the basis of a draft (an incomplete) report which was furnished to it by Gobodo for the first time at the Board meeting of 31 May 2017, which could have in no way been considered before the impugned decision was made; (c) by failing to consider that

Restivox had deliberately made false statements by including two local black women as shareholders in Restivox, when they had never been such. Also, Restivox gave disingenuous or inaccurate explanations for these falsehoods; (d) the impugned decision should be taken to have been made without good cause, as the Authority failed to provide adequate reasons, or any reasons at all, until called upon by Restivox to do so for purposes of their answering affidavit. The decision was accordingly unreasonable.

[21] Vukani's central argument on appeal was that the similarities in the reports dated 10 May 2017 and the one dated 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, to 10 May 2017. It produced this altered version in an attempt to indicate that the Authority had sight of the final Gobodo report well before the meeting of 31 May 2017, at which the decision was made to award the licence to Restivox.

[22] Both the Authority and Restivox contended that the backdating of the report was a new issue, not raised by Vukani on the papers. Accordingly, they argued that they could not properly respond to these issues in their answering affidavits. It was however acknowledged by the Authority's attorney, who appeared before us, that the issue was raised in argument in the high court, but rejected on the basis that it was not on the papers.

[23] The Authority and Restivox argued further that the existence of the Gobodo reports made no difference as the issues in dispute that turned on the shareholding and directorships in Restivox, had been resolved. In any event, they submitted, all the reports were the same in relation to the issues in dispute. The report of 7 June 2017 raised nothing new that the Board would not have known when they made their decision on 31 May 2017. It was further contended on

behalf of Restivox that all the issues that Vukani raised were simply a rehash of what had properly been answered by Restivox.

Discussion

[24] The immediate issue to be addressed concerns the Gobodo reports. According to Torres, there were altogether four reports prepared by Gobodo, namely those of 30 January 2013, 17 May 2017, 31 May 2017 and 7 June 2017. Although Pillay said that the report on which the Authority based its decision was the report dated 10 May 2017, though not mentioned by Torres, no supplementary affidavit from him was provided to deal with the additional report that he did not mention. This was very peculiar.

[25] The purpose of the 2013 investigation was to establish whether Restivox 'included any disqualified entities or persons or other factors relating to the probity of its owners, directors and managers, in terms of the …national and provincial legislation.' All the 2017 reports were supplementary to the 2013 report. If the report that served before the Board was that dated 10 May 2017, what was the purpose of the reports dated 17 and 31 May 2017 respectively? Especially strange was that the report of 17 May was far shorter than the ostensibly earlier report of 10 May. Why an existing complete report should have been abbreviated in this way was never explained.

[26] Torres' affidavit said nothing about the report dated 10 May 2017. If this was an error, only Torres could rectify it, not Pillay. To compound the problem, not only did Pillay fail to mention the other reports, particularly those generated after 10 May 2017, he contradicted Torres as to which report was considered by the Board on 31 May 2017. According to Torres, the report dated 31 May 2017 was presented by Gobodo at that meeting. Pillay alleged that Gobodo provided

the Authority with a final report on 16 May 2017. According to Torres, the final report was submitted on 7 June 2017.

[27] It was contended on behalf of the Authority that the report dated 17 May 2017 was the executive summary of the report dated 10 May 2017. This is not the case. The 17 May report contains 48 pages of detailed content some of which is repeated in other reports including the report dated 10 May 2017. In fact, the report of 10 May 2017 has its own executive summary. It is also remarkable that both the reports of 17 and 31 May 2017 are water marked as draft reports.

[28] A close analysis of the reports of 31 May 2017 and 7 June 2017 shows that the latter was a cleaning up of the former. Examples of this can be found in the indexes of the reports. The report of 7 June includes new sub-headings, such as paragraph 12 at page 64. There is substantial improvement of language and correction of errors in the later 7 June report. Substantive changes can be noted in various places such as paragraphs 14.1.2 at page 67 of the report and 16.4.3. In paragraph 14.1.2 of the 31 May 2017 report, a statement is made that a request had been made for the provision of undisclosed or contingent liabilities. The same paragraph in the 7 June 2017 report reflects that a letter had been received from Restivox's auditors confirming that there were no undisclosed or contingent liabilities.

[29] Furthermore, in paragraph 16.4.3 of the 31 May report a request was to be made to Restivox to provide an updated sensitivity analysis. The same paragraph in the 7 June report indicates that the updated financials, had been received and a comment was made about them appearing to be reasonable. Another example is paragraph 23.3 of the 31 May report, which has nine sub-paragraphs while the 7 June report has twelve. Paragraph 23.4.3, stating '[i]n our view, Restivox's responses are reasonable and satisfactory' is not contained in the earlier report of

31 May 2017. Paragraph 25 of the 31 May report is differently worded from the 7 June report.

[30] There are other significant peculiarities noted from the 10 May report. Paragraphs 1.9.7 and 15.1.6 of the 10 May report, which are identical to the 7 June report, make reference to a letter dated 15 May 2017 that was provided by Restivox. The date on this letter is post 10 May 2017. This letter is also mentioned in the same paragraphs of the 31 May report, although the paragraphs are differently worded. It makes no sense that a letter dated 15 May 2017 would be mentioned in a report of 10 May 2017. It is however logical that the letter would have been provided prior to the 31 May and 7 June reports.

[31] It is inexplicable how a report dated 10 May 2017, allegedly produced before the reports of 17 and 31 May, could contain all the modifications from the 31 May report that appear in the 7 June report. The materiality of those changes is not the issue. The mere presence of the modifications made between 31 May and 7 June in a report seemingly produced on 10 May is what is concerning. It appears that the Authority was sent an electronic copy of the 7 June report which would make it possible to change the date from 7 June to 10 May. It was not explained why a specific report was required for audit purposes, as averred by Pillay, when the report of 31 May was available.

[32] The Authority could not provide answers to these problems in argument. The contention that the backdating of the report was not on the papers was not helpful. Restivox would not be in the position to provide any answers to these questions as they lay at the Authority's door. The question of which version served before the Board at the meeting of 31 May 2021 was always queried by Vukani. The letter dated 11 March 2019 from Vukani's attorneys to the Authority's attorneys confirmed as much. Vukani's argument, therefore, that the

report of 10 May 2017 was a backdated version of the report of 7 June 2017 remained uncontroverted. There is no possibility of error on the papers. The Authority's attorney was unable to get around this. It is not clear why the Authority would go to the lengths of tampering with the date on Gobodo's report, if not to make it appear that the Board considered a final report when making a decision on 31 May 2017.

[33] Pillay alleged that the report considered on 31 May 2017 was submitted to the Authority by Gobodo on 16 May 2017 (oddly a day before the 17 May 2017 supplementary report which he was silent on). This rather peculiar date was not connected to any event, although it was prior to the meeting of 24 May, where the minutes record that the authority had not had time to consider the report, and therefore postponed the proceedings to 31 May. The handwritten notes, the origin and scribe of which were not identified, which attributed to Torres that 'he…indicated that the report submitted to the Authority was supposed to be dated 15th of May 2017 but due to error from their office it was dated 10th May 2017' were inconsistent with Torres' affidavit. Contrary to Pillay's assertion, Torres did not confirm the correctness of his affidavit. Instead he gave an irreconcilable version. There was no basis for the high court to reject Torres' affidavit as he was the director responsible for the investigation of the Restivox application and presented the Gobodo report at the Board meeting of 31 May. The high court erred by not scrutinising the version given by the Authority and holding that Torres must have made a mistake in his affidavit. It consequently erred by finding that the resemblance of the reports of 10 May and 7 June was a factor in favour of the Authority. To the contrary, the issue of the similarity between the reports was against it for the reasons mentioned above.

[34] The problems in this case were exacerbated by the fact that there was no proper explanation as to what was considered by the Board before making the

decision to award the licence to Restivox. Pillay's affidavit, read with the handwritten notes and the minutes, went no further than alleging that the Board deliberated on the application, amendments to the application, objection lodged, public hearing, Gobodo report and all relevant documents.' This was not helpful. The Authority was requested by Vukani to provide reasons under s 5(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) on 5 July 2017. This failure also prompted Restivox to ask for reasons in a letter dated 14 August 2018, complaining about the prejudice that it would suffer due to lack of reasons. Reasons were provided over a year after the request was made by Vukani and they were wholly inadequate.

[35] As pointed out by Hoexter[2] '. . . reasons are not really reasons unless they are properly informative. They must explain *why* action was taken or not taken; otherwise they are better described as findings or other information'. The rationale for giving reasons is to enable an aggrieved party to understand the reasoning behind the decision and decide whether or not to challenge it. Reasons should constitute more than mere conclusions. They should refer to the relevant facts, the applicable law and the processes leading to the conclusions.[3] Recently in *Maxrae Estates (Pty) Ltd v Minister of Agriculture, Forestry and Fisheries & Another*,[4] this Court held that the mere mention that a 'discretion has been exercised for the given purpose was not sufficient. The court was constrained to intervene where the decision maker had ignored the relevant factors and taken into account irrelevant considerations'. What factors the Board took into account in this instance, it is not clear.

[2]C Hoexter *Administrative Law in South Africa* (2012) at 461.
[3]*Gavric v Refugee Status Determination Officer* [2018] ZACC 38; 2019 (1) BCLR 1 (CC); 2019 (1) SA 21 (CC) para 69. See also *Minister of Environmental Affairs and Tourism and Another v Phambili Fisheries (Pty) Ltd* [2003] 2 All SA 616 (SCA); 2003 (6) SA 407 (SCA) para 40.
[4]*Maxrae Estates (Pty) Ltd v The Minister of Agriculture, Forestry and Fisheries & Another* [2021] ZASCA 73 para 17.

[36] The importance of reasons was highlighted in *Koyabe v Minister of Home Affairs* as follows:

'63. Although the reasons must be sufficient, they need not be specified in minute detail, nor is it necessary to show how every relevant fact weighed in the ultimate finding. What constitutes adequate reasons will therefore vary, depending on the circumstances of the particular case. Ordinarily, reasons will be adequate if a complainant can make out a reasonably substantial case for a ministerial review or an appeal.

64. In *Maimela*, the factors to be taken into account to determine the adequacy of reasons were succinctly and helpfully summarised as guidelines, which include –

"[t]he factual context of the administrative action, the nature and complexity of the action, the nature of the proceedings leading up to the action and the nature of the functionary taking the action. Depending on the circumstances, the reasons need not always be 'full written reasons'; the 'briefest *pro forma* reasons may suffice'. Whether brief or lengthy, reasons must, if they are read in their factual context, be intelligible and informative. They must be informative in the sense that they convey why the decision-maker thinks (or collectively think) that the administrative action is justified".

The purpose for which reasons are intended, the stage at which these reasons are given, and what further remedies are available to contest the administrative decision are also important factors. The list, which is not a closed one, will hinge on the facts and circumstances of each case and the test for the adequacy of reasons must be an objective one.'[5]

[37] The reasons provided by the Authority were a far cry from what could be considered reasonable. Much can be said about the fact that Restivox provided answers to Vukani's objections, as appears in various reports. This was however not the issue. The issue was how the Board arrived at its conclusion to award the licence to Restivox. The Authority did not tell us. It simply listed documents or information that the Board had at its disposal.

[5] *Koyabe v Minister of Home Affairs* [2009] ZACC 23; 2009 (12) BCLR 1192 (CC); 2010 (4) SA 327 (CC) para 63-64.

[38] Whether or not the Gobodo reports made a difference to the substantive issues was also not the issue. The Board called for an independent investigation of the Restivox application and therefore was bound to take into account the Gobodo reports as part of the decision-making process. The questions raised on the suspected tampering with the reports cannot be ignored. They raised doubts about the validity of the process. As demonstrated above, it was difficult to accept that the report of 10 May 2017 was genuine.

[39] In conclusion on this issue, given the unexplained incongruences, the inadequacy of reasons and the late production of records, some of which do not correspond with the facts, the decision taken by the Board cannot be sustained. This is worsened by the fact that the Board appeared not to have had a complete report when it made its decision. Added to that, the report of 31 May which was presented by Gobodo at the meeting, on close scrutiny, appears to have had outstanding matters which were only resolved later, if regard is to be had to the 7 June report. For those reasons, Vukani's impugning of the Board's decision is supported by the presumption in s 5(3)[6] of PAJA. It should accordingly not stand.

[40] As to remedy, Vukani sought substitution of the decision of the Board in the notice of motion and in its heads of argument. Counsel for Vukani did not press for this in argument, correctly so, as it would not have been an appropriate remedy in the circumstances. He, however, contended that if the Court were to order remittal of the matter, Pillay and Dichabe should not be present in the deliberation process as they were the individuals behind the uncooperative and obstructive conduct of the Authority.

[6] Section 5(3) of PAJA provides: 'If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.'

[41] Insofar as Pillay's position is concerned, the position is clearer. He gave dubious explanations as to how the decision was made on 31 May 2017. While Pillay is the chairman of the Board, we were told that there would be no difficulty with someone else chairing the meeting in his absence. As for Dichabe, the Chief Executive Officer, it is not clear how he can be excluded from the meeting. In any event, the person appearing to be prominent in the disputed conduct of the Authority in the review process is Pillay.

[42] Finally, counsel for Restivox requested that, the status quo in relation to the position of site operators be maintained if the matter were to be remitted to the Board for reconsideration. He contended that the reviewing and setting aside of the high court order would affect site operators, many of whom are small businesses who rely on the income they derive from the LGMs installed at their sites. He submitted that the Court is entitled to make a just and equitable order in terms of s 172(1)*(b)* of the Constitution by preserving the status quo in the interest of the economy while a decision is being made by the Board. Further, the Board should be given a short period in which to consider the remitted issues.

[43] I do not foresee any difficulty with this request. The facts of this case are peculiar. Given the time this litigation has taken, considered against the hardship that may result in the immediate application of the order to many people, it seems just and equitable to give a suspended order. It also appears just and equitable to give the Board a limited period in which to make the decision, so as to overcome any prejudice that may be suffered by any of the parties. The issues that should be determined are also narrow, they relate to the objections raised by Vukani.

[44] As to costs, counsel for Vukani requested that the costs order that was granted by the high court in its favour, in respect of the PAIA application, be set aside and substituted for an order awarding it costs on a scale as between attorney

and client. He further submitted that costs on the punitive scale are also warranted in respect of the review application and that Pillay and Dichabe be ordered to pay part of the costs awarded against the Authority personally.

[45] It is established that costs are largely treated as a matter for the court's discretion. No sufficient basis has been laid in this case to alter the costs awarded by the high court in respect of the PAIA application. Similarly costs on a scale as between attorney and client as well as personal costs orders against Pillay and Dichabe are not warranted in this case. It bears mention that there is a growing trend of parties seeking costs against state officials in their personal capacities. This kind of relief is not for the mere asking, it is an order that would be defensible only in exceptional circumstances. I am not convinced that this is such a case.

[46] In the result, the following order is made:

1 The appeal is upheld with costs including the costs of two counsel.

2 Paragraphs 5 and 6 of the order of the Free State Division of the High Court, Bloemfontein are set aside and replaced with the following order:

'5. The review application succeeds with costs.

6. The matter is remitted to the third respondent for reconsideration and the decision is to be made within 90 calendar days of the date of this order.

7. The operation of this order is suspended pending the decision of the third respondent in terms of paragraph 6 above'.

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N P MABINDLA-BOQWANA

JUDGE OF APPEAL

APPEARANCES

For the appellant:	P B J Farlam SC (with him C D Pienaar)
Instructed by:	Lovius Block, Bloemfontein
For the first to third respondents:	N W Phalatsi & Partners, Bloemfontein
For the fourth respondent:	B Roux SC (with him M Smit)
Instructed by:	Cliffe Dekker Hofmeyr Attorneys, Sandton Noordmans Inc, Bloemfontein