



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case No: 660/2022

In the matter between:

**CHAIRPERSON OF THE WESTERN
CAPE GAMBLING AND RACING BOARD**

FIRST APPELLANT

**WESTERN CAPE
GAMBLING AND RACING BOARD**

SECOND APPELLANT

**VUKANI GAMING WESTERN
CAPE (PTY) LTD t/a V SLOTS**

THIRD APPELLANT

**GRAND GAMING WESTERN CAPE
(RF) (PTY) LTD t/a GRAND SLOTS**

FOURTH APPELLANT

and

**GOLDRUSH GROUP MANAGEMENT
(PTY) LTD**

FIRST RESPONDENT

**MEMBER OF THE EXECUTIVE
COUNCIL FOR FINANCE
(WESTERN CAPE)**

SECOND RESPONDENT

Neutral citation: *Chairperson of the Western Cape Gambling and Racing Board and Others v Goldrush Group Management (Pty) Ltd and Another* (660/2022) [2023] ZASCA 148 (10 November 2023)

Coram: MAKGOKA, MABINDLA-BOQWANA, MEYER, GOOSEN and MOLEFE JJA

Heard: 15 August 2023

Delivered: 10 November 2023

Summary: Review – Gambling – Provincial Gambling Board having licenced two limited payout gambling machine operators and allocated limited payout machines to them – decision taken to allocate additional limited payout machines to existing operators in accordance with prior reservation to do so – party, which was not part of the initial licencing and allocation process, lacking standing to challenge the allocation on review – Board decision in any event lawful.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Kusevitsky J, sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel where so employed.

2 The order of the high court is set aside and replaced with the following order:

‘The application is dismissed with costs, including the costs of two counsel where so employed.’

JUDGMENT

Goosen JA (Makgoka, Mabindla-Boqwana, Meyer and Molefe JJA concurring):

[1] The appeal concerns a decision taken by the Western Cape Gambling and Racing Board (the Board) to allocate a number of limited pay out gambling machines (LPMs)¹ to two licenced operators. The Western Cape Division of the High Court (the high court) set aside the decision. The appeal is with the leave of the high court.

[2] The first appellant is the Chairperson of the Board. The second appellant is the Board. I shall refer to them collectively as ‘the Board.’ The Board was established in terms of the Western Cape Gambling and Racing Act 4 of 1996 (the Western Cape Act) and is the designated licencing authority for the Western

¹Section 26 of the National Gambling Act 7 of 2004 (the National Gambling Act), read with s 46 of the Western Cape Gambling and Racing Act 4 of 1996 (the Western Cape Act) define a limited payout machine as a gambling machine with a restricted prize.

Cape Province.² The third appellant is Vukani Gaming Western Cape (Pty) Ltd t/a V-Slots (V-Slots). The fourth appellant is Grand Gaming Western Cape (RF) (Pty) Ltd t/a Grand Slots (Grand Slots). V-Slots and Grand Slots are the licenced operators of LPMs in the province. They are commonly referred to as ‘route operators’.

[3] The first respondent is Goldrush Group Management (Pty) Ltd (Goldrush). The second respondent is the Member of the Executive Council for Finance, Western Cape (the MEC), who played no role in the matter, and was cited as the provincial executive responsible for gambling in the Province. Goldrush is a wholly owned subsidiary of Goldrush Group (Pty) Ltd (Goldrush Group), which is a holding company of affiliated entities that have interests in the gambling industry in several provinces. Goldrush described itself as a company specialising in the management of licenced operators in the gambling industry. Goldrush holds no interest in any licenced operators within the Western Cape Province.

The facts

[4] Regulations promulgated in terms of s 87(1) and (2) of the National Gambling Act 7 of 2004 (the National Gambling Act), fix the maximum number of LPMs to be licenced in the Western Cape Province at 9000. In the first phase of licencing LPMs, the provinces were restricted to a maximum of 50 per cent of the total number allowed.

[5] In 2004, the Board initiated the process of establishing the LPM gambling sector in the province. Acting in terms of s 31 of the Western Cape Act, it published a Request for Proposals (the RFP), inviting applications for the allocation of ‘route operator licences’, ie licences to operate LMPs in the

² Section 2 of the Western Cape Act read with s 30 of the National Gambling Act.

province. The Board had determined that it would make available 3000 LPMs to be allocated to route operators. It indicated, in the RFP, that it intended to appoint three operators and that each would be allocated 1000 LPMs.

[6] The Board received five applications in response to the RFP. Goldrush was not an applicant. It did not exist at the time. Following its evaluation of the applications, the Board decided to appoint only two route operators, namely V-Slots and Grand Slots. It allocated its stated minimum of 1000 LPMs to each of them, with the result that 1000 LPMs remained unallocated.

[7] During 2017, V-Slots and Grand Slots made written submissions to the Board to allocate to them the remaining 1000 LPMs. The Board's LPM Committee considered the submissions and recommended to the Board that it allocate the remaining 1000 LPMs, split as 500 LPMs to each. On 29 August 2017, the Board decided to allocate the remaining LPMs to V-Slots and Grand Slots as recommended by the LPM Committee.

[8] On 13 December 2017, a delegation from Goldrush Group made a presentation to the Board regarding the potential for the appointment of a third route operator in the province. Nothing came of this. Just under a year later, on 4 December 2018, Goldrush's attorneys wrote to the Board, that it had come to their client's attention that the Board either had or intended to increase the number of LPMs allocated to V-Slots and Grand Slots. They sought confirmation of this and raised several contentions regarding due process. On 12 December 2018, they submitted a formal request for access to information in terms of the Promotion of Access to Information Act 3 of 2000 (PAIA).

[9] On 13 December 2018, the Board replied to Goldrush's letter of 4 December. It confirmed that it had issued the remaining 1000 LPMs as an equal

split to the two licenced route operators. The Board said that it did not intend inviting applications for further route operators.

[10] On 12 December 2018, prior to the Board's reply referred to above, Goldrush submitted a request for reasons for the Board's decision to allocate the remaining 1000 LPM's to V-Slots and Grand Slots. It also requested an undertaking from the Board not to proceed with the allocation. It undertook to institute a review application within 30 days and threatened an urgent application to interdict the Board if no undertaking was provided. The Board replied on 21 December 2018, refusing to provide the undertaking.

In the high court

[11] On 25 March 2019, Goldrush launched an application in the high court to review and set aside the Board decision taken in August 2017,³ to allocate the remaining 1000 LPMs proportionally to V-Slots and Grand Slots. The notice of motion was framed in two parts. In Part A, Goldrush sought an urgent interdict pending the review relief sought in Part B. Goldrush did not, however, pursue the relief it had sought in Part A, and instead set the matter down for hearing of the review.

[12] Goldrush contended that when the Board decided to allocate the remaining 1000 LPMs, it was obliged to call for bids, and not simply to allocate them to V-Slots and Grand Slots as it did. Goldrush averred that had the Board done so, it would have applied for such allocation. It alleged that it had substantial involvement and experience in the gambling industry and that this would have ensured success in its application. In regard to its standing in the review application, Goldrush asserted that its involvement in the industry gave it a direct

³ The notice of motion incorrectly refers to a decision taken in November. It was, however, common cause that the decision was taken on 29 August 2017.

and substantial interest in matter. It advanced no claim to standing based on a broader public interest.

[13] Two preliminary issues were raised in opposition to the application by all of the appellants. They contended that Goldrush did not have standing to institute the review proceedings. They also alleged that Goldrush had inordinately delayed in bringing the review and had failed to make out a proper case for condonation of the delay. Regarding the substantive grounds for review, the Board explained that the RFP had expressly reserved the right to appoint fewer than three licenced operators and, in that event, to allocate additional LPMs to the licenced operators. It stated that the allocation of the remaining 1000 LPMs, was in accordance with the terms of the RFP. Its decision to appoint only two licenced operators had been taken pursuant to a rigorous selection process with full public participation and remained extant. It was not obliged to invite applications for the award of further route operator licences. Thus, its decision to allocate the remaining LPMs to V-Slots and Grand Slots was within its power.

[14] In its judgment on 20 April 2021, the high court found that Goldrush's claim to own-interest standing was speculative and hypothetical. Accordingly, the high court concluded, it lacked standing to challenge the Board's decision. As to the unreasonable delay issue, the high court found that there was no explanation before it for the delay. It found that Goldrush must have known about the decision to allocate the remaining LPMs in December 2017. It concluded that the delay in instituting the review (in March 2019) was unexplained and unreasonable. However, in considering whether the delay should be overlooked in the interests of justice, it considered the 'potential prejudice to affected parties' and the prospects of success. In regard to the latter, the high court found the decision to be reviewable 'under s 6(2)(e)(iii) of PAJA on the basis that the Board failed to

properly consider relevant considerations in deciding to approve Grand Slots and V-Slots additional licences’.

[15] The high court set aside the Board’s decision to allocate the remaining LPMs proportionally to V-Slots and Grand Slots. and granted the following further orders:

- ‘2. This order shall not affect existing LPM’s that have already been allocated and installed at licenced site routes pursuant to the 2017 decision.
3. In the event that there are non-operational LPM licences that are licenced and have not been allocated to a site, the Board is ordered to advertise same should it be prudent to do so.’

[16] The high court made no order regarding the costs of the abandoned interdict relief sought in Part A of the notice of motion. The learned judge ordered the present appellants to pay the costs of the application. As indicated, leave to appeal was granted by the high court. It also granted leave to Goldrush to cross-appeal against certain findings. The high court granted an order in terms of s 18(3) of the Superior Courts Act 10 of 2013, declaring its order operative pending the appeal.

The issues on appeal

[17] As was the case in the high court, three issues arise on appeal. The first concerns the standing of Goldrush. The second relates to the delay in prosecuting the review. The third concerns the merits of the review challenge.

[18] The standing of a party to pursue a legal remedy is a matter of ‘procedural justiciability’.⁴ The central question is whether the party who brings the suit is one who is entitled to seek the remedy.⁵ In the context of judicial review, a claim

⁴ C Hoexter and G Penfold *Administrative Law in South Africa* 3 ed (2021) at 659.

⁵ *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* [2012] ZACC 28; 2013 (3) BCLR 251 (CC) para 34.

to standing must be determined with reference to the administrative conduct or decision which the applicant seeks to bring under review. In *Giant Concerts CC v Rinaldo Investments (Pty) Ltd (Giant Concerts)*,⁶ the Constitutional Court held that a litigant asserting own-interest standing in the context of administrative review must ‘show that the decisions it seeks to attack had the capacity to affect its own legal rights or interests’.

[19] In this matter, as in *Giant Concerts*, Goldrush made no claim to interest on the basis of representation of any other party unable to assert its rights as envisaged in s 38(b) of the Constitution or based on the public interest. The high court’s finding that Goldrush did not establish a public interest standing was not challenged. In argument before this Court, counsel for Goldrush accepted that it had only asserted an own-interest claim to standing.

[20] In order to determine whether a decision has the capacity to affect a party’s legal rights or interests, the nature and effect of the decision must be considered. The decision under attack was one to allocate the remaining 1000 LPMs proportionally to the licenced route operators. Goldrush sought the setting aside of that decision. It sought no other related or consequential relief by which its asserted rights might be vindicated. In its founding affidavit it claimed that the decision affected its right to apply for a route operator licence in relation to the remaining LPMs. It framed the ‘impugned decision’ as one which encompassed a decision not to advertise the remaining 1000 LPMs for allocation to other parties who may qualify for route operator licences. It asserted that, based on its experience in the gambling industry, it was likely to qualify for a route operator licence and therefore be entitled to allocation of the remaining LPMs.

⁶ Ibid para 30.

[21] The review challenge, however, was against the allocation of remaining LPMs to the licenced route operators and not on the failure to invite applications for route operator licences. Goldrush's asserted commercial interest in applying for a route operator licence was not implicated or affected by the allocation to existing licenced operators. Those interests are only affected by the decision not to invite applications for further route operator licences.

[22] Goldrush, in summary, had no demonstrable own-standing commercial interest in the Board's decision to allocate the remaining LPMs to existing licenced route operators. The high court was therefore correct in its conclusion that Goldrush lacked standing to bring the application. Counsel for Goldrush submitted that, in any event, the high court had correctly accorded standing to Goldrush on the basis of the interests of justice exception envisaged in *Giant Concerts*. The Constitutional Court there observed:

‘... [T]hat the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest.’⁷

[23] What the *dictum* suggests is that if there are circumstances which would justify a claim to standing based upon the public interest or the interests of justice but that such claim is not made, the own-interest litigant should not fail merely because their standing is questionable. The proposition is qualified by the fact that ‘the public interest cries out for relief’. An indication of what those circumstances may be is given at the conclusion of the judgment in *Giant*

⁷ *Giant Concerts* fn 5 above para 34.

Concerts where the Constitutional Court reaffirmed the principle that a party who has no standing has no legal interest in the adjudication of the matter, and said:

‘When a party has no standing, it is not necessary to consider the merits, unless there is at least a strong indication of fraud or other gross irregularity in the conduct of a public body.’⁸

[24] In this case, there is no suggestion of fraud or irregularity. There is equally no indication of administrative conduct which is manifestly objectionable. The process by which route operators were licenced complied with the statutory requirements. The RFP declared the Board’s intention to appoint three suitably qualified route operators and to allocate to them 1000 LPMs in the first phase of establishing the industry. Applications were invited and those received were subjected to a rigorous selection process. The RFP indicated that in the event that fewer than three operators were licenced the available LPMs might be proportionally allocated to those appointed. It reserved the right to do so. When called upon to explain why it had allocated the remaining LPMs to the existing route operators, the Board explained that it had acted in accordance with the RFP issued at the time that route operators were appointed. The Board was not obliged to invite further applications for route operator licences. It did so in 2004 and decided then, as it was entitled to, to licence only two route operators. There is no statutory requirement for the advertisement of available LPMs to be allocated to route operators.

[25] These are all factors readily discernible from the context in which the decision to allocate LPMs was challenged. Nothing cries out, in the public interest, for investigation and adjudication. In the circumstances, the case was not justiciable even on the ‘exception’ provided in *Giant Concerts*.

⁸ Ibid para 58.

[26] The finding that Goldrush did not establish own-interest standing and that there is no basis to hold that the matter is nevertheless justiciable on the basis of broader public interest or the interests of justice, means that the appeal must succeed. The high court, however, ventured into the merits of the review when dealing with the unreasonable delay in bringing the review. It concluded that the review should succeed. On this basis it was prepared to countenance the delay and found that the review was justiciable despite Goldrush's lack of standing. In effect, the high court conferred standing because it found that the review ought to succeed. This approach is wrong.

[27] In any event, the high court's conclusion on the merits is not sustainable. Goldrush contended that the RFP did not permit the allocation of the initially unallocated 1000 LPMs to V-Slots and Grand Slots in the absence of those LPMs being advertised for allocation to other route operators. This stance resulted in a tortured argument to the effect that the RFP had 'run its course' as far as the initial 3000 LPMs were concerned, but not in respect of LPMs to which the Province is entitled and which may in due course be allocated.

[28] However, clause III of the RFP contained the following provisions:

'The Board intends to issue a maximum of three licences and allocate a thousand limited gambling machines per Licence holder. The intention therefore is not to issue less than a thousand limited gambling machines per limited gambling machine operator – *if fewer than three Applicants are found suitable for licencing, the Board reserves the right to increase the number of machines allocated per Applicant proportionally, subject to National norms, or to re-advertise and invite other applications.* Through this process the Board seeks to ensure that only reputable and experienced Operators will be active in the Province. The Board is also mindful of its duty to guard against over-stimulation of the latent demand for gambling, which would have a negative impact on the social fabric of the Province.

Prospective Operators should also take note of the options which the Board has identified regarding the possible future expansion of the industry in the Western Cape. If, once the industry has become established, it appears that the market and social and economic conditions then prevailing in the Province will accommodate the allocation of further limited gambling machines, the Board may offer further machines to existing Licenced Operators, against payment of such further fees as may be provided for by legislation at that time, after consulting industry role-players. *Should the Board elect to follow this course and should the existing licenced Operators not take up the offer to expand their operations, the Board may invite licence applications from other entities.*’ (Emphasis added.)

[29] These provisions explain the Board’s intentions in the appointment of licenced operators and the allocation of LPMs to them in unequivocal terms. When it was published, the RFP served to outline the policy that the Board would follow in relation to the development of the industry in the Province. It also served to explain to prospective operators how the Board would approach the granting of licences and what was expected of such operators. It is important to recall that each Province is entitled to a specified number of LPMs. In the case of the Western Cape that number was set at 9000. In the first phase of the development of the LPM industry, provinces were restricted to making available only 50 percent of the total number. The Board, however, elected to make available only 3000. As it turned out, the Board only appointed two operators and only allocated 2000 LPMs to them.

[30] Counsel for Goldrush conceded that at the time that V-Slots and Grand Slots were appointed as operators, the Board would have been entitled, pursuant to the RFP, to have allocated to each of them the whole of 3000 LPMs, ie 1500 LPMs each, Counsel also accepted that in respect of the allocation of ‘further’ LPMs, the Board was entitled to offer those LPMs to existing licence holders as provided in the RFP. However, so the argument went, the Board was not entitled

to allocate the remaining 1000 LPMs to V-Slots and Grand Slots as it had done, without advertising. The argument need only be stated to be rejected.

[31] The lawfulness of the RFP was not challenged. Nor was there a challenge to the Board's reservation of the right to allocate LPMs as provided by the RFP. The absence of a challenge to the lawfulness of the RFP, and the administrative decisions which underpin it, is an insurmountable obstacle in the path of Goldrush's review.⁹ The Board was entitled to set out its policy objectives in the RFP and was entitled to exercise its powers in accordance with such objectives. It reserved the right to appoint licenced route operators and to make allocations of LPMs in the manner provided by the RFP. It acted in accordance with such reservation, as it was entitled to do.

[32] The high court failed to take cognisance of the fact that the Board had acted within its powers. It appears to have considered that the allocation of LPMs involved 'additional licences' and that such *allocation* required a process initiated by way of advertisement. In this the high court erred. It is so that the appointment of licenced operators requires publication of an invitation to apply. That process, however, had already run its course when the RFP was issued and when the Board decided to appoint V-Slots and Grand Slots. The *allocation* of LPMs to licenced operators requires no licencing process. LPMs can only be allocated to operators who have been licenced.

[33] In the circumstances, the high court's conclusion that the Board's decision was unlawful, cannot stand. The order granted by the high court went further than the relief sought. Goldrush's conditional cross-appeal against paragraph 3 of the high court order was abandoned. Its cross-appeal relating to the high court finding

⁹ Compare *Peermont Global (North West) (Pty) Ltd v Chairperson of the North West Gambling Review Tribunal and Others and Two Other Cases* [2022] ZASCA 80 para 43-44.

that it lacked own-interest standing must fail for the reasons set out above. In the light of the conclusion to which I have come, nothing further need be said about the high court orders, save in respect of costs. The relief that was initially sought in Part A of the notice of motion was not pursued before the high court. Goldrush abandoned that relief after a full set of affidavits had been filed. The high court made no order in relation to those costs. In the light of the outcome of the appeal, Goldrush must also bear those costs. The substituted order below must be read to include all of the costs of the application before the high court.

[34] I make the following order:

1 The appeal is upheld with costs, such costs to include the costs of two counsel where so employed.

2 The order of the high court is set aside and replaced with the following order:

‘The application is dismissed with costs, including the costs of two counsel where so employed.’

G GOOSEN
JUDGE OF APPEAL

Appearances

For first and second appellants: R T Williams SC

Instructed by: Fairbridges Wertheim Becker Attorneys, Cape Town
Lovius Block Attorneys, Bloemfontein

For third appellant: I Jamie SC (with M Adhikari)

Instructed by: Edward Nathan Sonnenbergs Inc., Cape Town
Lovius Block Attorneys, Bloemfontein

For fourth appellant: K Pillay SC (with G Solik)

Instructed by: Bernadt Vukic Potash and Getz Attorneys, Cape Town
Lovius Block Attorneys, Bloemfontein

For first respondent: B Roux SC (with I B Currie)

Instructed by: Cliffe Dekker Hofmeyr Inc., Sandton
Noordmans Attorneys, Bloemfontein.