***Reportable***
Case No 252/99

In the matter between:

**AKANI GARDEN ROUTE (PTY) LTD** **Appellant**

**and**

**PINNACLE POINT CASINO (PTY) LTD** **Respondent**

Court: HARMS, SCHUTZ, NAVSA, MTHIYANE JJA and CHETTY AJA
Heard: 2 MAY 2001
Delivered: 17 MAY 2001

Subject: Review of disqualification for casino licence. Meaning of "policy determination".

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**JUDGMENT**

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HARMS JA/

HARMS JA:

[1] This appeal is against the judgment of a full court reported as *Pinnacle Point Casino (Pty) Ltd v Auret NO and Others* 1999 (4) SA 763 (C) and concerns the validity of a decision relating to a casino licence application by the Western Cape Gambling and Racing Board ("the Board"). The appellant ("Akani") and the respondent ("Pinnacle Point") submitted competing applications for the grant of such a licence for the southern Cape region in terms of the Western Cape Gambling and Racing Law 4 of 1996 ("the provincial Act"). On 30 November 1998, the Board informed Pinnacle Point that it had been selected as the successful applicant for the grant of the licence and that, in terms of the Request for Proposal (the Board's invitation for applications for a licence), the licence would not be awarded unless and until all negotiations pertaining thereto had been finalised to the satisfaction of the Board. A number of so-called conditions precedent to the award of the licence were set out, only one of which is now relevant and it reads:

"The Successful Applicant will obtain and present by 11 January 1999 an irrevocable, unconditional financial guarantee from an acceptable, first class, reputable financial institution regarding the financial commitment to the Project of . . . New Property Ventures (Pty) Ltd."

[2] New Property Ventures (Pty) Ltd owns 30% of Pinnacle Point's issued share capital and was obliged to provide or underwrite finances for the project in the sum of R22,5 million. Since the required guarantee was not forthcoming, the Board granted a number of extensions to Pinnacle Point to enable it to comply with the precondition. Eventually, on 5 February 1999, the Board, conscious of its public duty and its obligations to Akani, sent a letter to Pinnacle Point, setting a deadline for 11 May. The deadline was not met, mainly due to the negligence or incompetence of persons attached to Pinnacle Point. Consequently, the Board decided on the following day -

"to decline to issue the licence to [Pinnacle Point] in view of the non-performance in respect of the financial guarantees required by the Board for the project"

and

"to officially recognise Akani as the successful applicant."

These decisions gave rise to the present proceedings, which began as an application for their review, principally on the grounds of procedural and administrative unfairness. Some factual issues raised in the founding affidavit have not been persisted in. However, largely due to the nature of the defence raised by Akani in its answering affidavits, the central question became one of legality and because of what follows it will be unnecessary to rule on the fairness of the Board's resolution; nevertheless, my prima facie assessment is that if regard is had to all the circumstances the Board acted fairly and properly.

[3] The issue in this case is principally one of interpretation of the provincial Act and, for reasons that will become apparent, it is fundamental to have regard to its matrix and certain constitutional principles before setting out the further relevant facts and the argument. Since the interim Constitution, separation of powers has been a cornerstone of our constitutional dispensation (*South African Association of Personal*

*Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) esp par 22). This also applies to the separation of powers between the legislature and the executive at the national and provincial level. Concerning the latter, the Constitution (s 104) provides that the legislative authority of a province is vested in its provincial legislature and confers on the provincial legislature, i a, the power to pass a constitution and legislation for its province with regard to any matter within a functional area listed in Schedule 4 (i e functional areas of concurrent national and provincial competence, which includes gambling in general and casinos in particular). Section 104 (3) furthermore states that -

> "(3) A provincial legislature is bound only by the Constitution and, if it has passed a constitution for its province, also by that constitution, and must act in accordance with, and within the limits of, the Constitution and that provincial constitution."

Section 125 (2) vests the executive authority of a province in its premier, who exercises the executive authority, together with the other members of the executive council, by-

"(a) implementing provincial legislation in the province;

(b) implementing all national legislation within the functional areas listed in Schedule 4 …;

(c) . . .

(d) developing and implementing provincial policy . . .."

The Western Cape eventually adopted the Constitution of the Western Cape 1 of 1998 in conformity with the national Constitution which reiterates that the legislative authority of the Western Cape vests in the provincial parliament (s 9) and its executive authority in the premier who exercises this authority together with the other provincial ministers (who form a provincial cabinet) by, i a, implementing provincial legislation and by developing and implementing provincial policy (s 35). The two Constitutions do not use the same nomenclature: the former uses the terms "executive council" and "member" (as does the provincial Act) whereas the latter uses "cabinet" and "minister" respectively. The provincial Act was assented to before the Constitution and its date of commencement postdates that of the Constitution but that does not

affect this judgment.

[4] Since gambling is also within the functional competence of the National Legislature, the National Gambling Act 33 of 1996 was enacted. The structure of this Act and, particularly, s 13 makes it clear that the control over gambling vests in independent boards at national and provincial level and that political interference in the process is to be avoided (cf *Poswa v The Member of the Executive Council Responsible for Economic Affairs Environment and Tourism Respondent*, an as yet unreported judgment of this Court of March 2001). One of the principles set out is that -

"licensing authorities with specific functions and powers relating to gambling shall be established by the provinces for the regulation and control of gambling activities."

(Section 13(1)(g) with underlining added.)

[5] The provincial Act established the Board (s 2(1)) and provides that the right to carry on any gambling within the Province vests exclusively in the Board (ss (2)). This provision is made subject to ss (4) which states that the main object of the

Board is to control all gambling activities -

"subject to this Law and any policy determinations of the Executive Council relating to the size, nature and implementation of the industry."

(Underlining added.) The Board is then granted all powers necessary to achieve its main object and perform its functions under "this Law" (ss (5)). The term "this Law", as is evident from the Afrikaans text, was an inept attempt to dispense with the term "this Act", and it is defined to include the schedules and any regulation or rule made or issued thereunder (s 1). Section 81 authorizes the responsible member of the executive council (now the minister of the provincial cabinet) to make regulations relating to a number of matters and s 82 permits the Board to make rules relating to the exercise of its powers and the performance of its duties.

[6] Policy determinations of the Executive Council under s 2(4) have to be published in the Provincial Gazette. This was done[1] and of particular importance is

1 Provincial Notice 304 of 1997 as amended by Provincial Notices 440 of 1997 and 353 of 1998.

the policy determination that -

"all proposed financial commitments in respect of the total proposed capital investment of the successful applicant shall be underwritten by irrevocable bank or other financial institution securities acceptable to the Board, and shall be lodged prior to the issue of a licence and within seven days of the announcement by the Board of the successful applicant, whereupon such securities shall form part of the successful applicant's bid."

Realising at the time that the seven day time limit was totally unrealistic, the Board requested and obtained the consent of the relevant minister to impose a thirty day limit. (The source of the minister's power to have done so is not apparent.) Akani's answer to Pinnacle Point's application was based upon this policy determination: it argued that since the necessary guarantees had not been provided within seven or even thirty days of the announcement on 30 November 1998, Pinnacle Point had lost its status as successful applicant; this is the case irrespective of the Board's precondition because the Board was bound by the policy determination under s 2(4). It may be mentioned that once a party loses its status as successful applicant, the runner-up

takes its place as a matter of course. Holding that the seven day period was peremptory, the court of first instance upheld the argument and dismissed Pinnacle Point's application. On appeal, the Full Court held that the quoted provision was not a “policy determination”; the word “policy” bears the meaning of a course or principle of action; “policy” sets standards, is of a general nature and does not encompass specific rules. By contrast, this provision imposes detailed and strict requirements in relation to financial guarantees; consequently, the determination is invalid. See par 13 to 15 of the reported judgment.

[7] The word “policy” is inherently vague and may bear different meanings. It appears to me to serve little purpose to quote dictionaries defining the word. To draw the distinction between what is policy and what is not with reference to specificity is, in my view, not always very helpful or necessarily correct. For example, a decision that children below the age of six are ineligible for admission to a school, can fairly be called a “policy” and merely because the age is fixed does not make it

less of a policy than a decision that young children are ineligible, even though the word "young" has a measure of elasticity in it. Any course or program of action adopted by a government may consist of general or specific provisions. Because of this I do not consider it prudent to define the word either in general or in the context of the Act.

I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between legislature and executive will disappear. Cf *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) par 62. In this case, however, it seems that the provincial legislature intended to elevate policy determinations to the level of subordinate legislation, but leaving its position in the hierarchy unclear: does it have precedence above ministerial regulations

and Board rules where these form part of the definition of "the Law"? The inadvisability of having yet another level of subordinate legislation is immediately obvious; its legality was not debated and need not be decided and I shall assume its propriety for purposes of this judgment. One thing, however, is clear: policy determinations cannot override the terms of the provincial Act for the reasons already given. Where, for instance, the provincial Act entrusts the minister with the responsibility of determining the maximum permissible number of licences of any particular kind that may be granted in a particular area (s 81(1)(d)), the cabinet cannot regulate the matter by means of a policy determination, something it did. Likewise, where s 37 (1)(l) empowers the Board to impose conditions relating to the duration of licences, the cabinet cannot prescribe to the Board by way of a policy determination that, for instance, casino licences shall be for a period of ten years, something else it did. In other words, the cabinet cannot take away with one hand that which the lawgiver has given with another.

[8] As far as guarantees are concerned, s 37(1)(j) provides that -

"[t]he Board may impose conditions in respect of any licence issued under this Law, including conditions - requiring the payment or delivery to the Board of guarantees, including guarantees relating to the delivery of a proposed development."

This means that the competence to require guarantees and to set their terms was given by the Act to the Board. It is to be noted that the power is to be exercised in relation to licences and not to licence applications. In other words, what the Board is permitted to do is to attach such a condition to a licence and not as a precondition or condition precedent to the issuing of a licence, as it purported to do in the letter of 28 November 1998. I do not thereby wish to hold that the Board may not under s 12 or 35 impose preconditions to the grant of licences, but the fact that the legislature chose to empower it to deal with guarantees in a specific manner leads ineluctably to the conclusion that it cannot exercise a similar power under a general provision. *Generalia specialibus non derogant*. This result immediately disposes of another question raised, namely whether the Board could have imposed this precondition

irrespective of the policy determination. Cf par 18 of the Court a quo's judgment.

(The fact that such a precondition was anticipated in the Request for Proposal does not affect this conclusion.) It then becomes unnecessary to deal with that part of its judgment (par 16 to 17) dealing with the principle - the formulation and scope about which I have some reservations - that where a functionary deliberately acted in terms of a particular enabling provision and that provision is found to be invalid, then the validity of the action cannot be saved by the existence of a valid enabling provision elsewhere.

[9] Reverting to the policy determination, what it does is to impose an absolute obligation on applicants for licences to lodge circumscribed guarantees *before* the grant of licences. This emasculates the Board to the extent that it will never be able to exercise its powers and discretion under s 37(1)(j) to require such guarantees as a licence condition. The decision as to whether a guarantee from some-one other than a bank or other financial institution would be acceptable is no longer that of the

Board and also that relating to time limits and extensions of time. In other words, by an executive act a legislative act was amended, diluted or undone. This was beyond the powers of the cabinet. Although the determination under consideration could in another context conceivably be a termed a “policy”, within the structure of the provincial Act it is not one.

[10] It follows from this that the Full Court was correct in setting aside the Board's decision disqualifying Pinnacle Point as an applicant and nominating Akani in its stead as the successful applicant. Accordingly, the appeal is dismissed with costs, including the costs of two counsel.

L T C HARMS
JUDGE OF APPEAL

Agree:

SCHUTZ JA
NAVSA JA
MTHIYANE JA
CHETTY AJA