THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1040/2020

In the matter between:

PEERMONT GLOBAL (North West) (PTY) LIMITED **APPELLANT**

and

CHAIRPERSON OF THE NORTH WEST GAMBLING REVIEW TRIBUNAL **FIRST RESPONDENT**

NORTH WEST GAMBLING REVIEW TRIBUNAL **SECOND RESPONDENT**

CHAIRPERSON OF THE NORTH WEST GAMBLING BOARD **THIRD RESPONDENT**

NORTH WEST GAMBLING BOARD **FOURTH RESPONDENT**

JONOFORCE (PTY) LTD **FIFTH RESPONDENT**

PIONEER BINGO (NORTH WEST) (PTY) LTD **SIXTH RESPONDENT**

LATIANO 560 (PTY) LTD **SEVENTH RESPONDENT**

ELIOCUBE (PTY) LTD **EIGHTH RESPONDENT**

METRO GAMING AND ENTERTAINMENT (PTY) LTD **NINTH RESPONDENT**

and

Case no: 1055/2020

In the matter between:

GALAXY BINGO MORULENG (PTY) LTD (previously called Metro Gaming and Entertainment (Pty) Ltd) **FIRST APPELLANT**

GALAXY BINGO NORTH WEST (RF) (PTY) LTD **SECOND APPELLANT**

and

NORTH WEST GAMBLING BOARD **FIRST RESPONDENT**

CHAIRPERSON OF THE NORTH WEST GAMBLING BOARD **SECOND RESPONDENT**

CHAIRPERSON OF THE NORTH WEST GAMBLING REVIEW TRIBUNAL **THIRD RESPONDENT**

DENNIS MAKHARI NO **FOURTH RESPONDENT**

AMOS VILAKAZI NO **FIFTH RESPONDENT**

JONOFORCE (PTY) LTD **SIXTH RESPONDENT**

MEC FOR FINANCE, ECONOMY & ENTERPRISE DEVELOPMENT, NORTH WEST **SEVENTH RESPONDENT**

and

Case no: 1056/2020

In the matter between:

GALAXY BINGO MORULENG (PTY) LTD (previously called Metro Gaming and Entertainment (Pty) Ltd) **APPELLANT**

and

NORTH WEST GAMBLING BOARD **FIRST RESPONDENT**

CHAIRPERSON OF THE NORTH WEST GAMBLING BOARD **SECOND RESPONDENT**

CHAIRPERSON OF THE NORTH WEST GAMBLING REVIEW TRIBUNAL **THIRD RESPONDENT**

DENNIS MAKHARI NO **FOURTH RESPONDENT**

AMOS VILAKAZI NO **FIFTH RESPONDENT**

LATIANO 560 (PTY) LTD T/A GOLDRUSH BINGO NORTH WEST-MAFIKENG **SIXTH RESPONDENT**

MEC FOR FINANCE, ECONOMY & ENTERPRISE DEVELOPMENT, NORTH WEST **SEVENTH RESPONDENT**

Neutral citation: *Peermont Global (North West) (Pty) Ltd v Chairperson of the North West Gambling Review Tribunal and Others and Two Other Cases* (Case numbers 1040/2020); 1055/2020 and 1056/2020 [2022] ZASCA 80 (2 June 2022)

Coram: MAYA P, MAKGOKA, PLASKET and GORVEN JJA and MUSI AJA

Heard: 16 and 17 FEBRUARY 2022

Delivered: 2 June 2022.

Summaries:

Peermont v Chairperson of the North West Gambling Review Tribunal and Others

Administrative law – review – legality – the lawfulness and fairness of the licence application process in terms of the North West Gambling Act 2 of 2001 (the North West Act) – whether the licence application process was procedurally unfair, given that (a) the applicable Request for Applications was not provided to the appellant, and (b) allegedly incomplete copies of the bingo licence applications were made available for public inspection – whether electronic bingo terminals (EBTs) to be provided for play offered the game of 'bingo' as defined in the North West Act – whether the North West Gambling Board failed to have regard to the adverse impact that the licence of bingo operations was likely to have on the appellant's nearby casinos.

Galaxy Bingo Moruleng (Pty) Ltd and Another v North West Gambling Board and Others (in re Jonoforce (Pty) Limited)

Administrative law – review – legality – whether the decision to grant the application of the sixth respondent, Jonoforce (Pty) Ltd, for a bingo licence at Klerksdorp was unlawful – whether fact that a portion of the sixth respondent's application for a bingo licence was marked confidential and not publicly disclosed, violated ss 32(3)*(a)* and 24(5)*(d)* of the North West Act and rendered the award pursuant thereto procedurally unfair – whether the impugned decisions were *inter alia* irrational, unreasonable and based on a failure to consider relevant considerations.

Galaxy Bingo Moruleng (Pty) Ltd v North West Gambling Board and Others (in re Latiano 560 (Pty) Limited)

Administrative law – review – legality – whether the decision of the North West Gambling Board, to grant the application of Latiano 560 (Pty) Ltd, for a bingo licence in Mahikeng was unlawful – whether the decision was made on the basis of an arithmetical error – whether the reasons given by the Board did not reflect the decisions actually made, alternatively, show that the Board considered irrelevant considerations and failed to consider relevant ones.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Djaje J sitting as court of first instance):

In the *Peermont* appeal

The appeal is dismissed with costs, including the costs of two counsel.

In the *Galaxy* appeal (in *re* Jonoforce)

The appeal is dismissed with costs, including the costs of two counsel.

In the *Galaxy* appeal (in *re* Latiano)

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Makgoka JA (Maya P, Gorven, Plasket JJA and Musi AJA concurring):

Introduction

[1] This judgment concerns three appeals, namely: *Peermont Global (North West) Pty Ltd v Chairperson of the North West Gambling Review Tribunal and Others* (the Peermont appeal) under case number 1040/2020; *Galaxy Bingo Moruleng (Pty) Ltd and Another v North West Gambling Board and Others (in re: Jonoforce (Pty) Limited)* (the Galaxy appeal in *re* Jonoforce) under case number 1055/2020; *and Galaxy Bingo Moruleng (Pty) Ltd v North West Gambling Board and Others (in re Latiano 560 (Pty) Limited)* (the Galaxy appeal in *re* Latiano) under case number 1056/2020.

[2] The three appeals concern the awarding of bingo licences by the North West Gambling Board to Jonoforce (Pty) Limited and Latiano 560 (Pty) Limited.

Peermont Global (NW) (Pty) Limited (as an objector) and Galaxy Bingo Moruleng (Pty) Limited (as a co-competitor), were unsuccessful in their review applications in the North West Division of the High Court, Mahikeng (the high court) to set aside the awarding of those licences. The review applications were heard together in the high court and a composite judgment, dismissing the three applications, was delivered.

[3] On appeal, this Court similarly heard the three appeals together. In the three judgments, I consider the *Peermont* appeal, while Musi AJA considers both the *Galaxy* appeal *(in re* Jonoforce*)* and the *Galaxy* appeal (in *re* Latiano). The issues in the three appeals overlap, and for that reason, the three judgments should be read together and collectively as a trilogy.

[4] I turn to the Peermont appeal. The appellant, Peermont Global (NW) (Pty) Limited (Peermont) appeals against an order of the North West Division of the High Court, Mafikeng (the high court), which dismissed its application to review and set aside the decisions of the fourth respondent, the North West Gambling Board (the Board), taken on 10 June 2016 to award bingo licenses to, among others, the fifth respondent, Jonoforce (Pty) Ltd (Jonoforce) in Klerksdorp and to the seventh respondent, Latiano 560 (Pty) Limited (Latiano), in Mmabatho, respectively. Both areas are in the North West Province (the North West).

[5] Peermont was not an applicant for any of the awarded bingo licences. It objected to the awarding of those licences on the basis of the likely negative impact bingo operations would have on its casinos in the areas where the two licences had been awarded for bingo operations. Prior to its review application in the high court, Peermont had sought, unsuccessfully, to set aside the Board's decisions in an internal review before the North West Gambling Review Tribunal.

The legislative and regulatory framework

[6] It is necessary to first set out the legislative and regulatory framework within which the Board considered the bingo licence applications and made the impugned decisions. Gambling is an area of concurrent provincial and national competence. Nationally, it is regulated by the National Gambling Act 7 of 2004 (the National Act), while the relevant provincial legislation is the North West Gambling Act 2 of 2001 (the North West Act). In its preamble, the North West Act notes, among other things, that gambling should stimulate the creation of employment opportunities and provide a source of public revenue for the province.

[7] Section 30 of the National Act provides that each provincial licensing authority has exclusive jurisdiction to grant provincial licences in respect of gambling. Pursuant thereto, s 3 of the North West Act provides for the establishment of the Board as a juristic person. Section 4 of the North West Act set outs the powers and functions of the Board, which, among others, include: (a) overseeing gambling activities in the province; (b) exercising such powers and performing such functions and duties as may be assigned to the Board in terms of the Act or any other law; and (c) inviting applications for licences and considering such applications. The Board also has the power to make and enforce rules for the conduct of its proceedings and hearings, and to consult with any person or employ consultants regarding any matter relevant to the performance of its functions on such terms and conditions as it may determine.

[8] The composition of the Board is provided for in s 5, in terms of which the Board shall consist of nine members from diverse fields. Four of them are appointed by the relevant Member of the Executive Council (the MEC) for their respective expertise in law, accounting and auditing, welfare or socio-economic development and the tourism industry. Three of the members are designated by

each of the MECs for Economic Development and Tourism, Safety and Liaison, Finance and Provincial Treasury. Two members shall be appointed on the basis of having either proven business acumen, a knowledge of the gambling industry, or who are otherwise suitable for appointment as members of the Board. In addition, the Chief Executive Officer (the CEO) of the Board shall *ex officio* be a member of the Board but shall not be entitled to vote.

[9] Any person wishing to apply for a gambling licence may only do so if the Board has published a notice in a Provincial Gazette inviting applications for a specific type of gambling licence. The Board would invite applications for a specific gambling licence only after it had determined the need for a specific gambling licence in the province. In this matter the Board resolved that there was a need to issue bingo licences in the province.

[10] The procedure for applying for licences is set out in ss 24-28. In terms of s 24(2), '[n]o person shall make an application for a licence … unless the application is lodged pursuant to and in accordance with a notice inviting applications which has been published by the Board in the *Provincial Gazette*'. In terms of s 29, upon receipt of an application for a licence, the Board is required to publish notice of the application in the Provincial Gazette as well as a local newspaper, containing the material particulars of the application and inviting 'interested persons' to lodge written representations and to indicate whether they wish to make oral representations in response to the application.

[11] In terms of s 24(3) all applications for licences shall be considered and disposed of according to the procedures determined by the Board. And in terms of s 24(4) the Board may conduct or cause to be conducted any hearing, investigation or enquiry in relation to any application submitted under the Act. Section 28 provides that any application for the grant of a licence shall be lodged

in the manner and form determined by the Board and be accompanied by the documents and information determined by the Board and by payment of the prescribed application fee. In the event of non-compliance with the above, the application shall be invalid. After considering an application, the Board may grant or refuse or postpone the consideration of an application, subject to any terms or conditions it may deem fit. Section 29 requires the Board to give public notice of licence applications that it has received, and to invite interested persons to make representations on those applications. Section 32 requires the Board to make such applications, as well as any representations and responses that it receives, open to public inspection or to provide them on request. Sections 35 and 36 compel the Board to hold public hearings in respect of every licence application it has received.

[12] Section 90 provides for an internal remedy against decisions of the Board, to the Tribunal, which consists of an advocate or retired judge; one member designated by the National Gambling Board from the staff of the said Board; and one member appointed on the basis of proven business acumen or other suitability to serve on the Tribunal. The Tribunal has the power to: (a) confirm or set aside the decision or proceedings of the Board; (b) remit the matter to the Board with an order to take a decision in accordance with the correct procedure; or (c) take such a decision as in its opinion ought to have been given by the Board and direct the Board to do everything necessary to give effect to that decision.

Request for Applications

[13] These relevant provisions of the Act must be read with a document titled 'Request for Applications' (the RFA). This is a comprehensive document prepared and authorised by the Board pursuant to s 28(1). It sets out, among other things: the Board's purpose in relation to bingo licences; the objectives of licensing bingo operations; the principles applicable to bingo operations; the

processes for licence applications'; and the criteria applicable to the evaluation of such applications. The initial RFA was dated March 2015. It was later replaced by the amended RFA in October 2015. The amended RFA states its purpose as being 'to furnish interested parties and all prospective applicants for Bingo Operator licences with a clear indication of the regulatory requirements, the underlying principles applicable to the licensing of Bingo Operators, the process and criteria applicable to the licensing of such applicants'.

[14] The amended RFA states that the Board wished to achieve certain objectives such as: economic growth and development in the province; the upliftment and economic empowerment of historically disadvantaged communities; generation of additional revenue for the province; the promotion of economic activities in the province; and the provision of entertainment, sport and recreational facilities to members of the public.

[15] The amended RFA further states that bingo operations were seen as supplementary to casinos in achieving the following objectives: (a) the diversification and expansion of the existing gambling activities in the province; (b) the provision of additional alternative forms of leisure and entertainment to all areas in the province, in particular to the townships and rural communities; (c) the opening of the gambling sector and the creation of opportunities for direct participation of local previously disadvantaged individuals and small, medium and micro-sized entrepreneurs; (d) the provision of job opportunities in the previously disadvantaged areas; (e) the eradication of illegal gambling in the province; and (f) the promotion of Broad-Based Black Economic Empowerment (B-BBEE) to increase the participation of women and designated groups in the gambling sector.

[16] As to the designated areas identified for bingo operations, the RFA states that the Board had identified the need for bingo licences in those areas after considering the 'potential socio-economic impact on the community of the proposed licensee'. The Board therefore preferred '… that Bingo Operations be established in such areas where inadequate entertainment facilities presently exist and would require strong motivation of any application where the intended Bingo Operation will be situated within the same town or city with a casino.'

[17] With regard to the principles applicable to bingo operations, the RFA mentions, among others, that an applicant must have at least 60% shareholding by local previously disadvantaged individuals, of which 35% must be held by black women, with full exercisable voting rights and economic interests. Also, that the Board will consider the promotion of B-BBEE in the bingo market as vital to any application.

Factual background

[18] On 2 October 2015, pursuant to s 24(2) of the North West Act, the Board published a notice in which it invited 'interested parties' to apply for the grant of bingo licences in the North West. The notice mentioned that the RFA had been amended, and that a copy of the amended RFA would be available to 'interested parties' at the offices of the Board between 2-9 October 2015 upon payment of a non-refundable fee of R3 000. It is common cause that Peermont did not procure the amended RFA.

[19] On 26 November 2015, the Board published a notice detailing a number of applications it had received, which included those of Jonoforce and Latiano. The applications lay open for public viewing for one month, from 1 December to 31 December 2015. In terms of s 29 of the North West Act, the Board invited written objections (if any) to be submitted within the viewing period. Pursuant to that

notice, Peermont called for, and obtained, public-inspection copies of various applications from the Board. On 24 December 2015, Peermont submitted written objections to, among others, the Jonoforce and Latiano applications. On 2 February 2016, the Board informed Peermont that its objections were based on the old version of the RFA dated March 2015 and not the amended RFA. Peermont requested to be furnished with the amended RFA, which request the Board declined on the basis that its availability had been time bound, as provided for in the October notice.

[20] During May 2016, the Board held public hearings in respect of all of the applications, which Peermont attended and made oral and written submissions against the applications. On 10 June 2016, the Board made the decisions to award bingo licences to Jonoforce and Latiano, among others. The Board announced its decisions publicly by notice in the Provincial Gazette on 6 July 2016.

The internal review application and in the high court

[21] On 6 July 2016, Peermont launched an internal review application in terms of s 90 of the North West Act before the Tribunal, seeking to review and set aside the impugned decisions. Peermont raised five grounds of review before the Tribunal, of which only three are relevant for present purposes. First, that the licence application process was procedurally unfair. Second, that it was unlawful for the Board to award bingo licences for use in conjunction with conventional electronic bingo terminals (EBTs), as EBTs did not offer the game of 'bingo' as defined in the North West Act. Third, that the Board was obliged, but failed, to have regard to the adverse impact that the licensing of bingo operations was likely to have on Peermont's nearby casinos.

[22] In its written decision dated 29 August 2017, the Tribunal considered each of these review grounds, and found no merit in any of them. It accordingly

dismissed Peermont's internal review application with costs. Peermont applied to the high court to overturn the Tribunal's decision. The high court, too, dismissed that application. In broad outline, the high court agreed with the reasoning of the Tribunal, save to correct an error by the Tribunal of granting a costs order against Peermont. The Tribunal does not have a power to make such an order in its proceedings. In this Court, Peermont persisted in the three review grounds referred to above. I consider those grounds, in turn.

Procedural unfairness of the licensing process

[23] Peermont relied on two subsets for this proposition. The first was that the amended RFA, on which the licence applications and the impugned decisions were based, was not disclosed to it. The second was that the public-inspection versions of the applications unlawfully excluded significant portions of the applications that were material to Peermont's ability to object to the applications. Each of these, so was the submission, inhibited Peermont's ability to make meaningful and informed representations on the applications, and consequently infringed its right to procedural fairness.

Non-disclosure of the amended RFA

[24] With regard to the amended RFA, as mentioned already, on 2 December 2015 the Board published a notice in the provincial gazette which clearly informed 'interested parties' that the RFA had been amended, and that a copy thereof, was available upon request and against payment of a set fee. A time period for such requests was set between 2 to 9 October 2015.

[25] It was submitted on Peermont's behalf that the pre-conditions to access the amended RFA applied to prospective licence applicants, and could not lawfully be invoked against interested parties seeking to exercise their rights to object to

the applications after they had been lodged. For that reason, it was submitted, Peermont had no reason to procure a copy of the RFA in October 2015 because it did not intend to apply for a bingo licence. It also did not know at that point which bingo-licence applications would be lodged and their intended locations. It learned of the applications and the close proximity of the intended bingo operations to its casinos only on 26 November 2015, when the Board published the November notice. As with any other objector, it had reason to request the amended RFA only at that time, rendering it impossible for Peermont to comply with the Board's deadline of 9 October 2015.

[26] I disagree. By reason of it being a major player in the gambling industry in the North West, Peermont was, even by October 2015, very much an interested party in the awarding of gambling licences in the province. The phrase 'interested parties' is sufficiently wide to include both potential applicants and objectors. Therefore, Peermont's attempt to confine 'interested parties' to 'applicants' is simply not sustainable. In any event, on a plain reading of the amended RFA, nothing precluded Peermont from obtaining it. Thus, Peermont was entitled to obtain a copy of the amended RFA, but elected not to do so. It has only itself to blame for not having had sight of the amended RFA before it made its objections.

[27] It was also suggested on behalf of Peermont that the Board's refusal to furnish it with the amended RFA outside the set period was unlawful. I do not agree. In terms of section 28 of the North West Act, the Board is empowered to determine the manner and form of the applications. In this regard, the Board determined that the amended RFA would be furnished upon request within the set time period and upon payment of the requisite fee. It was perfectly entitled to do so. It was thus in accordance with its own processes that the Board declined to furnish the amended RFA to Peermont outside the allotted purchase window period.

[28] Peermont asserted that that the Board's decision was unlawful, but did not challenge it. Until competently set aside, that decision has force.[1] Peermont contends that it was not obliged to challenge the decision, as such a challenge would have been premature and incompetent 'because the Board's refusal to provide the amended RFA was merely one exercise of the Board's functions in a larger administrative process'. It also cited a number of practical difficulties that such an application would have occasioned, including unnecessary litigation and possible delay in the determination of the bingo applications.

[29] Regarding the prematurity argument, it is important to note that the Board is an organ of State. Its refusal to furnish Peermont with the amended RFA outside the window period, constituted 'an administrative action', defined in s 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) as a 'decision' taken by an 'organ of state', 'exercising a public power or performing a public function in terms of any legislation' 'which adversely affects the rights of any person and which has a direct, external effect…'[2]

[30] The Board's October 2015 notice, which contained the pre-conditions for obtaining the RFA, is sourced from the North West Act. When it made a decision refusing to furnish Peermont with the amended RFA, it exercised a public power in terms of that legislation. On Peermont's own version, the Board's decision adversely affected its rights, and undoubtedly had a direct and external effect. Thus, the Board's decision was clearly final and susceptible to review under PAJA. Therefore, it would not have been premature to challenge the Board's decision.

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[1] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA) para 26; *Member of the Executive Council for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) para 106.
[2] Section 1 of the Promotion of Administrative Justice Act 3 of 2000.

[31] There was another string to Peermont's prematurity bow: it was contended that courts would not permit a review of a process that is underway if any potential prejudice could be cured in the process itself. For this proposition, Peermont relied on *Rhino Oil and Gas Exploration SA (Pty) Ltd v Normandien Farms (Pty) Ltd and Another* [2019] ZASCA 88; 2019 (6) SA 400 (SCA) paras 30-34 (*Normandien*). That case concerned an attempt to review an administrative decision which had not been taken, but was anticipated. The issue was whether the failure by the South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Limited, a State-owned company, to comply with certain statutory provisions, which regulate public participation, in an application for an exploration right, was reviewable. This Court held that while failures to comply with statutory duties are reviewable under the common law, the applicant for review had to show that the failure gave rise to prejudice. Furthermore, it held that the application to review was not ripe and the applicant ought to have waited until after the exploration right was granted to launch its challenge. Thus, the application could not succeed.

[32] In contrast, here Peermont's express intention was to participate in, and influence, the process of awarding bingo licences by meaningful and informed representations on the licence applications. It alleged that its ability to do so was prejudiced by the Board's refusal to furnish it with a copy of the amended RFA. That decision was final, and the Board made it very clear to Peermont that it was not amenable to furnish the amended RFA outside the set period. There is nothing in the Board's correspondence with Peermont to suggest that the Board was inclined to reverse its decision. And nothing in the bid adjudicating process could alter it. *Normandien* therefore goes against Peermont's proposition, and is thus inapposite on this score.

[33] Peermont also relied on a passage in one of the related interim interdict judgments, where Hendricks J said the following about this issue:

'There is no doubt that two different RFA forms existed, namely the RFA form and the amended RFA form, which was not provided to Peermont. This is fatal. It can never be correct to contend that it was not necessary to make available to an objector the amended RFA form on which the decision to award the licence was based, and then argue that the objector in any event had sight of the previous RFA form and could base its objections thereon. This is unfair towards the objector and an infringement of his/her right to object'.

[34] In my view, Peermont's reliance on this passage is misplaced. First, the learned judge was only making prima facie findings in the context of an interim interdict, based on the facts then before the court. Those findings were certainly not binding on the high court when it determined the main review application, and less so, on this Court. But in any event, it seems Hendricks J was, with respect, wrong to the extent he suggested that the Board was, without more, obliged to provide Peermont with a copy of the amended RFA. It was Peermont's duty to request the copy and to comply with the conditions set by the Board, namely to request the copy within the stipulated time and to pay the required fee.

[35] In the final analysis, the over-arching consideration about the Board's refusal to furnish Peermont with the amended RFA, is one of prejudice. As a matter of fact, Peermont made substantive objections and fully participated in the public hearings. It has not explained, with reference to any portions of the amended RFA, how it was not able to comment meaningfully because of lack of access to it. Peermont's assertion of prejudice must also be tested by considering its stance before and after it received the amended RFA. It first had sight of the amended RFA when the Board produced the record of its decision in the internal review process. It is telling that having received the amended RFA, Peermont's objections remained as they had been, when it did not have the amended RFA. Peermont did not seek to amend or supplement any of its grounds of objection

after obtaining the amended RFA. This, in my view, diminishes Peermont's contention that by not having a copy of the amended RFA, it was hindered from making meaningful, informed representations on the licence applications. It also suggests strongly that Peermont did not suffer any material prejudice because of that fact.

The incomplete public-inspection versions of the applications

[36] Peermont complained that only very limited portions of the licence applications were made available to the public. It alleged that in respect of the Jonoforce application, the public-inspection version comprised only annexures to the applications; no portions of the actual licence applications were included. In respect of Latiano's application, Peermont contended that substantial portions were omitted or redacted. The public-inspection version left out not only its executive summary and its 'strong motivation' for being permitted to operate a bingo hall in the same town as a casino, but also the amount and details of the capital investment in the project, the number of bingo seats applied for; the split between EBTs and traditional paper bingo, and the name of the gaming-machine supplier that would provide EBTs to the premises.

[37] This is how the Board went about this aspect. It relied upon paragraph 4.6 of the amended RFA, which sets out the minimum information required for purposes of lodging an application for a licence. It divided the information in two parts. Part 1 relates to information about:

'i) Consolidated and costed Business plan in response to this RFA
ii) Project models and plans (interior and exterior)
iii) Land and zoning rights
iv) Property ownership and/or lease agreements
v) Shareholding and Corporate structure
vi) Shareholders agreements
vii) Business Entity Disclosure Form

viii) Copies of prescribed notices
ix) Confirmation of payment of prescribed fees
x) Bingo Operation Location Plan
xi) Floor plan as per Rule 13.05
xii) Financial statements (latest audited)
xiii) Copies of liquor and other relevant Licenses (proof of application)
xiv) Original Tax Clearance Certificate
xv) Valid business registration (CIPRO)
xvi) Third party agreements (if applicable)

b) Personal History Disclosures.'

[38] In part 2, the Board determined which information from the above list, needed to be available for public inspection. It excluded from public inspection, information relating to (a) consolidated and costed business plan in response to the RFA; (b) project models and plans; (c) shareholders agreements; (d) confirmation of payment of prescribed fees; (e) financial statements; (f) valid business registration (CIPRO); and (g) personal history disclosures. The Board determined that that information was confidential, and did not need to form part of the documents which must otherwise be available for public inspection.

[39] The result was that part 2 of paragraph 4.6 of the amended RFA provided for public view inspection in respect of:

(a) Business entity disclosure form;
(b) Copies of prescribed notices;
(c) Bingo Operation Location Plan;
(d) Floor plan as per Rule 13.05;
(e) Copies of liquor and other relevant licenses;
(f) Land and zoning rights;
(g) Property ownership and/or lease agreements;
(h) Shareholding and corporate structure;
(i) Original Tax Clearance Certificate;

(j) Third party agreements (if applicable).

These are the documents that lay for public inspection at the offices of the Board during the period 1 to 31 December 2015. It is common cause that Peermont did not avail itself of the opportunity to view the documents.

[40] In its answer to Peermont's complaint, the Board relied upon s 32 of the North West Act, which requires licence applications to be made available for inspection and consideration by interested parties. Section 32(1) requires the Board to hold any licence application submitted to it open for public inspection by interested persons. Section 32(2) obliges the Board to furnish a copy of such application to an interested party, on request and payment of the requisite fee. Section 32(3) creates limited and specific exceptions to these general disclosure requirements. It empowers the Board to determine, either on its own accord or on application by an applicant, that any information or document pertaining to the financial capacity, names of prospective employees and business plans of an applicant shall not be left open to the public inspection.

[41] The high court dealt summarily with Peermont's argument on three bases. First, it concluded that s 32 gives the Board the discretion to decide what information in the application should be availed to the public, and it was not for a party like Peermont to determine which information should not have been omitted. Second, the high court stated that Peermont has not been able to state why it failed to inspect the information that was availed, and lastly, that Peermont had failed to state the prejudice it had suffered by not having the said information.

[42] I understand Peermont's complaint slightly differently from the high court. Peermont objected to the manner in which the Board had decided in paragraph 4.6 of the amended RFA, to exclude certain information from public inspection. The gravamen of its complaint was that the substance had been stripped out of

the public-inspection versions of the applications. This, it contended, meant that a mandatory and material condition of the North West Act was not complied with. According to Peermont, it would have served little or no purpose for it to seek to view what it considered woefully inadequate information.

[43] To my mind, the main obstacle for Peermont is the wide and discretionary nature of the Board's powers set out in the amended RFA, where the Board had wide discretionary powers as to how it would assess applications for bingo licences. The amended RFA also contains clear, policy-laden ideals and objectives. Based on those powers, the Board determined, in terms of paragraph 4.6 of the amended RFA, which documents would be excluded from public inspection.

[44] As mentioned already, s 32(3) only permits the Board to exclude specified information that relates to the financial capacity of an applicant, the names of prospective employees or the applicant's business plan. Paragraph 4.6 of the amended RFA seems to go much further and excluded information beyond that mentioned envisaged in s 32(3). In its judgment, the high court seemed to endorse the Board's view that s 32(3) gave it a broad discretion to withhold information from public inspection. To that extent, it was clearly wrong. But, as mentioned already, the main obstacle in Peermont's path is that, absent an attack on the RFA on the basis of being *ultra vires* s 32, it stands and must be applied, even were it may (notionally) *ultra vires.*[3]

Unlawfulness of awarding the licenses

[45] Traditionally, Bingo is a game of chance played with cards. Each player matches numbers, pictures or symbols printed on the cards, with the numbers

[3] See *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) para 41.

drawn at random by the game host. The winner is the one who first matches the numbers. Over the years, the game has evolved and it is now played in whole or in part by electronic means. According to Peermont, the defining characteristic of bingo is the human element in matching the numbers, pictures or symbols on their card or device to that called out by the operator or announcer, in order to win against other human players.

[46] Peermont contended that the machines that the respondents intend using in their bingo halls, which it calls conventional EBTs, lack this characteristic because they entail automatic self-matching, and thus remove the human element from the game. Thus, they are illegal to operate within North West because the game they offer falls outside the definition of 'bingo' in the North West Act. According to Peermont, there was no dispute that the respondents intended using conventional EBTs, which 'have the look-and- feel as slot machines', whereas, in terms of both the National Gambling Act and the North West Act, only casino licensees can offer gambling slot machines. As mentioned already, Peermont operates two casinos in the North West – one in Klerksdorp and another in Mmabatho.

[47] According to Peermont, the Board was obliged, when granting the licences, to satisfy itself that the licences would be used for lawful purposes. It could only do so by considering the nature of the EBTs to be operated and whether or not they could lawfully be operated under a bingo licence. Therefore, by granting the bingo licences without considering the nature of the EBTs and the respondents' intended use, the Board failed to ensure that those EBTs met the definition in the North West Act. It thus failed to apply its mind to relevant considerations and committed a material error of law and acted unlawfully.

[48] I first consider whether EBTs offer the game of bingo as defined in the North West Act, after which I consider whether the Board was legally obliged to consider the type of EBTs when it awarded the licences.

Do EBTs offer the game of bingo as defined in the North West Act?

[49] A considerable plank of Peermont's argument in this regard was premised on the decision in *Akani Egoli (Pty) Ltd v Chairperson of the Gauteng Gambling Board* (Case number 17891/06, 29 January 2008) and the expert opinion of Professor Barr used in that case. It is therefore necessary to consider that decision more closely. The question in *Akani* was whether the Chief Executive Officer of the Gauteng Gambling Board was entitled to approve a particular electronic gaming machine, Real Touch Bingo (RTB), as a device that could be used in bingo outlets in Gauteng. The casino owners who opposed the approval of those machines, argued that RTB was nothing more than an ordinary slot machine, which bore no resemblance to the game of bingo, and was therefore not lawful for it to be approved for use in bingo halls. The court had to determine, on the basis of the Gauteng Gambling Act 4 of 1995 (the Gauteng Gambling Act), whether the game played on RTB was really the game of bingo. As the Gauteng Gambling Act did not have a definition of the term 'bingo', the court held that the Gauteng legislature had intended to conform to the definition of that term in the National Act.

[50] After considering the definition of 'bingo' in the National Act, the court analysed the manner in which the game was played on RTB, and had regard to the technical report of Professor Barr. It found that the player took no part in the actual game played on the RTB. He or she did no matching, either by electronic means or otherwise. In that regard, the court found that the RTB did not provide for an interactive game with player involvement in accordance with the definition of bingo in the National Act.

[51] On these considerations, the court concluded that the game played on the RTB was not bingo, and that the RTBs completely departed from traditional bingo and were intended deliberately to mimic casino slots. Therefore, the court reasoned, by approving those machines for use in licensed bingo premises, the Gauteng Gambling Board sanctioned unlawful conduct. It accordingly reviewed and set aside the decision of the Gauteng Gambling Board to approve the RTB for use in licensed bingo premises. Peermont relied heavily on these findings, and on the conclusions in related interdict judgments in the high court, in which the same approach was adopted in interpreting the definition of 'bingo' in the North West Act.

[52] In my view, *Akani* is distinguishable, and reliance on it in the interim interdict judgments was misconceived. The definition of 'bingo' in the National Act differs significantly from the definition in the North West Act. The National Act provides that:

'"bingo" means a game, including a game played in whole or in part by electronic means —

(a) that is played for consideration, using cards or other devices —

(i) that are divided into spaces each of which bears a different number, picture or symbol; and

(ii) with numbers, pictures or symbols arranged randomly such that each card or similar device contains a unique set of numbers, pictures or symbols;

(b) in which an operator or announcer calls or displays a series of numbers, pictures or symbols in random order and the players match each such number, picture or symbol on the card or device as it is called or displayed; and

(c) in which the player who is first to match all the spaces on the card or device, or who matches a specified set of numbers, pictures or symbols on the card or device, wins a prize, or any other substantially similar game declared to be bingo in terms of section 6(4).'

[53] Section 1 of the North West Act defines bingo as:

'the gambling game known as bingo and any similar gambling game which is played with cards (including electronic screens) on which appear a set of numbers or symbols and in the course

of which each player attempts to match for money, property, cheques or anything of value, all or a specified set of numbers or symbols on his or her cards to calls made by the operator and includes any similar gambling game operated in whole or in part by electronic means.'

[54] The difference between the National Act, and the North West Act, is that the latter has two parts. The second part is constituted by the words, 'and includes any similar gambling game operated in whole or in part by electronic means' at the end of the definition. Peermont's interpretation ignores this part, and caters for one type of the game contemplated in the first part of the definition. The requirement of 'similarity' envisages a second type of game to the one mentioned in the first part of the definition. This second type of game does not have to have all the attributes of the first type – only that it must be 'similar' to it.

[55] The second type of game is clearly broader than the traditional bingo game played electronically on electric screens, as this is already catered for in the first type of game. Furthermore, by providing that the game can be operated 'in whole or in part by electronic means' it is clearly contemplated that 'bingo' can be a wholly electronic game, with the player not doing anything other than to initiate the game. The effect of the second part of the definition is therefore that the legislature has broadened the definition 'bingo' to permit its playing by partially or wholly electronic means. Thus, the game offered by EBTs that do not involve player matching, fall within the second type of game. In light of the legislature's clear intention to broaden the definition of bingo, Peermont's insistence that 'bingo' should be interpreted restrictively in terms of how the game of bingo has traditionally been defined, is untenable.

[56] However, even what Peermont defines as conventional EBTs (without player matching) fall within the definition of 'bingo' in the North West Act, which is broad and was clearly intended to acknowledge technological

developments in the playing of the game of bingo. This conclusion is fortified by the definitions of 'gambling device' and 'gambling machine' in the North West Act. Gambling device means 'any equipment or thing used remotely or directly in connection with gambling or and including an electro-mechanical or electronic device, component or machine or gambling machine', while gambling machine means:

'any mechanical, electrical, video, electronic, electro-mechanical or other device, contrivance or machine which upon insertion of a coin, bank note, electronic credit card, debit card, smart card, token or similar object, or upon payment of any consideration is available to be played or operated and the playing or operation of which, whether by reason of the skill of the player or operator or the application of the element of chance or both, may deliver or entitle the person playing or operating the machine to receive cash, property, cheques, merchandise, credit, electronic credits, debits, tokens, tickets or anything of value but does not include an amusement machine.'

EBTs which fit into these definitions enable operation by electronic means in whole or in part in playing the game of bingo.

[57] In addition, Peermont's classification of certain equipment as 'conventional EBTs' is overbroad. Whether or not a particular EBT has been programmed in such a way that it functions in a manner that complies with the definition of bingo in the North West Act in every instance, will depend on an evaluation of the particular machine. This was the case in *Akani*, where there was evidence of how the RTB worked, something absent in the present case. It seems that these electronic terminals come in many configurations, shapes and sizes. One model of EBT could look different to another, run different hardware and software, and could offer a different type of electronic bingo, with a different look and feel. All these are technical and factual issues which are not capable of pre-judging without examination, as Peermont would have it.

[58] It follows that *Akani* offers no assistance on the question as to whether the EBTs likely to be used in conjunction with the licences offer bingo as defined in the North West Act, and are, therefore, lawful to use in the province. Equally, the pronouncements in the two related interdict judgments do not advance Peermont's case. They were made in the context of interim interdicts and the courts there could not make definitive findings on this issue. To the extent they purported to do so, their pronouncements should be regarded as obiter. In *National Treasury and Others v Opposition to Urban Tolling Alliance (OUTA) and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC) para 31, it was held that where an interim interdict was sought pending the institution and finalisation of a review application the court hearing the application for an interim 'need not determine the cogency of the review grounds.' It would not be appropriate to usurp the pending function of the review court and thereby anticipate its function.

Was it unlawful for the Board to award licences without considering the types of EBTs?

[59] It is common cause that when awarding the bingo licences, the Board did not consider the nature of the applicable EBTs that the respondents intended to use on the proposed licensed premises under the authority of the licences. The Board stated that that process is distinct from the licensing one, and would be undertaken at a later stage when the respondents submit the type of EBTs to be used in conjunction with their licences. For this, the Board relied upon regulation 145(1) of the North West Gambling Regulations of 2002 (the General Regulations),[4] which reads:

'Equipment to be of approved type and registered

(1) A licensee shall not keep or expose for play any equipment which may be used in the operation of a bingo game other than equipment which –

(a) has been supplied by a licensed manufacturer or supplier;

[4] North West Gambling Regulations, GN 353 of 2002, PG 5823, 5 November 2002.

(b) is identical in all material respects to equipment approved by the Board for distribution by the manufacturer or supplier; and
(c) in the case of such equipment as the Board may determine, has on application in the manner and form determined by the Board, been separately registered by the Board.'

[60] Peermont joined issue with the Board's reliance upon regulation 145, and made the following submissions. The regulation does not require the Board to assess whether bingo is played on the relevant machines. Its purpose is not to require the Board to assess whether the equipment in question complies with the Act's definition of 'bingo'. The regulation simply requires these machines to be supplied by licensed manufacturers or suppliers and to be identical to machines approved by the Board for distribution by the manufacturer or supplier. Such approval of manufacturer or supplier machines relates to the machines (the equipment) and not to the licensed activity for which the machines will be employed. Thus, the processes provided for under regulation 145 do not assess whether the machines in question offer the game of bingo. Instead, they are concerned with equipment standards.

[61] I do not agree with these submissions. The regulation expressly enjoins the Board to ensure that the bingo licensees use only the equipment which: (a) has been supplied by a licensed manufacturer or supplier; or (b) is similar to the equipment approved by the Board; or (c) has been separately registered by the Board. It is difficult to see how the Board can discharge this responsibility without enquiring, and determining, whether the equipment fits into the definition of 'bingo' in the North West Act. Viewed in this light, the regulation does require the Board to assess whether bingo is played on the relevant equipment. It is also significant that regulation 145 uses the word 'licensee', instead of 'applicant'. This fortifies the conclusion that the equipment-approval process is envisaged

only after a licence has been granted, and not at the time the grant of a licence is considered.

[62] This is also consistent with the amended RFA, which makes no reference to the type of EBT or bingo to be offered when licences are considered. This can only mean that it was envisaged that the approval of equipment was to be considered at a later stage. There is no suggestion that the Board intends to discard the process of equipment approval, and to simply allow the licensees to use unapproved equipment. Regulation 145 must be read together with s 65 of the North West Act, which enjoins the Board to ensure that all gaming machines must be separately approved and registered by it.

[63] Accordingly, when an applicant applies for a bingo licence, he or she is not required in the application to specify the type of EBT he or she intends to use, but to merely specify the number of EBTs or table games. The type of equipment to be used, and whether it offers 'bingo' as defined in the North West Act, is not relevant at this stage. It only becomes relevant when a licensee seeks the Board's approval for a specific equipment he or she intends to use, which application must be made under regulation 145(1). In that application, the licensee must motivate, and satisfy the Board, that the relevant equipment offers 'bingo' as defined in the North West Act. The Board may or may not be satisfied with the motivation. If not, the application would be rejected and the licensee will not be permitted to use the equipment in question for bingo.

[64] Viewed in this light, Peermont's challenge is premature as regards approvals yet to be made by the Board for the use of specific EBTs that any of the respondents might wish to use. It would have to wait for the Board's decision to approve specific equipment for use. It is not open for Peermont to anticipate the Board's decision in this regard with a pre-emptive strike. What is more,

Peermont has not suffered any prejudice as a result of the Board's adoption of the two-stage process. On this score, Peermont is in the same position as the applicant in *Normandien*, about which this Court appositely said (at para 34):

'Normandien has approached the court before any decision, according to it, has even been taken, and before it had suffered any prejudice on account of the actions complained of. It launched a pre-emptive strike against Rhino. It may perhaps have been best advised to "husband its powder" in anticipation of the battle that may (or may not) lie ahead.'

[65] In any event, it is common cause that most of the EBTs that Peermont objects to, have been approved by the Board for use in the North West since at least 2013. The Board approved the registration of two entities, International Game Technology-Africa (Pty) Limited (IGT) and SG Gaming Africa (Pty) Limited (SG) as manufacturers of the specific EBTs and approved their equipment for distribution to licensed bingo operators in the North West. To the extent Peermont is aggrieved by this decision, it seems common cause that Peermont has been aware of this fact, but did nothing to challenge the Board's decision to approve and authorise those EBTs. It cannot do so in these proceedings, where the two entities are not even cited.

Failure to consider impact on Peermont's casinos

[66] This complaint is predicated on Peermont's assertion that EBTs have the same look-and-feel as slot machines and provide a materially similar gaming experience, and therefore, would adversely affect its revenues and undermine its continued viability. In the amended RFA the licence applicants were required to provide strong motivation for establishing bingo operations in the same town as an existing casino. As mentioned already, Peermont operates casinos in Klerksdorp and Mmabatho, where Jonoforce and Latiano, respectively, had been granted bingo licences.

[67] To motivate its objection, Peermont relied, among others, on a report prepared by a firm of economists, RBB Economics (RBB). Peermont had commissioned that report to analyse the likely impact of a bingo operation with the relocation of the Galaxy bingo licence to Klerksdorp. The report concluded that there was a significant risk that a substantial portion of the revenues of Peermont's casino would be diverted to the bingo establishment, and there was a very significant risk that a material portion of its customers would no longer gamble at that casino to 'any appreciable extent'.

[68] In order to assist the Board in the evaluation of the licence applications, the Board commissioned Bohica Business Consulting CC (Bohica) to conduct probity reviews of the various applications and advise it accordingly. During May 2016, Bohica prepared a comprehensive report in respect of all the applications. The report dealt with various objections raised and the responses thereto, and provided recommendations to the Board. With specific regard to Peermont's objection based on the RBB report, Bohica found that the report provided no evidence of likely consumer trends and customer intentions. Bohica also found that Peermont's objection was anti-competitive. The Bohica report noted that the Board had given careful consideration to the socio-economic environment in determining how many Bingo licences were to be issued in different districts, including the impact that additional forms of gaming may have on communities.

[69] It is clear that the Board and Peermont approached this issue from different vantage points. Whereas Peermont viewed it from a purely narrow commercial interest, the Board considered broad objectives set out in the amended RFA, such as the need to empower historically disadvantaged businesses, diversification, the socio-economic environment and the impact that additional forms of gaming may have on communities. Thus, from Peermont's point of view, it seems that nothing short of the rejection of the licences would have satisfied its objection. This being

a review application, the question is whether the Board performed the function with which it was entrusted, and not whether its decision was correct. From a perusal of the minutes of its meeting of 10 June 2016, it seems that the Board considered Peermont's objection against the Bohica report, and other factors referred to earlier, and found it to be without merit.

[70] It is trite that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide. If he or she acts in good faith (and reasonably and rationally) a court of law cannot interfere.[5] The fact that the Board did not adopt Peermont's objections does not mean it did not consider the impact of the bingo operations on Peermont's casinos. It did, and balanced this against other relevant factors, which it was enjoined to consider. There is, therefore, similarly no merit in this ground of review.

Conclusion

[71] In all the circumstances, there is no merit in any of the three review grounds advanced by Peermont. They were correctly dismissed by both the Tribunal and the high court. The appeal must therefore fail and costs must follow the result.

[72] In the result, the appeal is dismissed with costs, including the costs of two counsel.

T MAKGOKA
JUDGE OF APPEAL

[5] *MEC for Environmental Affairs and Development Planning v Clairison's CC* [2013] ZASCA 82; [2013] 3 All SA 491 (SCA); 2013 (6) SA 235 (SCA) paras 18 and 23.

Musi AJA (Maya P, Makgoka, Gorven, Plasket JJA concurring)

[73] As explained above, the high court dismissed with costs, the review applications of the appellants, Galaxy Bingo Moruleng (Pty) Ltd (previously called Metro Gaming & Entertainment (Pty) Ltd) (Metro) and Galaxy North West (RF) (Pty) Ltd (collectively the Galaxy entities), to review and set aside the decisions of the North West Gambling Board (the Board), taken on 10 June 2016. The Board refused their respective applications for a bingo licence but granted it to the sixth respondent, (Jonoforce (Pty) Ltd (Jonoforce). They also unsuccessfully sought to review and set aside the decision of the North West Review Tribunal (the Tribunal), which had also dismissed their applications to review and set aside the Board's decisions.

[74] On 2 October 2015, the Board published a notice in the Provincial Gazette inviting interested parties to apply for bingo licences in the North West Province.[6] Two licences were to be awarded in the Kenneth Kaunda District Municipality.

[6] The invitation was published in terms of s 24 read with s 28 and s 52 of the North West Gambling Act 2 of 2001 (the Act). Section 24 reads:
'(1) The licences under this Act shall be –
(a) Casino licences
(b) Bingo licences
. . .
(2) No person shall make an application for a licence, and no such application shall be entertained, unless the application is lodged pursuant to and in accordance with a notice inviting applications which has been published by the Board in the *Provincial Gazette*, and which notice may state: -
(a) the type and number of licences to be issued and any conditions that may apply,
(b) the area to which the licence will relate,
(c) any requirements that may be necessary or desirable, and
(d) the evaluation criteria to be applied.
(3) All applications for licences shall be considered and disposed of according to the procedures determined by the Board.
(4) The Board may conduct or cause to be conducted any hearing, investigation or enquiry in relation to any application submitted under this Act.
(5) The Board shall not approve an application for any licence unless it is satisfied that –
(a) the funding of the business for which a licence is required is provided by a reputable person, body or institution,
(b) the premises in question are or will on completion be suitable for the purpose for which they will be used under the licence,
(c) the development is not undesirable within the specific geographic environment, with reference to social, religious, educational, cultural, economical, environmental and land-use aspects,

[75] The appellants showed interest and obtained a copy of the Request for Application (the RFA) from the Board. Upon receipt thereof, they noticed discrepancies and omissions in the RFA. They pointed these out to the Board as a result of which it issued several notices to all applicants, addressing some of the discrepancies and omissions.

[76] On 20 November 2015, the Galaxy entities submitted separate applications for the two bingo licences. They were both unsuccessful. The licences were awarded to Pioneer Bingo (NW) (Pty) Limited (Pioneer) and Jonoforce (Pty) Limited. Aggrieved by these decisions, the Galaxy entities launched internal review proceedings with the Tribunal.[7] Their applications were dismissed.

(d) the applicant has made full and frank disclosure of all matters prescribed or determined by the Board and the relevant information in respect of the application was made available for public scrutiny in terms of the provisions of this Act,
(e) the grant of the licence is in the public interest,
(f) the applicant qualifies in terms of section 25 and is not disqualified in terms of section 26.
(6) After consideration of an application the Board may grant or refuse or postpone the consideration of an application subject to any terms and conditions it may see fit.'

Section 28 provides:
'(1) Any application for the grant or renewal of a licence shall –
(a) be lodged in the manner and form determined by the Board,
(b) be accompanied by the documents and information determined by the Board and by the prescribed application fee or annual fee as the case may be, which shall not be refundable, and
(c) be invalid in the event of non-compliance with the foregoing in any respect.
(2) The applicant shall be liable for and pay the Board any reasonable costs incurred in connection with the publication and transmission of any notice contemplated in section 29(1).'

Section 52 reads:
'(1) No person shall maintain premises where the game of bingo is played, without a casino licence or a bingo licence, whether or not any such game is linked as contemplated in subsection (2).
(2) No person shall, by any electronic or similar method of linking, link licensed premises to any other premises so as to provide for the game of bingo to be played at such other premises without a bingo licence in respect of such premises.'

[7] The tribunal has power to review a decision or proceedings of the Board. Section 90 of the Act reads as follows:
'(1) Any person aggrieved by the decision or proceedings of the Board may by way of review proceedings to be prescribed, submit him or herself before a review tribunal in the manner prescribed by the Board in concurrence with the Responsible Member.
(2) The aggrieved person shall as soon as is reasonably possible and not later than thirty days after the Board has given its decision, inform the Board in writing of his or her intention to institute review proceedings as contemplated in subsection (1).
(3) The review tribunal referred to in subsection (1) shall be consist of three members appointed by the Responsible Member as follows:
(a) an advocate or retired judge who shall for the purposes of the review proceedings in terms of this section be appointed as the presiding officer,

[77] Dissatisfied with the decision of the Tribunal, the Galaxy entities took the decisions of the Board and the Tribunal on review in the high court, which also dismissed their applications with costs. That order is the subject of this appeal, with the leave of this Court. It must be mentioned that in the high court, the Galaxy entities abandoned the challenge to the decision in respect of Pioneer, and only sought to review the awarding of the licence to Jonoforce.

[78] The powers and functions of the Board are set out in s 4 of the North West Act. Section 4(1) reads as follows:

'(1) The powers and functions of the Board shall be –

(a) to oversee gambling activities in the Province;

(b) to advise the Responsible Member or furnish a report or recommendation to the Responsible Member on any matter referred to the Board by the Responsible Member for consideration and arising from the application of this Act relating to the control of gambling in the Province;

(c) to exercise such powers and perform such functions and duties as may be assigned to the Board in terms of this Act or any other law; and in particular to –

(i) invite applications for licences in terms of this Act;

(ii) consider and dispose of applications for licences in such manner and at such time and place as it may from time to time determine;

(iii) grant, renew, amend, refuse, suspend or revoke licences under this Act;

(iv) impose conditions in respect of any licence at any time;

. . .

(b) one member designated by the National Gambling Board from the staff of the said Board, and
(c) one member appointed on the basis of having either proven business acumen, or who is otherwise suitable for appointment as a member of the tribunal.
(4) The procedure to be followed in connection with the hearing of the review lodged in terms of this section, shall be as prescribed.
(5) The aggrieved person may in person or through a legal representative appear before the review tribunal.
(6) The tribunal hearing the review under this section may:
(a) confirm or set aside the decision or proceedings of the Board, or
(b) remit the matter to the Board with an order to take a decision in accordance with the correct procedure, or
(d) such a decision as in its opinion ought to have been given by the Board and direct the Board to do everything necessary to give effect to that decision.
(7) Members of the tribunal who are not in the full-time employment of the State, shall be paid such remuneration and allowances as the Responsible Member may from time to time determine with the concurrence of the Member of the Executive Council responsible for Finance.'

(xxviii) consult with any person or employ consultants regarding any matter relevant to the performance of its functions on such terms and conditions as the Board may determine.'

[79] The Board issued a Request for Applications (the RFA) in accordance with the prescripts of the Act. It is not disputed that the Board did so legally. The RFA has not been challenged by the appellants. The North West Act, the regulations published pursuant thereto, and the RFA therefore constitute the framework or system within which applications for bingo licences had to be submitted, evaluated and awarded.[8]

[80] In the amended RFA the board set out the objectives of licensing operations, the principles applicable to bingo operations, the criteria for evaluation of bingo licence applications, and the minimum requirements for purposes of lodging an application for a bingo operator licence. All the parties acted pursuant to the prescripts of the RFA.

[81] The review was launched in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) which, inter alia, provides as follows:

'(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if –

(a) the administrator who took it –

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

[8] *Allpay Consolidated Investment Holdings (Pty) Ltd Others v Chief Executive Officer of the South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) para 38.

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken –

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself –

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to –

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.'

[82] The Galaxy entities raised four grounds of review. First, they contended that the Board withheld important parts of Jonoforce's application from public inspection, in a procedurally unfair manner in contravention of s 32(3)*(a)* and 24(5)*(d)* of the North West Act. Second, they alleged that their applications were in almost every relevant metric, objectively superior, or similar to Jonoforce's application and that the scoring which resulted in Jonoforce receiving higher

points than them, was irrational and unreasonable, alternatively arbitrary and capricious. They also pointed out that the Board miscalculated Metro's score, which means that the Board's decision was influenced by a mistake of fact. Third, they asserted that the Board's reasons do not accord with the transcript and minutes of the Board's meeting and therefore, appear contrived. Fourth, they alleged that the Board was biased against them. I now consider the grounds of review.

Jonoforce's public inspection documents

[83] The appellants stated that Jonoforce's public inspection version contained only annexures to its application and that it did not contain the substance of the application or an executive summary. The appellants asserted that the public inspection version rendered the Jonoforce application insufficient and that the Board should not have considered it because it was unlawful and irregular to do so. They argued that the nature of the public inspection version of Jonoforce's application rendered the Board's decision reviewable because:

(a) it was contrary to s 32(3)*(a)* of the North West Act and paragraph 6.3 of the RFA;

(b) it was contrary to paragraph 5.2.5(b) of the RFA; and

(c) it rendered the Board's decision procedurally unfair, as they were not given reasonable opportunity to make informed and meaningful representations on the application.

[84] Section 32(3)*(a)* of the North West Act states that:

'(3) The Board may determine that –

(a) any document or information relating to the financial capacity of any person participating in an application, to the names of prospective employees or to the business plans of an applicant, shall not be open to public inspection, provided such information can be separated from the remainder of the application and is marked confidential.'

[85] Paragraph 6.3 of the RFA reads as follows:

'Confidentiality

In terms of the provisions of section 32(3) of the Act, an applicant may in the application concerned, identify any document or information included in the application, which in the opinion of the applicant is confidential or should for any reason not be disclosed to the public and show cause why the Board may determine why such document or information should not be open to public inspection.

Applicants are therefore, required to submit a list containing all information deemed confidential, as well as the reasons why such information should not be disclosed, in terms of clause 3.3 herein.

In terms of the Act, the Board may, further, determine that any document or information relating to the financial capacity of any person participating in an application, to the names of prospective employees or the business plans of an applicant, shall not be open to public inspection, provided such document or information can be separated from the remainder of the application and is marked confidential.'

[86] In terms of s 32(3) of the North West Act, an applicant may identify any document or information included in the application, which in the applicant's opinion, is confidential or should, for any reason, not be disclosed to the public and show cause why the Board may determine why such document or information should not be open to public inspection. All applicants were required to submit a list containing all information deemed confidential, as well as the reasons why such information should not be disclosed in terms of s 32(3). In terms of s 32(3) of the Act, the Board may, further, determine that any document or information relating to the financial capacity of any person participating in the application, the names of prospective employees or the business plans of an applicant, shall not be open to public inspection, provided such document or information can be separated from the remainder of the application and is marked confidential.

[87] The appellants contended that the Board sealed more than the categories of information than was permitted by the Act. Additionally, so went the argument,

what was sealed could not be separated from what remained because what remained gave almost no useful information as to the nature of Jonoforce's application.

[88] The Board contended that it decided which portions of the applications ought to be made available for public inspection. It asserted that s 28(1) gives it the power to decide the manner and form in which an application for a licence should be made. It pointed out that it made such determination in paragraph 4.6 of the RFA. Paragraph 4.6 divides the required information into two parts. Part one deals with the detailed application and part two with the portion that will be made available for public inspection. The Board further contended that the appellants were given the opportunity to object to the information made available for public inspection but they did not do so.

[89] Jonoforce contended that its public inspection copy contained all the information required in paragraph 4.6 of the RFA. However, Jonoforce admitted that it did not include its executive summary in its public inspection version, and that on this score, it did not comply with paragraph 5.2.5(b) of the RFA.

[90] The Tribunal was persuaded that the Galaxy entities failed to establish that Jonoforce's application failed to meet the criteria set out in the RFA read together with the applicable provisions of the North West Act. Although the Galaxy entities pressed this ground of review in the high court, that court neither discussed nor analysed it.

[91] Section 24(5)*(d)* of the North West Act provides that the Board shall not approve an application for any licence unless the applicant has made full and frank disclosure of all matters prescribed or determined by the Board and the relevant information of the application was made available for public scrutiny in

terms of the provisions of the North West Act. In terms of s 32(1) any application, representations, responses and further information lodged shall be open for public inspection by interested persons during the normal office hours of the Board.

[92] Paragraph 5.2.5(b) of the RFA required the content of the public viewing documents to be the same as in paragraph 5.2.2 of the RFA. Paragraph 5.2.2 reads as follows:

'5.2.2 Executive Summary

The Executive Summary in the proposal should provide a synopsis of the key aspects and benefits of the applicant's proposed business operation.

The Key aspects of the proposed project should be clearly described, taking into account amongst others the evaluation criteria, including the following information where applicable:

(a) details of the project team;

(b) related managerial experience;

(c) summary of business plan;

(d) financial and funding model or strategy, including a summary of the sourcing, level and nature of financing and the ability to meet financial obligations;

(e) details of any contract entered into between the applicant and an agency/site, if any;

(f) a summary of the estimated financial returns to the applicant from the operation;

(g) a summary of the key socio-economic benefits of the project to citizens of the North West Province;

(h) a summary of the estimated revenue to the provincial government in respect of gambling taxes.'

[93] Paragraph 4.6 of the RFA sets out the minimum information required for purposes of lodging an application for a bingo operator licence. It is common cause that Jonoforce complied with paragraph 4.6 and submitted all the information required in terms thereof.

[94] It is clear from s 24(5) that the Board must be satisfied that the requirements stated therein were met before it can approve any licence. The Board set out the

minimum requirements for purposes of lodging an application for a bingo operator licence in the RFA. The Board was satisfied that Jonoforce complied with the prescripts of the RFA. The Board did not regard the failure to include the executive summary in the public inspection version as material. It was satisfied that the relevant information in respect of the application was made available for public scrutiny.

[95] The Galaxy entities admit that they did not object to Jonoforce's application during the public hearings. They left the public hearing session after making their presentation but before Jonoforce had done so. They state that they did not see the need to robustly challenge the Jonoforce application prior to the decision to grant the licence to Jonoforce, as, according to them, Jonoforce's public inspection version was hopelessly non-compliant and they expected the Board to reject it outright. They state that had a proper public inspection copy been made available they would have been apprised of what Jonoforce's application actually contained and would have made submissions with regard to its deficiencies.

[96] I am of the view that the Galaxy entities had sufficient and reasonable opportunity to make representations and challenge Jonoforce's application. They deliberately decided not to. A party should not be allowed to eschew a process that is geared at achieving transparency, accountability and equity only to demand its benefits after an unfavourable decision is taken. The Galaxy entities made an election and they must be held to it. In *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[9] the principle was stated thus:

[9] *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2008] ZACC 16; 2009 (1) SA 390 (CC); [2008] 12 BLLR 1129 (CC); (2008) 29 ILJ 2507 (CC); 2009 (2) BCLR 111 (CC).

'The principle of the right of election is a fundamental one in our law . . . When exercising an election, the law does not allow a party to blow hot and cold. A right of election, once exercised, is irrevocable particularly when the *volte face* is prejudicial or is unfair to another.'[10]

[97] The Galaxy entities did not contend that they were prejudiced by the exclusion of the executive summary from Jonoforce's public inspection version. Their *volte face* will be unfair towards Jonoforce, for they had enough opportunity to raise their objections at the public hearing.

[98] In any event, the Board's failure to textually and legalistically comply with s 32(2) is not fatal if one has regard to the purpose of the section. The test as formulated in *African Christian Democratic Party v Electoral Commission*[11] is whether what the Board did constituted compliance with s 32(2) viewed in the light of its purpose. The purpose of the section is to ensure fairness and transparency in the allocation of Bingo licences by giving interested parties an opportunity to object to an application, whilst protecting the applicant against disclosure of confidential information. Any person, including the Galaxy entities, could request further information about Jonoforce's application before or during the public hearings. None of them availed themselves of the opportunity to do so. In my view the purpose of the section was achieved.

[99] The Galaxy entities contended that Jonoforce was not candid in its application because it stated that its directors had 'no criminal history or prior convictions', whereas two of its directors had previous convictions. They asserted that the Board could not have been satisfied that Jonoforce made full and frank disclosure. I am of the view that Galaxy entities are clutching at straws with this assertion. That fact was disclosed in Jonoforce's application in the company

[10] Fn 9 above para 54.
[11] *African Christian Democratic Party v The Electoral Commission and Others* [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC) at para 25.

declaration. The Board was therefore aware of this fact, and clearly did not consider it a hindrance when it made its decision to award Jonoforce the licence.

[100] I am of the view that the Board complied with the Act and the RFA. It adopted a fair procedure and complied with all the terms and conditions in the RFA. Its decision was therefore rational and reasonable. This review ground ought to fail.

Objective superiority

[101] The appellants contended that their applications were objectively superior in each critical area indicated in the RFA. The seven critical areas and the scores allocated to each are depicted below.

NO	EVALUATION CONSIDERATION	RATING/SCORE
1	Management competence	20
2	Viability and financing of the operation	20
3	Broad Based Black Economic Empowerment commitments	20
4	Measures to create sustainable employment opportunities	15
5	Socio-Economic Development	10
6	Employment Practices and Human Resources Development Plans	10
7	Security Measures	5
TOTAL SCORE		**100**

[102] According to the Galaxy entities, the points allocated to Jonoforce, given their accepted superiority were unreasonable and irrational alternatively arbitrary or capricious. Jonoforce obtained 546, Metro 445 and Galaxy Bingo 459.

[103] The Board denied the Galaxy entities' assertions and pointed out that it applied its mind to all the applications and exercised a discretion as to who should

be awarded a licence. It stated that the Act and the RFA gave it a very wide discretion to evaluate the information submitted by an applicant and that it procured the services of Bohica Business Consultants CC (Bohica) in order to assist and advise it on the evaluation of the applications.

[104] Jonoforce conceded that the Galaxy entities' bid was superior, in certain areas. It attributed this to the fact that the Galaxy entities are well established gambling industry players, with access to financial muscle, human resources and technical support. Jonoforce, on the other hand, is a new entrant in the bingo field and it understandably does not have access to similar resources.

[105] The Tribunal found that the transformation of the gambling industry was a legitimate goal that should be pursued to broaden access to opportunities for all, especially previously disadvantaged people. Additionally, but allied to this, it found that diversifying and expanding the existing gambling sector is a compelling legitimate statutory purpose. On these considerations, it concluded that the Board's decision was rational.

[106] The high court found that the Board's reasoning for allowing new entrants in the gambling sector was sensible and could prevent monopolies. It further found that the Board possesses the necessary expertise 'in determining the award of licences in the province'. It too, held that the granting of a licence to Jonoforce was reasonable.

[107] The Galaxy entities argued that the high court erred in finding that the Board's decision was consonant with the need to allow new entrants. They submitted that the high court erred in finding that the Board acted reasonably and by deferring to the Board.

[108] The essence of this ground of review is that the Board did not assess the facts properly. The Galaxy entities required the high court to evaluate and compare their applications with Jonoforce's. According to them, this exercise would have shown that their applications were superior to that of Jonoforce. The appellants set out, at length, all the facts that make their applications objectively superior.

[109] It should be remembered that the high court had to adjudicate a review and not an appeal. In *Pepcor Retirement Fund and Another v Financial Services Board and Another*,[12] this Court stated:

'Recognition of material mistake of fact as a potential ground of review obviously has its dangers. It should not be permitted to be misused in such a way as to blur, far less eliminate, the fundamental distinction in our law between two distinct forms of relief: appeal and review. For example, where both the power to determine what facts are relevant to the making of a decision, and the power to determine whether or not they exist, has been entrusted to a particular functionary (be it a person or a body of persons), it would not be possible to review and set aside its decision merely because the reviewing court considers that the functionary was mistaken either in its assessment of what facts were relevant, or in concluding that the facts exist. If it were, there would be no point in preserving the time-honoured and socially necessary separate and distinct forms of relief which the remedies of appeal and review provide.'[13]

[110] A reviewing court should always guard against usurping the functions and decision-making powers of administrative agencies.[14] In *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism*

[12] *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA); [2003] 3 All SA 21 (SCA).
[13] Ibid para 48.
[14] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 45.

and Environmental affairs: KwaZulu-Natal Provincial Government and Another,[15] this Court, with reference to mistake of fact, said the following:

'I consider that the present state of the law in this regard, is correctly set out in the following *dictum*, in the case of *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* 2019 (1) SA 204 (GJ) para 12…:

"In sum, a court may interfere where functionary exercises a competence to decide facts but in doing so fails to get the facts right in rendering a decision, provided the facts are material, were established, and met a threshold of objective verifiability. That is to say, an error as to material facts that are not objectively contestable is a reviewable error. The exercise of judgement by the functionary in considering the facts, such as the assessment of contested evidence or the weighing of evidence, is not reviewable, even if the court would have reached a different view on these matters were it vested with original competence to find the facts."'[16]

[111] The facts on which the Galaxy entities rely to show their objective superiority are not uncontested. With regard to management competence, Jonoforce points out that the Galaxy entities do not assert that its management competence and experience was deficient or rendered it unqualified to be awarded a bingo licence. Jonoforce explains that the Galaxy entities used the same management team at all its bingo operations. This team, according to Jonoforce, is not directly involved in the day-to-day individual bingo sub-operations. The team also charges 5% of gross gaming revenue management from each bingo operator. Jonoforce stated that, although the appellants have greater access to funding and resources, its management team consists of successful entrepreneurs and it is self-funded through loans from its non-Previously Disadvantaged Individuals (PDI) shareholders.

[15] *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government and Another* [2020] ZASCA 39; [2020] 2 All SA 713 (SCA); 2020 (4) SA 453 (SCA); 2020 (7) BCLR 789 (SCA).
[16] Ibid para 23.

[112] The Galaxy entities also asserted that the 300m² site secured by Jonoforce is hopelessly inadequate for bingo operations. Jonoforce explains that the size of its site was a deliberate choice to balance a number of competing priorities, including securing the best location. The Board accepted this, and there is nothing reviewable about its decision.

[113] The Galaxy entities proffered the same gross gaming revenue projections for two different applications at two different municipalities. Bohica analysed all the applications and found Jonoforce's to be adequate. Jonoforce also advanced the Board's objective of opening and diversifying the gambling sector in the North-West Province.

[114] It is clear that the factual basis for the alleged objective superiority is heavily contested. Were this Court to delve into each and every aspect which the appellants alleged show their superiority with a view of upsetting the decision of the Board, the distinction between appeal and review would be impermissibly blurred.

[115] The Galaxy entities also challenged the Board's scoring. They argued that the scores of some Board members were not rationally connected to the information before the Board. In this regard, the Galaxy entities singled out one of the Board members, Mr Kunene, who gave Jonoforce a perfect score of 100.

[116] The Board consists of a group of people with diverse backgrounds and experiences.[17] Their judgment and allocation of points would inevitably be

[17] In terms of section 5 of the Act the Board shall consist of nine members whom –
'*(a)* one member shall be qualified to be admitted to practice as a legal practitioner and after having so qualified, practiced as a legal practitioner or performed services related to the application or administration of the law,
(b) one member shall be an accountant or auditor registered in terms of the Public Accountants' and Auditors' Act, 1991 (Act No. 80 of 1991), with experience in public practice as defined in section 1 of that Act,
(c) one member shall be appointed by virtue of his or her knowledge and experience in the field of welfare or socio-economic development,

influenced by their backgrounds. One factor may weigh heavy for one but not for the other. The Galaxy entities failed to mention that Mr Kunene gave Galaxy North West 98 out of 100. It is clear that he gave very high scores relative to the other Board members. The Galaxy entities contended that the scores should be predictable and within a particular range.

[117] The Tribunal found that the difference in scoring is indicative of the fact that the Board members applied their minds to the subject matter and '[t]o expect similar and/or equivalent scoring from persons of diverse professional and social backgrounds would undermine the requirements for diversity'. Unsurprisingly, the Galaxy entities do not offer any support for their submission of predictability. However, the fact that the Board members allocated different scores or that their respective scores differ greatly does not necessarily make the decision irrational. The scoring of the individual members was not the sole criterion.

[118] The Board miscalculated Metro's score by reflecting its score as 433 instead of 445. The Galaxy entities contend that as a result, the Board's decision was influenced by a mistake of fact. The correct score would not have made a difference with regard to the decision as Jonoforce's score would still be higher

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(d) one member shall be appointed by virtue of his or her knowledge and active involvement in the tourism industry,
(e) one member shall be designated by the Member of the Executive Council responsible for Economic Development and Tourism,
(f) one member shall be designated by the Member of the Executive Council responsible for Safety and Liaison;
(g) one member shall be designated by the Member of the Executive Council responsible for Finance and Provincial Treasury,
(h) two members shall be appointed on the basis of having either proven business acumen, a knowledge of the gambling industry, or who are otherwise suitable for appointment as members of the Board.
(2) In addition, the Chief Executive Officer of the Board shall *ex officio* be a member of the Board but shall not be entitled to vote.
(3) A member of the Board other than a member referred to in paragraphs *(e)*, *(f)* or *(g)* of subsection (1) shall not be appointed until the Responsible Member has invited interested parties by notice in the *Provincial Gazette* and an advertisement in the media to nominate within 21 days of the publication of such notice candidates for consideration.
. . .
(11) A member of the Board shall before assuming office, make and subscribe an oath or solemn affirmation in the form determined by the Responsible Member.'

than Metro's score. Although this was a mistake of fact, it was not a material mistake as the scores were not the only criterion used to award licences. The Board's decision was not materially influenced by this mistake.

[119] Metro also bemoaned the fact that it received different scores for different applications. In my view, there is nothing untoward about this. The different applications were for different sites (Klerksdorp and Mahikeng) and Metro was competing with a different entity (Latiano) at Mahikeng. It is, therefore, understandable that it was evaluated and scored relative to the other competitor.

[120] Therefore, the high court's conclusion that the Board's decision on this score was reasonable, is unassailable. Likewise, the high court's conclusion that the Board properly considered the review grounds discussed above is correct.

Reasons

[121] As stated above, the Board gave the reasons for its decisions to the Galaxy entities. Most of the reasons overlap. With regard to both Galaxy entities, the Board stated that in evaluating the applications it considered the objectives of the RFA which sought to:

(a) diversify and expand existing gambling activities and provide additional and alternative forms of leisure and entertainment to all areas in the province, in particular, townships and rural communities; and

(b) open the sector and create opportunities for direct participation by local previously disadvantaged individuals and Small Medium and Micro size entrepreneurs, in the gambling industry.

[122] The Board indicated that in granting the applications to the successful applicants it considered that this would diversify, open and create opportunities for direct participation by local previously disadvantaged individuals.

Furthermore, so the Board stated, in determining the best application, it took into consideration all factors that would make an application exceptional in comparison to all others; and it could not find any factors that made the Galaxy entities' bids exceptional.

[123] With regard to Metro, the Board pointed out that during the evaluation of its applications in respect of Klerksdorp (Dr Kenneth Kaunda District Municipality) and Mmabatho (Ngaka Modiri Molema District Municipality), the Board established that it stated the same gross gaming revenue projections for both applications, whereas the demographics and the economies of scale were different. It stated that because the two municipalities are vastly different and thus require different financial projections for operating a bingo hall, Metro had failed to account and justify the similarity in the financial projections, during the public hearing.

[124] The Galaxy entities contended that the reasons proffered by the Board are inconsistent with the transcript of the Board's meeting and the minutes thereof. It contended that the Board used the scores allocated for each critical area as the basis for granting the respective licences. They submitted that the Board, in considering new entrants, failed to apply its mind and took an irrelevant consideration into account. It argued that the phrase 'new entrant' does not appear in the RFA at all.

[125] The Tribunal found that the appellant's attack of the Board's policy decisions should be rejected. It found that the policy objective of the RFA also seeks to achieve the ideals of Broad Based Black Economic Empowerment (B-BBEE) as set out in the Broad Based Black Economic Empowerment Act 53 of 2003.

[126] The high court, with reference to clause 1.2 of the RFA, stated that it was important for the Board to exercise its discretion in such a way as to ensure that the main objectives of the RFA were met. It found that it would serve no purpose to allow monopoly in the industry and not allow new entrants. It concluded that the Galaxy entities did not establish sufficient grounds to have the Board's decision reviewed and set aside.

[127] While it is correct that the RFA does not make specific reference to 'new entrants', paragraph 1.2 of the RFA states, inter alia, that the Board realises that introducing additional bingo licences in the province will, amongst others, assist in achieving the objectives of diversification, expansion and opening the sector to create opportunities for direct participation of local previously disadvantaged individuals and small businesses. Furthermore, it stated that it endeavoured to achieve and promote the ideals of B-BBEE, with the view to increasing the participation of women and designated groups in the sector.

[128] In my view, properly construed, paragraph 1.2 of the RFA sought to allow new entrants into the gambling business. It is inconceivable that the objectives of diversification, expansion and opening the sector can be achieved without a concerted effort to allow new players into the industry. It is also rational and reasonable that the Board would look at the number of women in the B-BBEE structure of an applicant, because the stated objective was to increase the participation of women.

[129] The Galaxy entities contended that the second reason for the rejection of their applications is unsustainable and lawfully unjustifiable. They argued, first, that it was not necessary for an application to be exceptional and secondly, if it was a requirement then their applications were exceptional.

[130] Clause 4.7 of the RFA states:

'The Board shall in evaluating the applications for a Bingo Operator licence not be limited to the above criteria and shall take into consideration all factors that may make the bid exceptional in comparison to all other applications in determining the best bid.'

[131] The Board explained that the arithmetic scoring was not the sole evaluation criterion. It pointed out that it evaluated the appellants' applications in accordance with the permissible criteria set out in the RFA. As indicated above, one such criterion, on which Metro was found wanting, was its gross gaming revenue projections for different sites.

[132] The RFA, which stands unchallenged, clearly stated that the critical areas were additional considerations for evaluation and all the applicants were aware of this. The site of the bingo operations is an obvious important consideration but no score was allocated therefor. This is so, according to the Board, because it was part of the total evaluation process. This cannot be gainsaid.

[133] The minutes and the transcript of the Board meeting of 10 June 2016 both reflect that the issue relating to Metro's gross gaming revenue was highlighted and seen as an obstacle. The minutes reads:

'The meeting further highlighted that Metro Gaming and Entertainment (Pty) Ltd [Galaxy Bingo Moruleng] stated the same gross gaming revenue projections in respect of Klerksdorp, (Dr. Kenneth Kaunda Municipality) and Mmabatho (Ngaka Modiri Molema) whereas the demographics and the economies of scale are distinct.'

The minutes reflected that:

'The meeting agreed that the successful applicants met the minimum requirements of the evaluation criteria, and further highlighted that the bids by Jonoforce (Pty) Ltd . . . satisfied the objectives of the RFA and further met the requirement of exceptional bid as per the RFA and further agreed that granting applications to Jonoforce (Pty) Ltd and Pioneer Bingo (NW) (Pty) Ltd will diversify, open the sector and create opportunities for direct participation by Local Previously Disadvantaged Individuals.'

[134] The Board was clearly not convinced by the explanation given by Metro. The Board regarded it as an important factor militating against granting the licence to Metro. Although the Board did not mention the scores in its reasons, one can reasonably accept that the scores were but one of the considerations it took into account.

Bias

[135] The Galaxy entities contended that the Board was biased or reasonably appeared to be biased against them. They submitted that the evidence showed a concerted, though ham-fisted, attempt to award the licence to Jonoforce at all costs, regardless of its inferior application. In support of this contention, the Galaxy entities alleged that:

(a) Jonoforce obtained significantly higher scores for metrics where it was objectively and numerically inferior to them;

(b) the Board unfairly took issue with their financial projections;

(c) the report showed procedural bias against them when it failed to respond to their letters; and

(d) the Board was biased against them during the public hearings.

[136] The Tribunal considered the complaints of the Galaxy entities and concluded that objectively speaking there is no merit in any of them. The high court also found that there were no facts to support the allegations of bias.

[137] It is trite that the test for bias is objective and the onus of establishing it is on the Galaxy entities. The test, as formulated in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (*SARFU*),[18] is whether a reasonable, objective and informed person would on the

[18] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* – Judgment on recusal application 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC).

correct facts reasonably apprehend that the adjudicator did not bring an impartial mind to bear on the adjudication of the matter.[19]

Jonoforce's higher scores

[138] I have dealt with this issue above. The Galaxy entities did not put forward any evidence or reason why any individual Board member or the Board as a collective would be biased against them. The scores were allocated by individual members of the Board for each critical area. The allocation of significantly higher scores is not necessarily indicative of bias and the Galaxy entities did not show why the scores are indicative of bias in this matter.

Financial projections

[139] The Galaxy entities alleged that the Board unreasonably took issue with Metro's financial projections while ignoring the fact that Jonoforce's projections showed a business barely turning a profit after five years. This submission is not entirely correct. Jonoforce's projections show that it would be profitable in the third year. The fact that the Board took issue with Metro's gross gambling revenue projections is reasonable. The Board was dealing with two applications by the same entity for bingo licences at two different areas. It was only reasonable to ask why the gross gambling revenue projections for the different areas were the same.

Failure to respond to letters

[140] The Galaxy entities wrote several letters to the Board seeking clarification on certain aspects in the RFA. Instead of replying directly to them, the Board decided to issue general notices to all applicants clarifying some of the issues raised by the appellants. This was a practical way to deal with concerns raised as

[19] Fn 18 above para 48.

a general notice would draw the attention of all applicants to the concerns raised and addressed. The Galaxy entities were seemingly satisfied with the manner in which their queries were addressed. This is so because they did not correspond with the Board further on the issues raised in the letters.

Bias at public hearings

[141] This complaint relates to public hearings held on 23 and 24 May 2016. The purpose of the hearings was clearly for all the applicants to present their respective applications and for the Board members to ask questions, if any. The Galaxy entities were asked about the fact that different entities use the Galaxy Bingo name and branding. The Galaxy entities alleged that the Board was biased against them because other applicants were not asked about the difference between their company name and their trading name. Mr Sekgaphane, the former CEO of the Board, explained that the questions were asked in order to get clarification from the Galaxy entities regarding the use of the name Galaxy.

[142] The CEO stated that in corresponding with the Galaxy entities or members of their corporate structure the corporate entities' names were used interchangeably and this caused confusion. He also pointed out that the Galaxy entities submitted multiple applications for bingo licences and that the Board endeavoured to get clarification on the identity of the 'true faces behind the various corporate structures'. When the Galaxy entities answered that other companies also used trade names the Board pointed out to them that only one trading name 'Goldrush' was used by another applicant, whereas in the case of the Galaxy entities different trading names were used.

[143] I am of the view that this was in the circumstances a fair question and it does not exhibit any bias against the Galaxy entities. Their corporate structure is indeed complicated. In fact, the Tribunal also misunderstood their intricate

corporate structure, which is one of the issues taken by them against the Tribunal's decision. The questions regarding their intricate corporate structure and names used by the different entities were fair. Mr Mogapi, a Board member, specifically asked the Galaxy entities' representative whether the fact that Metro uses the Galaxy Gaming brand would not cause confusion. The insistence that the Metro Gaming Entertainment changed its name to Galaxy Bingo Moruleng (Pty) Ltd or display Metro Gaming and Entertainment signage is probably because of the confusing corporate structure rather than bias. The name change occurred after a licence was awarded to Metro and could not have influenced the decision not to grant the Galaxy entities licences.

[144] The Galaxy entities also complained that the CEO of the Board asked them a question about whether they agreed that the Board could impose conditions when granting a licence. This question was asked because there was, at the time, a live dispute between the Board and one of the Galaxy entities about the question whether the Board could impose conditions when granting a licence. This question was also reasonable under the circumstances.

[145] The Galaxy entities also complained that the Board asked them a question about the fact that they would be funded by way of an interest-free loan. The funding model was one of the critical areas of the evaluation. Granting a corporate entity an interest-free loan is indeed strange and questions to clarify that is not an indication of bias. It is inconceivable that a biased Board would grant Metro a bingo licence during the same sitting. The fact that it obtained a higher score than Latiano also shows a lack of bias. A reasonable person with knowledge of the facts would not apprehend bias or make such an allegation. The Galaxy entities' apprehension of bias was therefore unreasonable and the Tribunal and the high court correctly dismissed this review ground.

Review against the Tribunal

[146] The appellants requested the high court to review and set aside the decision of the Tribunal on several bases. They contended that the Tribunal:

(a) misconceived its powers;

(b) applied the incorrect review standards;

(c) did not properly consider its arguments on bias; applied the wrong standard in determining whether to grant an order of substitution; and

(d) failed to apply its mind.

[147] The high court found that the issue relating to the Tribunal misconceiving its powers had 'nothing to do with the decision of the tribunal to uphold the decision of the board and as such takes the matter nowhere'. It also found that there was no reason to review the Tribunal's decision on the ground of it applying the incorrect review standard. On the issue of bias, it found that the Galaxy entities did not establish any facts to establish bias. Thus, it dismissed the review application against the decisions of the Tribunal.

Tribunal misconceived its powers

[148] The Tribunal found that s 90(1) of the North West Act gave it the power of a 'classical wider review'. The Galaxy entities agree with this finding. I will therefore accept the proposition for present purposes.

[149] The Galaxy entities contended that the Tribunal wrongly refused to interrogate the Board's decision by holding in various ways that it was required to defer to the Board. It submitted that the Tribunal therefore committed a material error of law. This submission is incorrect. The Tribunal did interrogate the Board's decision. There are instances in its decision where it found that the Board's decisions on different aspects were rational. It found that: (a) the RFA was a rational and legitimate policy of the Board; (b) the Board's decision to grant

the bingo licences to Jonoforce and Latiano was rational; and (c) the Tribunal should not substitute its opinion for that of the Board as the Board's decision was rational. The Tribunal made these findings after interrogating the Board's decisions. Besides, its power to decide the matter afresh would only arise if it found during the review process that any of the Board's decisions is one that a reasonable decision-maker could not reach.[20]

[150] It is correct, as the appellants contended, that the Tribunal relied on pre-constitutional cases when it adjudicated this matter. It found an administrative decision cannot be reviewed unless it is arbitrary, capricious, *mala fide* or so grossly unreasonable that it shows that the functionary did not apply its mind. It did not apply the 'reasonable decision-maker standard' or the standards set out in s 6 of PAJA. These permit both a reasonableness and rationality challenge, which can be taken cumulatively or in the alternative. The appropriate standard is dependent on the cause of action or the review ground utilised to challenge a decision or process.

[151] The Tribunal also used the rationality standard, which is lower than the reasonableness standard. It subjected both the procedure and the decisions of the Board to a rationality standard. In *National Energy Regulator of South Africa and Another v PG Group (Pty) Limited*[21] Khampepe J, writing for the majority, held:

'I do not believe that we can separate process rationality and substantive rationality in the way the second judgment purports to. The relevant question for rationality is whether the means (including the process of making a decision) are linked to the purpose or ends. To my mind, rationality necessarily, whether found in PAJA or anywhere else, must include some evaluation of process. If not, then we are simply asking whether a decision is right or wrong based on *post hoc* reasoning.

[20] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 44.
[21] *National Energy Regulator of South Africa and Another v PG Group (Pty) Limited and Others* [2019] ZACC 28; 2019 (10) BCLR 1185 (CC); 2020 (1) SA 450 (CC).

It is a natural and inescapable denouement that the process leading to the decision "must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred".
There is no reason why rationality under PAJA should be given a different (more restrictive) meaning. It follows that rationality under PAJA includes an assessment of whether the means (including everything done in the process of taking the decision) links to the end.'[22]

[152] A proper reading of the Tribunal's decision clearly shows that it objectively apprised the process and the decisions of the Board. It used the pre-*Bato Star* test by asking whether the decision was 'so grossly unreasonable'. This is a higher standard. As stated above the correct question is whether the decision is one which a reasonable decision-maker could not reach. The Tribunal's analysis and findings are consonant with a conclusion that the Board's decisions fall within a range of reasonable decisions that the Board could make.

[153] In *Bato Star* a reasonable decision is described thus:
'What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the court now have a substantive as well as procedural ingredient, the distinction between appeals and reviews continues to be significant.'[23]

[154] The Tribunal applied the wrong standard but it subjected the process and decision to a review. Its decision with regard to the Board's decision is one that a

[22] Fn 21 above para 48-50.
[23] Fn 21 above para 45.

reasonable decision-maker could reach. The Board's decision is also within the band of reasonable decisions that a reasonable decision-maker could reach.

[155] The Tribunal cannot be faulted for finding that it should be slow to interfere with the Board's decisions. The Tribunal was correct in showing deference to the Board. It is clear from its reasons that it did not rubberstamp unreasonable decisions and neither did it timidly accept them. It said:

'Given the fact and circumstances of [the appellants'] review applications the review Tribunal should not intervene with the decisions of the [the Board], more so, as there is no evidence before the Review Tribunal that the [Board] did not apply its mind to the licence applications that were before it.'

[156] The Tribunal indeed made a mistake by accepting that the applicant before it was only Metro. It constantly referred to 'the applicant' instead of 'the applicants', since it had two different entities before it as applicants. Furthermore, the Tribunal, in dismissing the review applications, described each as having been brought by 'the applicant'. The Galaxy entities submitted that these mistakes are indicative of the Tribunal's failure to apply its mind. The Tribunal was aware that it was dealing with two review applications brought by Metro and only one brought by Galaxy Bingo North West. It stated, in its decision, that 'the Applicant, Metro Gaming and Entertainment (Pty) Ltd "Metro" brings [these] review applications'. It referred to the sites. With regard to the Galaxy Bingo North West, the Tribunal properly referred to it and the fact that it brought a review application with regard to one application. This indicates that the Tribunal made genuine mistakes which are not necessarily indicative of it not applying its mind.

[157] For all of the above reasons, I am of the view that the appeal should be dismissed. There is no reason why the costs should not follow the result.

[158] As a result, the appeal is dismissed with costs, including the costs of two counsel.

C MUSI
ACTING JUDGE OF APPEAL

The Galaxy appeal (in *re* Latiano)

Musi AJA (Maya P, Makgoka, Gorven, Plasket JJA concurring)

[159] In this appeal, the appellant, Galaxy Bingo Moruleng (Pty) Ltd (previously called Metro Gaming & Entertainment (Pty) Ltd) (Metro)) is aggrieved by the decision of the Board declining its application for a bingo license and awarding such license to the sixth respondent, Latiano 560 (Pty) Ltd t/a Goldrush Bingo, North West (Latiano) in the Ngaka Modiri Molema District Municipality. After it received a formal letter of rejection from the Board and, later, reasons for the rejection, Metro launched an unsuccessful internal review to the North West Gambling Review Tribunal (the Tribunal), which dismissed its review application. It approached the court *a quo* seeking to review and set aside the decisions of the board and the tribunal. The application was dismissed.

[160] Metro raised three grounds of review against the Board's decision. First, that the Board incorrectly calculated Latiano's score and thereby committed a material mistake of fact as well as a failure to apply its mind properly to all the relevant considerations. Second, that the Board's reasons do not accord with the transcript and the minutes of the relevant Board meeting and appear contrived. Allied to this ground, that the Board took irrelevant considerations into account

and failed to take into account relevant considerations and that it acted unreasonably and irrationally. Third, that the Board was biased against Metro.

[161] The bias review ground, which was similar to the one raised in the Jonoforce appeal, was comprehensively discussed and definitively dealt with, and rejected, in that judgment and therefore, nothing more needs to be said about it in this judgment. It suffices to say that the reasons proffered on this aspect in the Jonoforce appeal apply with equal force to this appeal. I now turn to consider the remaining grounds of review, seriatim.

Board miscalculated Latiano's score

[162] The decision to award the license to Latiano was taken at the Board's meeting held on 10 June 2016. Six Board members allocated scores. Metro and Latiano's consolidated scores were incorrectly calculated as follows: Latiano 471 average 79 (471/6 = 78.5 rounded off to 79). Metro 470 average 78 (470/6 = 78.3 rounded off to 78). It is common cause that the correct consolidated scores were: Latiano 467 average 77.83 (467/6 = 77.83) and Metro 470 average 78.3 (470/6 = 78.3).

[163] Metro therefore achieved a higher score. The difference being, on the average score, 0.5. Metro contended that based on its superior score the licence ought to have been awarded to it because the scores were the sole criterion used in the allocation of licences. It stated that the minutes and the transcript of the meeting make it clear that the licenses were awarded based on the scores. It pointed out that the minutes reflected that:

'The meeting after considering the applications resolved that the following applications should be granted as per the allocated scores.'

[164] Metro further sought to rely on the remarks by Mr Sekgaphane, the Board's Chief Executive Officer (the CEO), when he explained the process to the Board members as follows:

'The elements [listed on the scorecards] that you find under these headings are elements that you find in the full reading of the RFA.

. . .

The last score sheet is the result, it's basically now going to tell us according to District Municipality, which applicant came top, second, third and fourth and in the RFA we said the evaluation of bids and the granting and the granting of licences will be on the best (indistinct) consideration, which basically means that the highest scored applicant will be given preference to be licensed …' (Appellant's emphasis.).

[165] The appellant also relied on the following extract from the transcript:

'CHAIRPERSON: … Can we then move to the next region, which is Ngaka Modiri Molema.

Latiano 79

Metro Gaming 78

Board members are you satisfied with that reflection?

BOARD MEMBERS AGREE.

CHAIRPERSON: Alright, thank you. Can we then move to the final region?'

[166] The Tribunal found that the scoring was used as a computation aid by the Board in the exercise of its discretion. Additionally, it found that scoring did not remove and/or exclude the Board's discretion, because the Board could still grant the licence to an entity that did not achieve the highest score. The high court mentioned this ground of review but, unfortunately, did not discuss or analyze it.

[167] As already mentioned, the Board enjoyed wide discretionary powers conferred in the RFA. Metro has not challenged the lawfulness of the RFA. It is this unchallenged policy that the Board utilized in the exercise of its function to, inter alia, consider and dispose of applications for licences in such manner as it

may determine.[24] The RFA mentions the critical areas that the Board would use for the evaluation and it retained the right to look at other factors during the evaluation process. It is clear from the RFA that the Board did not fetter its discretion with the allocation of scores for the critical areas.

[168] For example, paragraph 4.7 of the RFA, headed 'Considerations for Evaluations', the Board stated that:

'a) In addition to the above criteria the Board will in selecting the preferred bidder consider any other additional information and commitments made by the applicant in support of the application in determining the best bid.

(b) The Board shall in evaluating the applications for a Bingo Operator licence not be limited to the above criteria and shall take into consideration all factors that may make the bid exceptional in comparison to all other applications in determining the best bids.'

[169] This is consonant with the principles stated in *Kemp and Others v Van Wyk and Others*[25] that:

'[G]enerally there can be no objection to an official exercising a discretion in accordance with an existing policy if he or she is independently satisfied that the policy is appropriate to the circumstances of the particular case. What is required is only that he or she does not elevate principles or policies into rules that are considered to be binding with the result that no discretion is exercised all.'[26]

[170] The transcript and the minutes of the meeting, contrary to what Metro asserts, show that the scoring was not the only or determinant factor which the Board was to consider. When briefing the Board, the CEO emphasized this point. He explained:

'If you have four applications in Bojanala and you have positioned one, two, three for lack of a better word, then – and there are two licenses in Bojanala, the working of the RFA is such

[24] See s 4*(c)*(ii) of the North West Act.
[25] *Kemp and Others v Van Wyk and Others* [2008] 1 All SA 17 (SCA).
[26] Ibid para 1.

that number 1 and number 2 will then be licensed for Bojanala, because that would be influenced by the scoring *and the principle of the best bid evaluation.*' (My emphasis.)

[171] He later gave a full explanation when addressing a concern raised by Mr Kunene, a Board member. He said:

'So basically, we wouldn't even have to sit here, basically we'll just have to look at that scoring and then tick off, but there is an element that I'm raising and Mr. Kunene, that (indistinct) your question, and I said when the Board finished with the evaluation, there will be the total score according to districts that is going to be displayed. You have, as the Board – finished with the evaluation, there will be the total score according to districts that is going to be displayed. You have, as the Board – I'm answering the last part of your question, are these scores reflective of what we see? If you see that there is a candidate there who is being scored high and according to the evaluation that has been led by a consultant, that applicant does not deserve to score that high, you have to apply your mind to say are we right to proceed with this (indistinct) because definitely, if this matter can go to Court, that question is (inaudible) to say but did you see this applicant was non-compliant (indistinct).

Now you have (indistinct) to manage the scoring . . . That is why that engagement is important. It's not for you to deliberate at length, but you must have confidence that the scoring reflects generally what we have seen from the report. So here the scoring is a guide which you must use, as I said, to determine 1 and 2, but most importantly this Board must be satisfied with the decision that it makes, which will be when you now to decide to (indistinct), because this [score] is not the right the score (inaudible) outcome of the evaluation. A decision must still say grant, denied, and is going to help the Board in making – (indistinct) to your question Mr. Kunene through you Chair.'

[172] It is clear from the above that a two-step process was going to be, and was indeed, followed by the Board. The individual Board members had to allocate scores in accordance with the critical areas. Those scores would then be consolidated, thereafter, the Board members – as a collective, would have to evaluate the scores to determine whether those scores are reflective of all the evaluation areas stated, inter alia, in paragraph 4.7 of the RFA, including the critical areas and the additional considerations. It is because of this two-stage

approach that the consolidated scores were given to the Board members and they were asked whether the scores reflect a fair and transparent evaluation of the application. It is only after the Board agreed that the scores reflect a fair and transparent evaluation, in accordance with the report of the consultants and the RFA that they moved on to the next district.

[173] Moreover, when the scores reflected that a licence ought to be granted to Pioneer Bingo, for another district, the CEO pointed out that although the scoring showed that it ought to be successful, the Board still had to consider whether the misrepresentations made by its main funder were material. Pioneer Bingo's main funder did not disclose his previous convictions. The Board deliberated on the issue and found that he apologized for the misrepresentations and gave an acceptable explanation.

[174] With regard to Metro and Latiano, the Board members were under the impression that the latter obtained a higher score. They were of the view that the score was a proper reflection of their evaluation and that it was in line with consultant's report. They were clearly of the view that Latiano was the better candidate, considering the overall evaluation criteria, including the scoring.

[175] On these considerations, it is evident that even if the correct scores were reflected, the Board would still have preferred Latiano during the second stage of the evaluation, based on its reasons. It is clear from the minutes of the meeting that the issue of Metro's gross gaming revenue projections weighed heavily against it. The Board was not satisfied with its explanation. It would have failed the second stage of the evaluation.

[176] Metro contended that a further factor that justified the awarding of the license to it was that it complied with the requirement of the RFA, which stated

that copies of liquor and other relevant licences or proof of application therefor was required for purposes of lodging an application for a bingo operator licence. Latiano did not comply with this requirement. According to Metro, this was a brazen non-compliance with a mandatory requirement because Latiano indicated that it intends to procure liquor and associated items from local suppliers.

[177] This requirement must be seen in context. It is only when an applicant had applied for a liquor licence or indicated that it applied for a liquor licence that proof thereof would be required. Metro does not allege that a liquor licence is an indispensable requirement to obtain a bingo operator licence. There is no indication that a bingo licence ought not to be granted if an applicant does not intend to sell liquor. In any event, the Board has the power to grant a licence conditional upon the licence holder getting a liquor licence before operating. I am of the view that this non-compliance is not material.

[178] In *Allpay Consolidated Investment Holding (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*[27] the Constitutional Court said the following:

'Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between "mandatory" or "peremptory" provisions on the one hand and "directory" ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this Court O'Regan J succinctly put the question in *ACDP v Electoral Commission* as being "whether what the applicant did constituted compliance with the statutory provisions viewed

[27] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency (Corruption Watch and Centre for Child Law as Amici Curiae)* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC).

in the light of their purpose". This is not the same as asking whether compliance with the provisions will lead to a different result.'[28]

[179] Metro contended that the Board's reasons do not accord with the transcript and the minutes of the meeting of 10 June 2016. I have already indicated that the transcript indicates that the Board considered other aspects. Metro contended that the Board took into account irrelevant considerations when it considered new entrants and previously disadvantaged women. It also contended that the Board misconstrued the enquiry under the RFA and as a result it was materially influenced by an error of law.

[180] These contentions were made because of the following reasons that the Board gave for its decision to grant the licence to Latiano:

'[T]he Board in evaluating your application . . . took into consideration the objectives of the Request for Applications (RFA), which seek to achieve the following:

(i) diversification and expansion of existing gambling activities and provision of additional and alternative forms of leisure and entertainment to all areas in the Province, in particular, townships and rural communities; and

(ii) open the sector and create opportunities for direct participation by Local Previously Disadvantaged Individuals and Small Medium and Micro size entrepreneurs, in the gambling industry.

The Board taking the above objectives of the RFA into consideration, deemed it necessary to grant the application for a Bingo License in Mmabatho to Latiano … after it was established that [Latiano] satisfied the above objectives of the RFA in that 60% of its shareholders are four black females who are new entrants in the market, and Local Previously Disadvantaged Individuals.

It is worth mentioning that the Board in granting the applications to the above-mentioned applicant, considered that this will diversify, open the sector and create opportunities for direct participation by Local Previously Disadvantaged Individuals.'

[28] Fn 28 above para 30.

[181] Metro contended that its B-BBEE commitments, including to PDI women, were superior to Latiano's. However, Metro's PDI's for this application were a young male who owns 25% shares in Metro and a female who owns 35% shares. The female already had shares in another business that was allocated a bingo licence in Brits. Metro alleged that Latiano's award does not support broad-based empowerment because it only allocated shares to four black women. It also disputed the women are new entrants. Finally, it contended that the award to Latiano did not further diversification in the market and therefore, was not rationally connected to the reasons given.

[182] The high court and the Tribunal found that the reasons given by the Board were rational and reasonable. The Tribunal found that the fact that Latiano had four females owning 60% shares who were new entrants and local PDIs made Latiano's application exceptional. It further found that the Board applied its mind when considering the B-BBEE credentials of both applicants.

[183] The high court found that the supposed superiority relied on by Metro was only because of the fact that it already has licences in the North-West and in other provinces. It reasoned that Metro's argument 'on its own completely defeats the intention of having new entrants in the gambling industry'.

[184] The fact that the RFA does not contain the phrase 'new entrants' does not mean that the Board was barred from considering such entrants into the gambling industry as part of its evaluation. The RFA makes plain that the Board aimed to diversify and expand existing gambling activities and it wished to open the sector to create opportunities for direct participation of local PDIs and small medium and micro-size and entrepreneurs, in the gambling industry. The RFA further states that the Board considers B-BBEE in the bingo market as vital to any application. Applicants were requested to clearly and precisely articulate in the

application ‘the promotion of economic transformation in order to contribute to meaningful participation of local black people in the provincial economy’. The Board could achieve these objectives by, inter alia, looking at new PDI entrants into the gambling market.

[185] It is clear that the Board could only achieve those objectives by scrutinizing applications to determine whether they met those objectives. Metro’s argument that because a score was already allocated for B-BBEE it meant that the Board could not consider that issue outside of the scores allocated, is wrong. Since this was a vital issue to consider in the evaluation, it was not unreasonable for the Board to look closely at the B-BBEE structure and persons who participate as previously disadvantaged individuals. In any event, as already mentioned, the Board was not satisfied with Metro’s gross gaming revenue projections.

[186] The decision to give more weight to the four female PDI entrants is rationally connected to the objectives set out in the RFA. The means employed justifies the end. It is also a decision which a reasonable decision-maker would reach, considering the objectives stated in the RFA. In my opinion the appeal is without merit.

[187] As a result, the appeal is dismissed with costs, including the costs of two counsel.

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C MUSI

ACTING JUDGE OF APPEAL

Appearances:

In the *Peermont* appeal

For appellant	F Snyckers SC (with him I Goodman)
Instructed by:	Webber Wentzel, Sandton Symington de Kok Attorneys, Bloemfontein.
For third and fourth respondents:	M P van der Merwe SC (with him K M Mahlase)
Instructed by:	Bokwa Inc., Pretoria Bokwa Inc., Bloemfontein.
For fifth and eighth respondents:	H Maenetje SC (with him S Pudifin-Jones)
Instructed by:	Ian Levitt Attorneys, Sandton Pieter Skein Attorneys, Bloemfontein.
For sixth respondent:	R G Buchanan SC (with him O H Ronaasen)
Instructed by:	Le Roux Inc. Attorneys, Mahikeng Honey Attorneys, Bloemfontein.
For seventh respondent:	B Roux SC (with him M Smit)
Instructed by:	Cliffe Dekker Hofmeyr Inc, Sandton Noordmans Attorneys, Bloemfontein.
For ninth respondent:	P Farlam SC (with him P Olivier)
Instructed by:	Edward Nathan Sonnenbergs, Sandton

	Lovius Block Inc, Bloemfontein.

In the *Jonoforce* appeal

For appellants	P Farlam SC (with him P Olivier)
Instructed by:	Edward Nathan Sonnenbergs Inc, Sandton
	Lovius Block Inc, Bloemfontein.
For first and second respondents:	M P van der Merwe SC (with him M Mathaphuna)
	Instructed by:
	Bokwa Inc., Pretoria
	Bokwa Inc., Bloemfontein.
For sixth respondent:	H Maenetje SC (with him S Pudifin-Jones)
Instructed by:	Ian Levitt Attorneys, Sandton
	Pieter Skein Attorneys, Bloemfontein.

In the *Latiano* appeal

For appellants	P Farlam SC (with him P Olivier)
Instructed by:	Edward Nathan Sonnenbergs Inc, Sandton
	Lovius Block Inc, Bloemfontein.
For first and second respondents:	MP van der Merwe SC (with him M Mathaphuna)
Instructed by:	Bokwa Inc., Pretoria
	Bokwa Inc., Bloemfontein.

For sixth respondent:	B Roux SC (with him M Smit) Instructed by: Cliffe Dekker Hofmeyr Inc., Sandton Noordmans Attorneys, Bloemfontein.